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= [Laws, etc.]*

FEDERAL STATUTES ANNOTATED^{cf}

SUPPLEMENT, 1920

Containing all the Laws of a Permanent and General
Nature Enacted by the Sixty-sixth Congress between
January 1, 1920, and December 21, 1920

WITH

SUPPLEMENTAL NOTES CONTINUING THE ANNOTATION IN THE
PRIOR VOLUMES.

EDWARD THOMPSON COMPANY
NORTHPORT, LONG ISLAND, NEW YORK
1921

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1920*

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PREFACE

The statutes collected in this Supplement connect, without break or duplication, with those contained in the 1919 Supplement. They are the general, permanent, and public acts passed by Congress between January 1, 1920, and December 21, 1920. These acts are classified according to the scheme of titles in the main work, and in using this Supplement the reader should examine the corresponding title to locate the late, amendatory, or repealing legislation on the topic under consideration.

The latter part of the volume is devoted to the supplemental notes. These supplemental notes connect directly with and continue those in the 1919 Supplement, and present all the subsequent decisions construing the statutes contained in the prior volumes. The arrangement is by title, volume, page, and section as the statutes are found in preceding volumes, and the investigator has merely to turn to the corresponding title, volume, page and section as shown by the captions in this Supplement to find the late cases. The omission of a title or of page and section captions implies that no new cases have been found.

Tables of titles, Revised Statutes sections, and statutes chronologically arranged are included, together with a table connecting the notes with the first edition and supplements thereto.

The Nineteenth Amendment and supplemental notes to the Constitution are included in this volume.

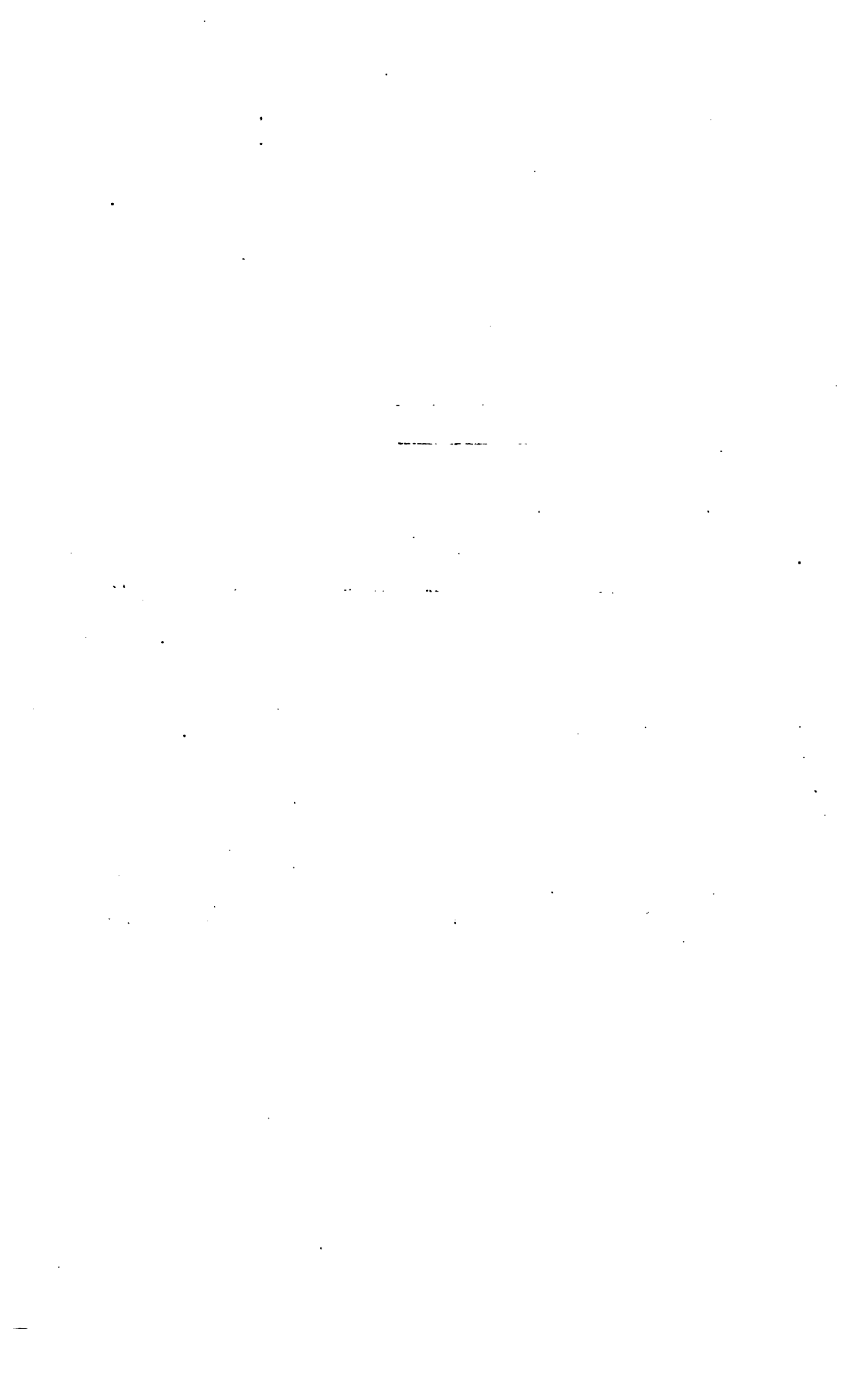


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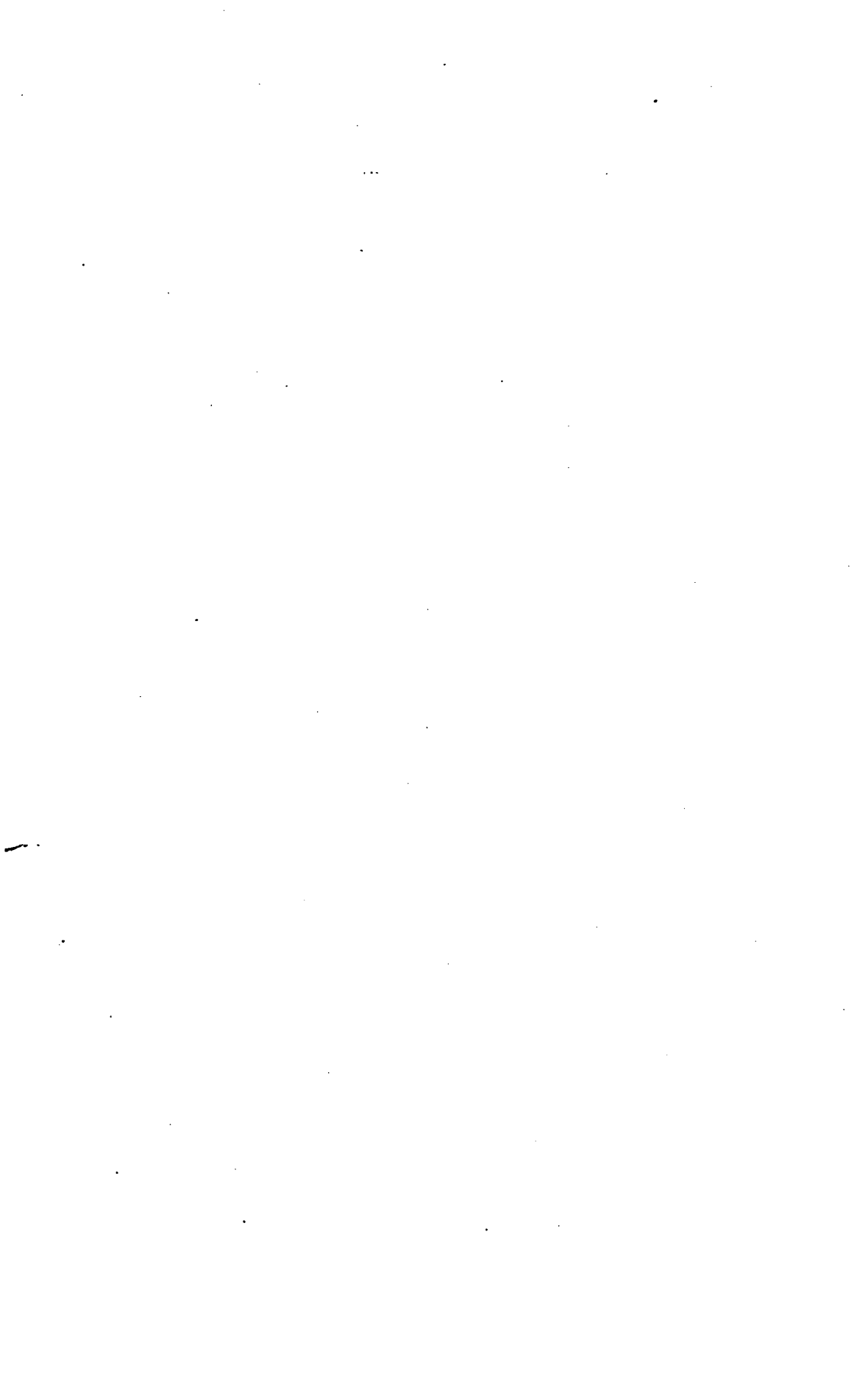


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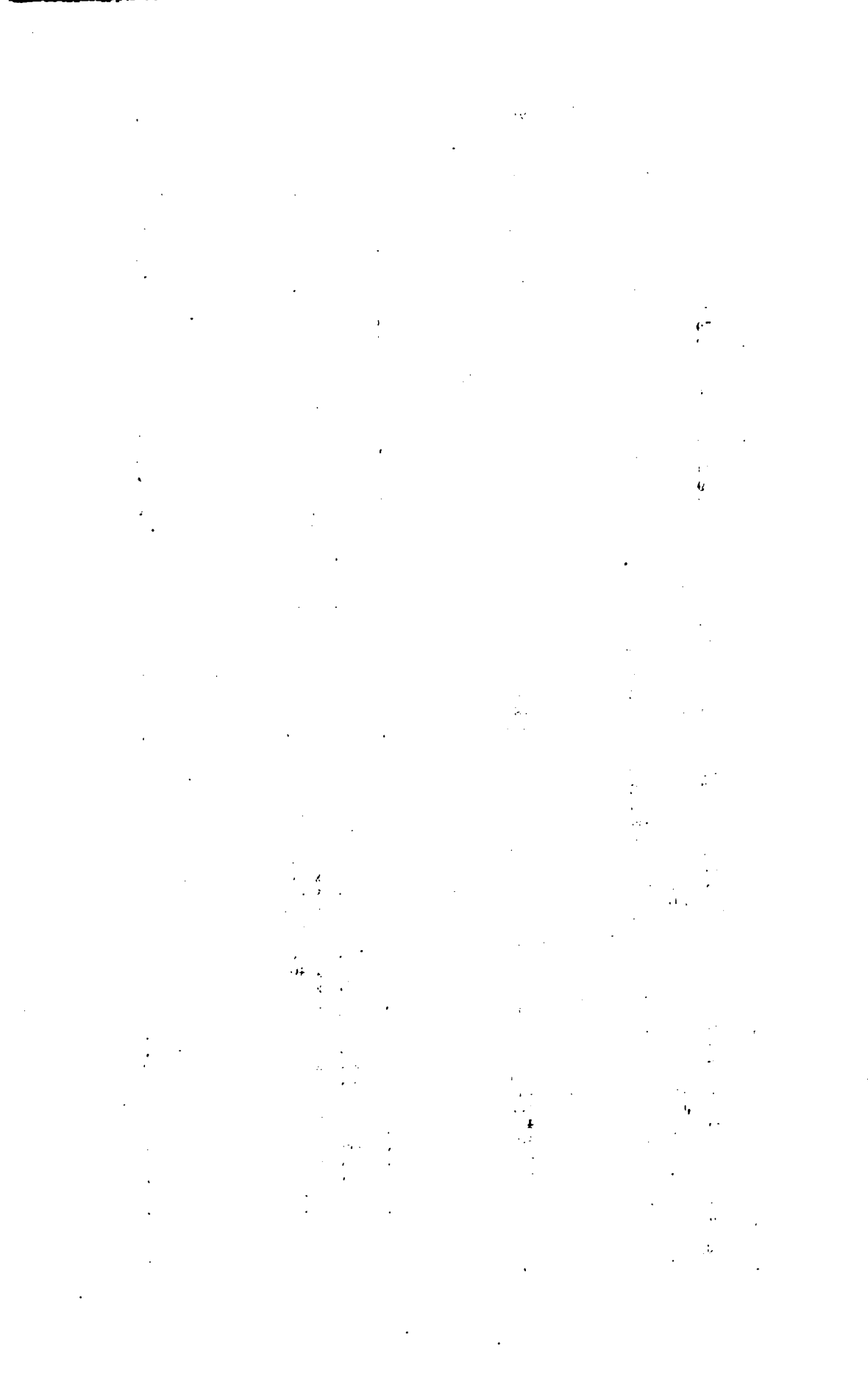
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CROSS-REFERENCES

See also *ALASKA; IMPORTS AND EXPORTS; INTERNAL REVENUE*

An Act To amend certain sections of the Federal Farm Loan Act, approved July 17, 1916.

[*Act of April 20, 1920, ch. 154, 41 Stat. L. 570.*]

[SEC. 1.] [**Farm Loan Board — appointments — registrars — appraisers — examiners — sec. 3 of Farm Loan Act amended.**] That the seventh paragraph of section 3 be amended by adding after the word "Act" the words "and may appoint a deputy registrar who shall during the unavoidable absence or disability of the registrar perform the duties of that office" and also by adding after "registrars," in the sixth line of said paragraph the words "deputy registrars," so that the paragraph as amended will read:

"The Federal Farm Loan Board shall appoint a farm loan registrar in each land bank district to receive applications for issues of farm loan bonds and to perform such other services as are prescribed by this Act, and may appoint a deputy registrar who shall during the unavoidable absence or disability of the registrar perform the duties of that office. It shall also appoint one or more land bank appraisers for each land bank district and as many land bank examiners as it shall deem necessary. Farm loan registrars, deputy registrars, land bank appraisers, and land bank examiners appointed under this section shall be public officials and shall, during their continuance in office, have no connection with or interest in any other institution, association, or partnership engaged in banking or in the business of making land mortgage loans or selling land mortgages: *Provided*, That this limitation shall not apply to persons employed by the board temporarily to do special work." [41 Stat. L. 570.]

For sec. 3, here amended, see 1918 Supp. Fed. Stat. Ann. 14.

SEC. 2. [**Application for farm loan — appraisal by loan committee — report — sec. 10 of Farm Loan Act amended.**] That the first paragraph of section 10 be amended to read as follows:

"That whenever an application for a mortgage loan is made through a national farm loan association, the loan committee provided for in section 7 of this Act, shall forthwith make, or cause to be made, such investigation as it may deem necessary as to the character and solvency of the applicant, and the sufficiency of the security offered, and cause written report to be made of the result of such investigation, and shall, if it concurs in such report, approve the same in writing. No loan shall be made unless the report is favorable, and the loan committee is unanimous in its approval thereof.

"The written report required in the preceding paragraph shall be submitted to the Federal land bank, together with the application for the loan, and the directors of said land bank shall examine said written report when they pass on the loan application which it accompanies, but they shall not be bound by said appraisal." [41 Stat. L. 570.]

For sec. 10, here amended, see 1918 Supp. Fed. Stat. Ann. 24.

SEC. 3. [Powers of farm loan associations — sec. 11 of Farm Loan Act amended.] That the third paragraph of section 11 be amended to read as follows:

"Third. To fix reasonable initial charges to be made against applicants for loans and to borrowers in order to meet the necessary expenses of the association: *Provided*, That such charges shall not exceed amounts to be fixed by the Farm Loan Board, and shall in no case exceed 1 per centum of the amount of the loan applied for; to acquire and dispose of property, real and personal, that may be necessary or convenient for the transaction of its business." [41 Stat. L. 570.]

For sec. 11, here amended, see 1918 Supp. Fed. Stat. Ann. 25.

SEC. 4. [Restrictions on loans based on first mortgages — sec. 12 of Farm Loan Act amended.] That section 12 of said Act be amended by striking out in the second provision the words "additional payments in sums of \$25. or any multiple thereof for the reduction of the principal, or the payment of the entire principal, may be made on any regular installment date," and inserting in lieu thereof the words "the mortgagor may, upon any regular installment date, make in advance any number of payments or any portion thereof on account of the principal of his loan as provided by his contract or pay the entire principal of such loan," so that the provision as amended will read:

"Every such mortgage shall contain an agreement providing for the repayment of the loan on an amortization plan by means of a fixed number of annual or semiannual installments sufficient to cover, first, a charge on the loan at a rate not exceeding the interest rate in the last series of farm-loan bonds issued by the land bank making the loan; second, a charge for administration and profits at a rate not exceeding 1 per centum per annum on the unpaid principal, said two rates combined constituting the interest rate on the mortgage; and, third, such amounts to be applied on the principal as will extinguish the debt within an agreed period, not less than five years nor more than forty years: *Provided*, That after five years from the date upon which a loan is made the mortgagor may, upon any regular installment date, make, in advance, any number of payments or any portion thereof on account of the principal of his loan as provided by his contract or pay the entire principal of such loan, under the rules and regulations of the Federal Farm Loan Board: *And provided further*, That before the first issues of farm-loan bonds by any land bank the interest rate on mortgages may be determined in the discretion of said land bank, subject to the provisions and limitations of this Act."

And that the fourth provision in said section be amended by striking out in subdivision (d) all after the word "mortgaged" and inserting in lieu thereof the words "incurred for agricultural purposes, or incurred prior to the organization of the first Farm Loan Association established in and for the county in which the land is situated," so that the provision as amended will read:

"Fourth. Such loans may be made for the following purposes and for no other.

"(a) To provide for the purchase of land for agricultural uses.

"(b) To provide for the purchase of equipment, fertilizers, and live stock necessary for the proper and reasonable operation of the mortgaged farm; the term 'equipment' to be defined by the Federal Farm Loan Board.

“(c) To provide buildings and for the improvement of farm lands; the term ‘improvement’ to be defined by the Federal Farm Loan Board.

“(d) To liquidate indebtedness of the owner of the land mortgaged incurred for agricultural purposes, or incurred prior to the organization of the first Farm Loan Association established in and for the county in which the land is situated.” [41 Stat. L. 570.]

For sec. 12, here amended, see 1918 Supp. Fed. Stat. Ann. 25.

SEC. 5. [Form of farm loan bonds — sec. 20 of Farm Loan Act amended.] That section 20 of said Act be amended by striking out \$25 and \$50, in line 2 of paragraph 1, and inserting in lieu thereof the numeral \$40, and also by inserting after \$1,000 the words “and such larger denominations as the Federal Farm Loan Board may authorize,” so that the paragraph as amended will read:

“SEC. 20. That bonds provided for in this Act shall be issued in denominations of \$40, \$100, \$500, \$1,000, and such larger denominations as the Federal Farm Loan Board may authorize; they shall run for specified minimum and maximum periods, subject to payment and retirement, at the option of the land bank, at any time after five years from the date of their issue. They shall have interest coupons attached, payable semiannually, and shall be issued in series of not less than \$50,000, the amount and terms to be fixed by the Federal Farm Loan Board. They shall bear a rate of interest not to exceed 5 per centum per annum.” [41 Stat. L. 571.]

For sec. 20, here amended, see 1918 Supp. Fed. Stat. Ann. 32.

SEC. 6. [Special provisions of farm loan bonds — sec. 21 of Farm Loan Act amended.] That the last paragraph of section 21 of said Act be amended by inserting after the word “president” the words “or vice president” and by inserting after the word “secretary” the words “or assistant secretary” and also the words “For the purpose of signing such bonds the board of directors of any Federal land bank is authorized to select a vice president who need not be a member of the board of directors,” and also by striking out the words “and shall” and inserting in lieu thereof the words “such bonds shall also,” so that the paragraph as amended will read:

“Every farm-loan bond issued by a Federal land bank shall be signed by its president or vice president and attested by its secretary or assistant secretary. For the purpose of signing such bonds the board of directors of any Federal land bank is authorized to select a vice president who need not be a member of the board of directors; such bonds shall also contain in the face thereof a certificate signed by the Farm Loan Commissioner to the effect that it is issued under the authority of the Federal Farm Loan Act, has the approval in form and issue of the Federal Farm Loan Board, and is legal and regular in all respects; that it is not taxable by National, State, municipal, or local authority; that it is issued against collateral security of United States Government bonds, or indorsed first mortgages on farm lands, at least equal in amount to the bonds issued; and that all Federal land banks are liable for the payment of each bond.” [41 Stat. L. 571.]

For sec. 21, here amended, see 1918 Supp. Fed. Stat. Ann. 33.

Joint Resolution Extending the provisions of an Act amending section 32 of the Federal Farm Loan Act approved July 17, 1916, to June 30, 1921.

[Resolution of May 26, 1920, No. 45, ch. 208, 41 Stat. L. 627.]

[Farm loan bonds — purchase by Secretary of Treasury — sec. 32 of Farm Loan Act amended.] That the provisions of the Act of Congress approved January 18, 1918, entitled "An Act to amend section 32 of the Federal Farm Loan Act approved July 17, 1916," be, and the same hereby are, extended to the fiscal years ending June 30, 1920, and June 30, 1921, to the extent that the Secretary of the Treasury be, and he hereby is, authorized, as by the terms of said Act, to purchase during the fiscal years ending June 30, 1920, and June 30, 1921, or either of them, any bonds which he might have purchased during the fiscal years ending June 30, 1918, and June 30, 1919, or either of them, under the provisions of the original Act: *Provided*, That he shall purchase no bonds issued against loans approved after March 1, 1920. *[41 Stat. L. 627.]*

For Act of Jan. 18, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 41.

An Act To amend section 16 of the Act of Congress approved July 17, 1916, known as the Federal Farm Loan Act.

[Act of May 29, 1920, ch. 215, 41 Stat. L. 691.]

[Joint stock land banks — voluntary liquidation — assumption of obligations by Federal land bank — sec. 16 of Farm Loan Act amended.] That section 16 of the Act of Congress approved July 17, 1916, known as the Federal Farm Loan Act, be amended by adding thereto the following:

"Any joint-stock land bank organized and doing business under the provisions of this Act may go into voluntary liquidation by making provision, to be approved by the Federal Farm Loan Board, for the payment of its liabilities: *Provided*, That such method of liquidation shall have been duly authorized by a vote of at least two-thirds of the shareholders of such joint-stock land bank at a regular meeting, or at a special meeting called for that purpose, of which at least ten days' notice in writing shall have been given to stockholder.

"For the purpose of assisting in any such liquidation duly authorized as in the preceding paragraph provided, any Federal land bank may, with the approval of the Federal Farm Loan Board, acquire the assets and assume the liabilities of any joint stock land bank, and in such transaction may waive the provisions of this Act requiring such land bank to acquire its loans only through national farm loan associations, or agents, and those relating to status of borrower, purposes of loan, and also the limitation as to the amount of individual loans.

"No Federal land bank shall assume the obligations of any joint-stock land bank, in such manner as to make its outstanding obligations more than twenty times its capital stock, except by the creation of a special reserve equal to one-twentieth of the amount of such additional obligations assumed." *[41 Stat. L. 691.]*

For sec. 16, here amended, see 1918 Supp. Fed. Stat. Ann. 29.

An Act Making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1921.

[Act of May 31, 1920, ch. 217, 41 Stat. L. 694.]

* * * **[Distribution of seeds, etc.—congressional supply.]** That the Secretary of Agriculture, after due advertisement and on competitive bids, is authorized to award the contract for the supplying of printed packets and envelopes and the packeting, assembling, and mailing of the seeds, bulbs, shrubs, vines, cuttings, and plants, or any part thereof, for a period of not more than five years nor less than one year, if by such action he can best protect the interests of the United States. An equal proportion of five-sixths of all seeds, bulbs, shrubs, vines, cuttings, and plants, shall upon their request, after due notification by the Secretary of Agriculture, that the allotment to their respective districts is ready for distribution, be supplied to Senators, Representatives, and Delegates in Congress for distribution among their constituents, or mailed by the department upon the receipt of their addressed franks, in packages of such weight as the Secretary of Agriculture and the Postmaster General may jointly determine: *Provided, however,* That upon each envelope or wrapper containing packages of seeds the contents thereof shall be plainly indicated, and the Secretary shall not distribute to any Senator, Representative, or Delegate seeds entirely unfit for the climate and locality he represents, but shall distribute the same so that each Member may have seeds of equal value, as near as may be, and the best adapted to the locality he represents: *Provided also,* That the seeds allotted to Senators and Representatives for distribution in the districts embraced within the twenty-fifth and thirty-fourth parallels of latitude shall be ready for delivery not later than the 10th day of January: *Provided also,* That any portion of the allotments to Senators, Representatives, and Delegates in Congress remaining uncalled for on the 1st day of a [sic] April shall be distributed by the Secretary of Agriculture, giving preference to those persons whose names and addresses have been furnished by Senators and Representatives in Congress and who have not before during the same season been supplied by the department: *And provided also,* That the Secretary shall report, as provided in this Act, the place, quantity, and price of seeds purchased, and the date of purchase; but nothing in this paragraph shall be construed to prevent the Secretary of Agriculture from sending seeds to those who apply for the same. And the amount herein appropriated shall not be diverted or used for any other purpose but for the purchase, testing, propagation, and distribution of valuable seeds, bulbs, mulberry and other rare and valuable trees, shrubs, vines, cuttings, and plants. [41 Stat. L. 704.]

* * * **[Kelp plant at Summerland, California.]** For the completion, operation, and maintenance of the Government kelp plant at Summerland, California, \$192,900: *Provided,* That the product obtained from such experimentation may be sold at a price to be determined by the Secretary of Agriculture, and the amount obtained from the sale thereof shall be covered into the Treasury as miscellaneous receipts. [41 Stat. L. 714.]

* * * **[Photographic films — sale or rental.]** That hereafter the Secretary of Agriculture is authorized, under such rules and regulations and subject to such conditions as he may prescribe, to loan, rent, or sell copies of films: *Provided,* That in the sale or rental of films educational institutions or associa-

tions for agricultural education not organized for profit shall have preference; all moneys received from such rentals or sales to be covered into the Treasury of the United States as miscellaneous receipts. [41 Stat. L. 718.]

* * * **[Experiment stations — sale of products.]** The Secretary of Agriculture is authorized to sell such products as are obtained on the land belonging to the agricultural experiment stations in Alaska, Hawaii, Porto Rico, the island of Guam, and the Virgin Islands of the United States, and the amount obtained from the sale thereof shall be covered into the Treasury of the United States as miscellaneous receipts. [41 Stat. L. 721.]

* * * **[Plant Quarantine Act — new section added — moving plants and plant products from District of Columbia — regulations.]** That the Plant Quarantine Act, approved August 20, 1912 (Thirty-seventh Statutes, page 315), be, and is hereby, amended by adding at the end thereof the following section:

“SEC. 15. That in order further to control and eradicate and to prevent the dissemination of dangerous plant diseases and insect infections and infestations no plant or plant products for or capable of propagation, including nursery stock, hereinafter referred to as plants and plant products, shall be moved or allowed to be moved, shipped, transported, or carried by any means whatever into or out of the District of Columbia, except in compliance with such rules and regulations as shall be prescribed by the Secretary of Agriculture as hereinafter provided. Whenever the Secretary of Agriculture, after investigation, shall determine that any plants and plant products in the District of Columbia are infested or infected with insect pests and diseases and that any place, articles, and substances used or connected therewith are so infested or infected, written notice thereof shall be given by him to the owner or person in possession or control thereof, and such owner or person shall forthwith control or eradicate and prevent the dissemination of such insect pest or disease and shall remove, cut, or destroy such infested and infected plants, plant products, and articles and substances used or connected therewith, which are hereby declared to be nuisances, within the time and in the manner required in said notice or by the rules and regulations of the Secretary of Agriculture. Whenever such owner or person can not be found, or shall fail, neglect, or refuse to comply with the foregoing provisions of this section, the Secretary of Agriculture is hereby authorized and required to control and eradicate and prevent dissemination of such insect pest or disease and to remove, cut, or destroy infested or infected plants and plant products and articles and substances used or connected therewith, and the United States shall have an action of debt against such owner or persons for expenses incurred by the Secretary of Agriculture in that behalf. Employees of the Federal Horticultural Board are hereby authorized and required to inspect places, plants, and plant products and articles and substances used or connected therewith whenever the Secretary of Agriculture shall determine that such inspections are necessary for the purposes of this section. For the purpose of carrying out the provisions and requirements of this section and of the rules and regulations of the Secretary of Agriculture made hereunder, and the notices given pursuant thereto, employees of the Federal Horticultural Board shall have power with a warrant to enter into or upon any place and open any bundle, package, or other container of plants or plant products whenever they shall have cause to believe that infections or infestations of plant

pests and diseases exist therein or thereon, and when such infections or infestations are found to exist, after notice by the Secretary of Agriculture to the owner or person in possession or control thereof and an opportunity by said owner or person to be heard, to destroy the infected or infested plants or plant products contained therein. The police court or the municipal court of the District of Columbia shall have power, upon information supported by oath or affirmation showing probable cause for believing that there exists in any place, bundle, package, or other container in the District of Columbia any plant or plant product which is infected or infested with plant pests or disease, to issue warrants for the search for and seizure of all such plants and plant products. It shall be the duty of the Secretary of Agriculture, and he is hereby required, from time to time, to make and promulgate such rules and regulations as shall be necessary to carry out the purposes of this section, and any person who shall move or allow to be moved, or shall ship, transport, or carry, by any means whatever, any plant or plant products from or into the District of Columbia, except in compliance with the rules and regulations prescribed under this section, shall be punished, as is provided in section 10 of this Act." [41 Stat. L. 726.]

The Plant Quarantine Act will be found in 1 Fed. Stat. Ann. (2d ed.) 231.

* * * [Vehicles and parts thereof — exchange for new.] That hereafter the Secretary of Agriculture may exchange used parts, accessories, tires, or equipment of motor-propelled and horse-drawn vehicles in part payment for new parts, accessories, tires, or equipment of such vehicles authorized to be purchased by him, to be used for the same purposes as those proposed to be exchanged. [41 Stat. L. 728.]

* * * [Traveling expenses.] Whenever, during the fiscal year ending June 30, 1921, the Secretary of Agriculture shall find that the expenses of travel can be reduced thereby, he may, in lieu of actual traveling expenses, under such regulations as he may prescribe, authorize the payment of not to exceed 3 cents per mile for a motor cycle or 7 cents per mile for an automobile, used for necessary travel on official business. [41 Stat. L. 730.]

* * * [Borrowers from United States of money for purchase of wheat seed — poor crops as releasing from liability.] That a yield of five bushels or less per acre of wheat on lands owned by those in the drought-stricken regions who borrowed money from the Government of the United States for the purchase of wheat for seed be, and the same is hereby, declared to be a failure, and the borrower whose yield was five bushels or less per acre be, and he is hereby, released from repayment of the amount borrowed by him from the Government: *Provided*, That nothing herein shall release the borrower who signed a guaranty fund agreement and whose crop was not a failure, from making the contribution provided for in such agreement, but said guaranty fund shall be used as stipulated in the agreement to the settlement of the loans to those whose crop was a failure. [41 Stat. L. 730.]

ALASKA

Act of May 31, 1920, ch. 217 (Agricultural Appropriation Act), 9.

Fur-Bearing Animals—Walruses and Sea Lions—Leasing Islands—Secretary of Commerce—Secretary of Agriculture—Wardens and Other Officers, 9.

Act of June 4, 1920, ch. 223 (Diplomatic and Consular Appropriation Act), 9.

Boundary Line with Canada—Surveys—Appropriation and Advances—Expenses of Commissioner, 9.

Act of June 5, 1920, ch. 265, 10.

Homestead Entries—Reserved Shore Spaces—Restoration to Entry—Waiver of Restrictions—Acts of May 14, 1898, and March 3, 1903, Amended, 10.

* * * [Fur-bearing animals—walruses and sea lions—leasing islands—Secretary of Commerce—Secretary of Agriculture—wardens and other officers.] Hereafter the powers and duties heretofore conferred upon the Secretary of Commerce by existing law, proclamations, or Executive orders with respect to any mink, marten, beaver, land otter, muskrat, fox, wolf, wolverine, weasel, or other land fur-bearing animals in Alaska, and with respect to the leasing of certain islands in Alaska for the propagation of fur-bearing animals, are hereby conferred upon, and shall be exercised by, the Secretary of Agriculture, and the powers and duties conferred upon the Secretary of Agriculture by existing law, with respect to walruses and sea lions, are hereby conferred upon, and shall be exercised by, the Secretary of Commerce: *Provided*, That nothing in this Act shall affect the powers and duties conferred upon the Secretary of Commerce by existing law, proclamations, or Executive orders with respect to fur seals and sea otters, and jurisdiction over the Pribiloff Islands and the fur-bearing animals thereon; and hereafter the wardens and other officers heretofore or hereafter appointed by the Secretary of Agriculture for the protection of bird reservations in Alaska under control of the Department of Agriculture, or for the protection of fur-bearing animals in Alaska, shall have and exercise like authority and powers in the performance of their respective duties as are conferred upon game wardens by the Alaska game law of May 11, 1908 (Thirty-fifth Statutes at Large, page 102), and by existing law upon officers and agents of the Department of Commerce employed in the salmon fisheries and fur-seal and sea-otter services in Alaska. [41 Stat. L. 716.]

This is from the Agricultural Appropriation Act of May 31, 1920, ch. 217.

For Act of May 11, 1908, mentioned in the text, see 1 Fed. Stat. Ann. (2d ed.) 358.

* * * [Boundary line with Canada—surveys—appropriation and advances—expenses of commissioner.] To enable the Secretary of State to mark the boundary and make the surveys incidental thereto between the Territory of Alaska and the Dominion of Canada, in conformity with the award of the Alaskan Boundary Tribunal and existing treaties, including employment at the seat of government of such surveyors, computers, draftsmen, and clerks as

are necessary; and for the more effective demarcation and mapping, pursuant to the treaty of April 11, 1908, between the United States and Great Britain, of the land and water boundary line between the United States and the Dominion of Canada, as established under existing treaties, to be expended under the direction of the Secretary of State, including the salaries of the commissioner and the necessary engineers, surveyors, draftsmen, computers, and clerks in the field and at the seat of government, rental of offices at Washington, District of Columbia, expense of printing and necessary traveling, for payment for timber necessarily cut in determining the boundary line not to exceed \$500, and commutation to members of the field force while on field duty or actual expenses not exceeding \$5 per day each to be expended in accordance with regulations from time to time prescribed by the Secretary of State \$55,000, together with the unexpended balances of previous appropriations for these objects: *Provided*, That hereafter advances of money under the appropriation "Boundary line, Alaska and Canada, and the United States and Canada," may be made to the commissioner on the part of the United States and by his authority to chiefs of parties, who shall give bond under such rules and regulations and in such sum as the Secretary of State may direct, and accounts arising under advances shall be rendered through and by the commissioner on the part of the United States to the Treasury Department as under advances heretofore made to chiefs of parties: *Provided*, That when the commissioner is absent from Washington and from his regular place of residence on official business he shall be allowed actual and necessary expenses of subsistence, not in excess of \$8 per day. [41 Stat. L. 743.]

This is from the Diplomatic and Consular Appropriation Act of June 4, 1920, ch. 223.

An Act To provide for the abolition of the eighty-rod reserved shore spaces between claims on shore waters in Alaska.

[Act of June 5, 1920, ch. 265, 41 Stat. L. 1059.]

[Homestead entries — reserved shore spaces — restoration to entry — waiver of restrictions — Acts of May 14, 1898, and March 3, 1903, amended.] That the provisions of the Act of May 14, 1898 (Thirtieth Statutes at Large, page 409), extending the homestead laws to Alaska, and of the Act of March 3, 1903 (Thirty-second Statutes at Large, page 1028), amendatory thereof, in so far as they reserve from sale and entry a space of at least eighty rods in width between tracts sold or entered under the provisions thereof along the shore of any navigable water, and provide that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, shall not apply to lands classified and listed by the Secretary of Agriculture for entry under the Act of June 11, 1906 (Thirty-fourth Statutes, page 233), and that the Secretary of the Interior may upon application to enter or otherwise in his discretion restore to entry and disposition such reserved spaces and may waive the restriction that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water as to such lands as he shall determine are not necessary for harborage uses and purposes. [41 Stat. L. 1059.]

For provisions of Act of May 14, 1898, and amendatory act, affected by the text, see 1 Fed. Stat. Ann. (2d ed.) 330, 325.

For Act of June 11, 1906, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 591.

ALIEN PROPERTY CUSTODIAN

See TRADING WITH THE ENEMY

ALIENS

See IMMIGRATION

AMERICAN LEGION

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

AMERICAN NATIONAL RED CROSS

See CHARITIES

ANIMALS

Act of May 31, 1920, ch. 217 (Agricultural Appropriation Act), 11.

Cattle Reacting to Tuberculin Test—Shipment for Immediate Slaughter—Act of May 29, 1884, Amended, 11.

Cattle Shipped for Breeding or Feeding Purposes—Permitting Reshipment on Reacting to Tuberculin Test, 11.

CROSS-REFERENCES

See also **ALASKA; WAR DEPARTMENT AND MILITARY ESTABLISHMENT**

• • • [Cattle reacting to tuberculin test — shipment for immediate slaughter—Act of May 29, 1884, amended.] That the Act approved May 29, 1884 (Twenty-third Statutes at Large, page 31), be, and the same is hereby, amended to permit hereafter cattle which have reacted to the tuberculin test to be shipped, transported, or moved from one State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, for immediate slaughter, in accordance with such rules and regulations as shall be prescribed by the Secretary of Agriculture. [41 Stat. L. 699.]

This and the following paragraph are from the Agricultural Appropriation Act of May 31, 1920, ch. 217.

The Act of May 29, 1884, amended by the text, will be found in 1 Fed. Stat. Ann. (2d ed.) 406.

• • • [Cattle shipped for breeding or feeding purposes—permitting reshipment on reacting to tuberculin test.] That hereafter the Secretary of Agriculture may, in his discretion, and under such rules and regulations as he

may prescribe, permit cattle which have been shipped for breeding or feeding purposes from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, and which have reacted to the tuberculin test subsequent to such shipment, to be reshipped in interstate commerce to the original owner. [41 Stat. L. 699.]

ANNUITIES

See CIVIL SERVICE

ANTITRUST LAWS

See SHIPPING AND NAVIGATION; TRADE COMBINATIONS AND TRUSTS

ARMY

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

ARTICLES OF WAR

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

ATTACHMENT

See SHIPPING AND NAVIGATION

AVIATION

See NAVY; POSTAL SERVICE; WAR DEPARTMENT AND MILITARY ESTABLISHMENT

BANKS AND BANKING

See AGRICULTURE; NATIONAL BANKS

CANADA

See ALASKA

CANAL ZONE

See RIVERS, HARBORS AND CANALS

CARRIERS

See ANIMALS; INTERSTATE COMMERCE; POSTAL SERVICE; RAILROADS; SHIPPING AND NAVIGATION; TRADE COMBINATIONS AND TRUSTS

CATTLE

See ANIMALS

CEMETERIES

Act of April 15, 1920, ch. 140, 13.

Who May Be Buried in National Cemeteries — R. S. Sec. 4878 Amended, 13.

An Act To amend section 4878 of the Revised Statutes as amended by the Act of March 3, 1897.

[Act of April 15, 1920, ch. 140, 41 Stat. L. 552.]

[Who may be buried in national cemeteries — R. S. sec. 4878 amended.] That section 4878 of the Revised Statutes, as amended by the Act of March 3, 1897 (chapter 378, Twenty-ninth Statutes at Large, page 625), be, and it hereby is, amended to read as follows:

“**Sec. 4878.** All soldiers, sailors, or marines dying in the service of the United States, or dying in a destitute condition after having been honorably discharged from the service, or who served, or hereafter shall have served, during any war in which the United States has been, or may hereafter be, engaged, and, with the consent of the Secretary of War, any citizen of the United States who served in the Army or Navy of any government at war with Germany or Austria during the World War and who died while in such service or after honorable discharge therefrom, may be buried in any national cemetery free of cost. The production of the honorable discharge of a deceased man in the former case, and a duly executed permit of the Secretary of War in the latter case, shall be sufficient authority for the superintendent of any cemetery to permit the interment. Army nurses honorably discharged from their service as such may be buried in any national cemetery, and, if in a destitute condition, free of cost. The Secretary of War is authorized to issue certificates to those Army nurses entitled to such burial.” [41 Stat. L. 552.]

For R. S. sec. 4878, amended by the text, see 2 Fed. Stat. Ann. (2d ed.) 22.

CENSUS

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 14.

Sec. 1. Census Office — Suspension of Unnecessary Work, 14.

Act of June 5, 1920, ch. 263, 14.

Sec. 1. Monthly Statistics by Director of Census — Hides, Skins and Leather, 14.

2. Confidential Nature of Information Furnished for Statistical Purposes — Penalty for Disclosure, 14.

3. Duty to Furnish Information — Penalty for Failure to Furnish, 15.

[SEC. 1.] * * * [Census office — suspension of unnecessary work.] That the Secretary of Commerce is authorized, in his discretion, to suspend during the decennial Census period such work of the Census Office, other than the Fourteenth Census, as he may deem advisable. [41 Stat. L. 678.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214. An identical provision appeared in the Appropriation Act of March 1, 1919, and is set out in 1919 Supp. Fed. Stat. Ann. 15.

An Act Authorizing and directing the Director of the Census to collect and publish monthly statistics concerning hides, skins and leather.

[Act of June 5, 1920, ch. 263, 41 Stat. L. 1057.]

[SEC. 1.] [Monthly statistics by Director of Census — hides, skins and leather.] That the Director of the Census be, and he is hereby, authorized and directed to collect and publish statistics monthly concerning —

(a) The quantities and classes of hides and skins, owned or stored, and the quantities and classes of such products disposed of during the preceding census month by packers, abattoirs, butchers, tanners, jobbers, dealers, wholesalers, importers, and exporters;

(b) The quantities and classes of hides and skins in the process of tanning or manufacture, the quantities and amount of finished product for the preceding month;

(c) The quantities and classes of leather owned or stored and manufactured during the preceding census month by tanners, jobbers, dealers, wholesalers, importers, exporters, and establishments cutting or consuming leather. [41 Stat. L. 1057.]

SEC. 2. [Confidential nature of information furnished for statistical purposes — penalty for disclosure.] That the information furnished by any individual establishment under the provisions of this Act shall be considered as strictly confidential and shall be used only for the statistical purposes for which it is supplied. Any employee of the Bureau of Census who, without the written authority of the Director of the Census, shall publish or communicate any information given into his possession by reason of his employment under the

provisions of this Act shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than \$1,000 or imprisoned not more than one year, or both. [41 Stat. L. 1057.]

SEC. 3. [Duty to furnish information — penalty for failure to furnish.] That it shall be the duty of every owner, president, or treasurer, secretary, director, or other officer or agent of any abattoir and of any packing, tanning, jobbing, dealing, wholesaling, importing, or exporting establishment where hides and skins are stored or sold, or leather is tanned, treated, finished, or stored or any establishment is engaged in the cutting of leather or in the production of boots and shoes, gloves, saddlery, harness, or other manufactures of leather goods, wherever leather is consumed, when requested by the Director of the Census or by any special agent or other employee of the Census Office acting under the instructions of said director to furnish completely and accurately to the best of his knowledge, all the information authorized to be collected by section 1 of this Act. The demand of the Director of the Census for such information shall be made in writing or by a visiting representative and if made in writing shall be forwarded by registered mail and the registry receipt of the Post Office Department shall be accepted as prima facie evidence of such demand. Any owner, president, treasurer, secretary, director, or other officer or agent of any establishment required to furnish information under the provisions of this Act, who under the conditions hereinbefore stated shall refuse or willfully neglect to furnish any of the information herein provided for or shall willfully give answers that are false, shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000. [41 Stat. L. 1057.]

CHARITIES

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 15.

Sec. 1. American National Red Cross — Auditing of Accounts by War Department — Reimbursement, 15.

[SEC. 1.] * * * **[American National Red Cross — auditing of accounts by War Department — reimbursement.]** The American National Red Cross annually shall reimburse the War Department for auditing the accounts of the American National Red Cross, as required by the Act approved February 27, 1917, and the sum so paid shall be covered into the Treasury of the United States as a miscellaneous receipt. [41 Stat. L. 659.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214.

For Act of Feb. 27, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 85.

CHARTERS

See SHIPPING AND NAVIGATION

CHINA

See JUDICIARY

CITIZENSHIP

Act of June 4, 1920, ch. 223 (Diplomatic and Consular Appropriation Act), 16.

Sec. 5. Passports to Persons after Declaration of Intention — Sec. 1 of Act of March 2, 1907, Repealed, 16.

SEC. 5. [Passports to persons after declaration of intention — Sec. 1 of Act of March 2, 1907, repealed.] Section 1 of the Act approved March 2, 1907, entitled "An Act in reference to the expatriation of citizens and their protection abroad" (Thirty-fourth Statutes at Large, part 1, page 1228), authorizing the Secretary of State to issue passports to certain persons not citizens of the United States is hereby repealed. [41 Stat. L. 751.]

This is sec. 5 of the Diplomatic and Consular Appropriation Act of June 4, 1920, ch. 223. Other sections of this act will be found under the title **PASSPORTS**, *post*.

Sec. 1 of Act of March 2, 1907, repealed by the text, will be found in 2 Fed. Stat. Ann. (2d ed.) 122.

CIVIL SERVICE

Act of May 22, 1920, ch. 195, 17.

- Sec. 1. Employees in Classified Civil Service — Retirement on Annuity — Persons Eligible, 17.*
- 2. Amount of Annuity — Classification — Rates — "Basic Salary, Pay, or Compensation," 18.*
- 3. Period of Service — Computation — Election to Receive Pension or Insurance, 19.*
- 4. Commissioner of Pensions — Rules and Regulations — Orders — Appeals, 19.*
- 5. Employees Disabled before Reaching Retirement Age — Medical Examinations — Fees — Traveling Expenses — Discontinuance of Annuities, 19.*
- 6. Employees Subject to Retirement — Separation from Service — Continuance in Service, 20.*
- 7. Applications for Annuities — Adjudication of Claim — Commencement of Annuities, 21.*
- 8. Civil Service Retirement and Disability Fund — Deductions from Salary — Investment — Supplemental Contributions, 22.*
- 9. Deductions from Salaries — Presumption as to Employees' Consent, 22.*
- 10. Transfer or Reinstatement of Employees — Credit for Past Service, 22.*
- 11. Deductions from Salaries — Return — Redeposit — Payment — To Whom Made, 23.*
- 12. Payment of Annuities — Time — Method, 23.*

Sec. 13. Reports of Heads of Executive Departments—Records of Civil Service Commission—Annual Report of Commissioner of Pensions, 23.

14. Annuities—Assignment—Attachment, etc., 24.

15. Appropriation for Expenses, etc.—Annual Estimates, 24.

16. Actuaries—Selection—Duties—Compensation, 24.

17. Laws Repealed, 25.

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 25.

Sec. 1. Civil Service Commission—Detail of Clerks and Employees, 25.

Civil Service Commission—Rooms and Accommodations—Act of Jan. 16, 1883, Amended, 25.

CROSS-REFERENCES

See also **DIPLOMATIC AND CONSULAR OFFICERS; POSTAL SERVICE**

An Act For the retirement of employees in the classified civil service, and for other purposes.

[*Act of May 22, 1920, ch. 195, 41 Stat. L. 614.*]

[SEC. 1.] [**Employees in classified civil service—retirement on annuity—persons eligible.**] That beginning at the expiration of ninety days next following the passage of this Act, all employees in the classified civil service of the United States who have on that date, or shall have on any date thereafter, reached the age of seventy years and rendered at least fifteen years of service computed as prescribed in section 3 of this Act, shall be eligible for retirement on an annuity as provided in section 2 hereof: *Provided*, That mechanics, city and rural letter carriers, and post-office clerks shall be eligible for retirement at sixty-five years of age, and railway postal clerks at sixty-two years of age, if said mechanics, city and rural letter carriers, post-office clerks, and railway postal clerks shall have rendered at least fifteen years of service computed as prescribed in section 3 of this Act.

The provisions of this Act shall include superintendents of United States national cemeteries, employees of the Superintendent of the United States Capitol Buildings and Grounds, the Library of Congress and the Botanic Gardens, excepting persons appointed by the President and confirmed by the Senate, and may be extended by Executive order, upon recommendation of the Civil Service Commission, to include any employee or group of employees in the civil service of the United States not classified at the time of the passage of this Act. The President shall have power, in his discretion, to exclude from the operation of this Act any employee or group of employees in the classified civil service whose tenure of office or employment is intermittent or of uncertain duration.

All regular annual employees of the municipal government of the District of Columbia, appointed directly by the commissioners, or by other competent authority including those receiving per diem compensation paid out of general appropriations, but whose services are continuous, and including public-school employees, excepting school officers and teachers, shall be included in the provisions of this Act, but members of the police and fire departments shall be excluded therefrom.

Postmasters, and such employees of the Lighthouse Service as come within the provisions of section 6 of the Act of June 20, 1918, entitled, "An Act to authorize aids to navigation and for other works in the Lighthouse Service, and for other purposes," shall not be included in the provisions of this Act. [41 Stat. L. 614.]

For the Act of June 20, 1918, sec. 6, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 450.

SEC. 2. [Amount of annuity — classification — rates — "basic salary, pay, or compensation."] That for the purpose of determining the amount of annuity which retired employees shall receive, the following classifications and rates shall be established:

Class A shall include all employees to whom this Act applies who shall have served the United States for a total period of thirty years or more. The annuity to a retired employee in this class shall equal 60 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$720 per annum or be less than \$360 per annum.

Class B shall include all employees to whom this Act applies who shall have served the United States for a total period of twenty-seven years or more, but less than thirty years. The annuity to a retired employee in this class shall equal 54 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$648 per annum, or be less than \$324 per annum.

Class C shall include all employees to whom this Act applies who shall have served the United States for a total period of twenty-four years or more, but less than twenty-seven years. The annuity to a retired employee in this class shall equal 48 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$576 per annum, or be less than \$288 per annum.

Class D shall include all employees to whom this Act applies who shall have served the United States for a total period of twenty-one years or more, but less than twenty-four years. The annuity to a retired employee in this class shall equal 42 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$504 per annum, or be less than \$252 per annum.

Class E shall include all employees to whom this Act applies who shall have served the United States for a total period of eighteen years or more, but less than twenty-one years. The annuity to a retired employee in this class shall equal 36 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$432 per annum, or be less than \$216 per annum.

Class F shall include all employees to whom this Act applies who shall have served the United States for a total period of fifteen years or more, but less than

eighteen years. The annuity to a retired employee in this class shall equal 30 per centum of such employee's average annual basic salary, pay, or compensation from the United States for the ten years next preceding the date on which he or she shall retire: *Provided*, That in no case shall an annuity in this class exceed \$360 per annum, or be less than \$180 per annum.

The term "basic salary, pay, or compensation" wherever used in this Act shall be so construed as to exclude from the operation of the Act all bonuses, allowances, overtime pay, or salary, pay, or compensation given in addition to the base pay of the positions as fixed by law or regulation. [41 Stat. L. 614.]

SEC. 3. [Period of service — computation — election to receive pension or insurance.] That for the purposes of this Act and subject to the provisions of section 10 hereof, the period of service shall be computed from the date of original employment, whether as a classified or unclassified employee in the civil service of the United States, and shall include periods of service at different times and services in one or more departments, branches, or independent offices of the Government, and shall also include service performed under authority of the United States beyond seas, and honorable service in the Army, Navy, Marine Corps, or Coast Guard of the United States: *Provided*, That in the case of an employee who is eligible for and elects to receive a pension under any law, or compensation under the War Risk Insurance Act, the period of his or her military or naval service upon which such pension or compensation is based shall not be included for the purpose of assignment to classes defined in section 2 hereof, but nothing contained in this Act shall be so construed as to affect in any manner his or her right to a pension, or to compensation under the War Risk Insurance Act, in addition to the annuity herein provided.

It is further provided that in computing length of service for the purposes of this Act all periods of separation from the service and so much of any period of leave of absence as may exceed six months shall be excluded, and that in the case of substitutes in the Postal Service only periods of active employment shall be included. [41 Stat. L. 615.]

SEC. 4. [Commissioner of Pensions — rules and regulations — orders — appeals.] That for the purpose of administration, except as otherwise provided herein, the Commissioner of Pensions, under the direction of the Secretary of the Interior, be, and is hereby, authorized and directed to perform, or cause to be performed, any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect. An appeal to the Secretary of the Interior shall lie from the final action or order of the Commissioner of Pensions affecting the rights or interests of any person or of the United States under this Act, the procedure on appeal to be as prescribed by the Commissioner of Pensions, with the approval of the Secretary of the Interior. [41 Stat. L. 616.]

SEC. 5. [Employees disabled before reaching retirement age — medical examinations — fees — traveling expenses — discontinuance of annuities.] That any employee to whom this Act applies who shall have served for a total period of not less than fifteen years, and who, before reaching the retirement age as fixed in section 1 hereof, becomes totally disabled for useful and efficient service by reason of disease or injury not due to vicious habits, intemperance,

or willful misconduct on the part of the employee, shall upon his or her own application or upon the request or order of the head of the department, branch, or independent office concerned, be retired on an annuity under the provisions of section 2 hereof: *Provided, however,* That no employee shall be retired under the provisions of this section until examined by a medical officer of the United States or a duly qualified physician or surgeon or board of physicians or surgeons designated by the Commissioner of Pensions for that purpose and found to be disabled in the degree and in the manner specified herein.

Every annuitant retired under the provisions of this section, unless the disability for which retired is permanent in character, shall, at the expiration of one year from the date of such retirement and annually thereafter until reaching the retirement age as defined in section 1 hereof, be examined under direction of the Commissioner of Pensions by a medical officer of the United States, or a duly qualified physician or surgeon or board of physicians or surgeons designated by the Commissioner of Pensions for that purpose, in order to ascertain the nature and degree of the annuitant's disability, if any; if the annuitant recovers and is restored to his or her former earning capacity before reaching the retirement age, payment of the annuity shall be discontinued from the date of the medical examination showing such recovery; if the annuitant fails to appear for examination as required under this section, payment of the annuity shall be suspended until continuance of the disability has been satisfactorily established. The Commissioner of Pensions is hereby authorized to order or direct at any time such medical or other examination as he shall deem necessary to determine the facts relative to the nature and degree of disability of any employee retired on an annuity under this section.

Fees for examinations made under the provisions of this section by physicians or surgeons who are not medical officers of the United States shall be fixed by the Commissioner of Pensions, and such fees, together with the employee's reasonable traveling and other expenses incurred in order to submit to such examinations, shall be paid out of the appropriations for the cost of administering this Act.

In all cases where the annuity is discontinued under the provisions of this section before the annuitant has received a sum equal to the total amount of his or her contributions with accrued interest, the difference shall be paid to the retired employee, or to his or her estate, upon application therefor in such form and manner as the Commissioner of Pensions may direct.

No person shall be entitled to receive an annuity under the provisions of this Act, and compensation under the provisions of the Act of September 7, 1916, entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," covering the same period of time; but this provision shall not be so construed as to bar the right of any claimant to the greater benefit conferred by either Act for any part of the same period of time. [41 Stat. L. 616.]

For Act of Sept. 7, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 429.

SEC. 6. [Employees subject to retirement—separation from service—continuance in service.] That all employees to whom this Act applies shall, upon the expiration of ninety days next succeeding its passage, if of retirement age, or thereafter on arriving at retirement age as defined in section 1 hereof, be automatically separated from the service, and all salary, pay, or

compensation shall cease from that date, and it shall be the duty of the head of each department, branch, or independent office of the Government to notify such employees under his direction of the date of such separation from the service at least sixty days in advance thereof: *Provided*, That no person employed in the executive departments within the District of Columbia, retired under the provisions of this Act during the fiscal year ending June 30, 1921, shall be replaced by additional employees, but if the exigencies of the service so require, places made vacant by such retirement may be filled by promotion or transfer of eligible employees already in the service: *Provided*, That if within sixty days after the passage of this Act or not less than thirty days before the arrival of an employee at the age of retirement, the head of the department, branch, or independent office of the Government in which he or she is employed certifies to the Civil Service Commission that by reason of his or her efficiency and willingness to remain in the civil service of the United States the continuance of such employee therein would be advantageous to the public service, such employee may be retained for a term not exceeding two years upon approval and certification by the Civil Service Commission, and at the end of the two years he or she may, by similar approval and certification, be continued for an additional term not exceeding two years, and so on: *Provided, however*, That at the end of ten years after this Act becomes effective no employee shall be continued in civil service of the United States beyond the age of retirement defined in section 1 hereof for more than four years. [41 Stat. L. 617.]

SEC. 7. [Applications for annuities — adjudication of claim — commencement of annuities.] That every employee who is or hereafter becomes eligible for retirement because of age as provided in this Act, shall, within sixty days after its passage or thirty days before reaching the retirement age, or at any time thereafter, file with the Commissioner of Pensions, in such form as he may prescribe, an application for an annuity, supported by a certificate from the head of the department, branch, or independent office of the Government in which the applicant has been employed, stating the age and period or periods of service of the applicant and salary, pay, or compensation received during such periods, as shown by the official records: *Provided, however*, That in the case of an employee who is to be continued in the civil service of the United States beyond the retirement age as provided in section 6 hereof, he or she may make application for retirement at any time within such period of continuance in the service; but nothing contained in this Act shall be construed to prevent the compulsory retirement of such employee when in the judgment of the head of the department, branch, or independent office in which he or she is employed such retirement would promote the best interests of the service.

Upon receipt of satisfactory evidence the Commissioner of Pensions shall forthwith adjudicate the claim of the applicant, and if title to annuity be established, a proper certificate shall be issued to the annuitant under the seal of the Department of the Interior.

Annuities granted under this Act for retirement on account of age shall commence from the date of separation from the service on or after the date this Act shall take effect, and shall continue during the life of the annuitant. Annuities granted for disability under the provisions of section 5 hereof shall be subject to the limitations specified in said section. [41 Stat. L. 617.]

SEC. 8. [Civil service retirement and disability fund — deductions from salary — investment — supplemental contributions.] That beginning on the first day of the third month next following the passage of this Act and monthly thereafter there shall be deducted and withheld from the basic salary, pay, or compensation of each employee to whom this Act applies a sum equal to 2½ per centum of such employee's basic salary, pay, or compensation. The Secretary of the Treasury shall cause the said deductions to be withheld from all specific appropriations for the particular salaries or compensation from which the deductions are made and from all allotments out of lump-sum appropriations for payments of such salaries or compensation for each fiscal year, and said sums shall be transferred on the books of the Treasury Department to the credit of a special fund to be known as "the civil-service retirement and disability fund," and said fund is hereby appropriated for the payment of annuities, refunds, and allowances as provided in this Act.

The Secretary of the Treasury is hereby directed to invest from time to time, in interest-bearing securities of the United States, such portions of the "civil-service retirement and disability fund" hereby created as in his judgment may not be immediately required for the payment of annuities, refunds, and allowances as herein provided, and the income derived from such investments shall constitute a part of said fund for the purpose of paying annuities and of carrying out the provisions of section 11 of this Act.

The Secretary of the Treasury is hereby authorized and empowered in carrying out the provisions of this Act to supplement the individual contributions of employees with moneys received in the form of donations, gifts, legacies, bequests, or otherwise, and to receive, invest, and disburse for the purposes of this Act all moneys which may be contributed by private individuals or corporations or organizations for the benefit of civil-service employees generally or any special class of employees. [41 Stat. L. 618.]

SEC. 9. [Deductions from salaries — presumption as to employees' consent.] That every employee coming within the provisions of this Act shall be deemed to consent and agree to the deductions from salary, pay, or compensation as provided in section 8 hereof, and payment less such deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for all regular services rendered by such employee during the period covered by such payment, except the right to the benefits to which he or she shall be entitled under the provisions of this Act, notwithstanding the provisions of sections 167, 168, and 169 of the Revised Statutes of the United States, and of any other law, rule, or regulation affecting the salary, pay, or compensation of any person or persons employed in the civil service to whom this Act applies. [41 Stat. L. 618.]

For R. S. secs. 167–169, mentioned in the text, see 2 Fed. Stat. Ann. (2d ed.) 148.

SEC. 10. [Transfer or reinstatement of employees — credit for past service.] That upon the transfer of any employee from an unclassified to a classified status, or upon the reinstatement of a former employee, credit for past service rendered subsequent to the date this Act shall take effect, or for any part thereof, shall be granted only upon deposit with the Treasurer of the United States of the amount of such deductions with interest as provided in this Act as would have been made for the periods of actual service, or part thereof,

for which credit is to be given, but such interest shall not be computed for periods of separation from the service: *Provided*, That failure to make such deposit shall not deprive the employee of credit for any past service rendered prior to the date this Act shall become operative, and to which he or she would otherwise be entitled. [41 Stat. L. 618.]

SEC. 11. [**Deductions from salaries — return — redeposit — payment — to whom made.**] That in the case of an employee in the classified civil service of the United States who shall be transferred to an unclassified position, and in the case of any employee to whom this Act applies who shall become absolutely separated from the service before becoming eligible for retirement on an annuity, the total amount of deductions of salary, pay, or compensation with accrued interest computed at the rate of 4 per centum per annum, compounded on June 30 of each fiscal year, shall, upon application, be returned to such employee: *Provided*, That all money so returned to an employee must be redeposited with interest before such employee may derive any benefit under the provisions of this Act, upon reinstatement or retransfer to a classified position; and in case an annuitant shall die without having received in annuities an amount equal to the total amount of the deductions from his or her salary, pay, or compensation, together with interest thereon at 4 per centum per annum compounded as herein provided up to the time of his or her death, the excess of the said accumulated deductions over the said annuity payments shall be paid in one sum to his or her legal representatives upon the establishment of a valid claim therefor; and in case an employee shall die without having reached the retirement age or without having established a valid claim for annuity, the total amount of deductions with accrued interest as herein provided shall be paid to the legal representatives of such employee: *Provided*, That if in case of death the amount of deductions to be paid under the provisions of this section does not exceed \$300, and if there has been no demand upon the Commissioner of Pensions by a duly appointed executor or administrator, the payment may be made, after the expiration of three months from date of death, to such person or persons as may appear in the judgment of the Commissioner of Pensions to be legally entitled to the proceeds of the estate, and such payment shall be a bar to recovery by any other person. [41 Stat. L. 619.]

SEC. 12. [**Payment of annuities — time — method.**] That annuities granted under the terms of this Act shall be due and payable monthly on the first business day of the month following the month or other period for which the annuity shall have accrued, and payment of all annuities, refunds, and allowances granted hereunder shall be made by checks drawn and issued by the disbursing clerk for the payment of pensions in such form and manner and with such safeguards as shall be prescribed by the Secretary of the Interior in accordance with the laws, rules, and regulations governing accounting that may be found applicable to such payments. [41 Stat. L. 619.]

SEC. 13. [**Reports of heads of executive departments — records of Civil Service Commission — annual report of Commissioner of Pensions.**] That it shall be the duty of the head of each executive department and the head of each independent establishment of the Government not within the jurisdiction of any executive department to report to the Civil Service Commission in such manner as said commission may prescribe, the name and grade of each employee

to whom this Act applies in or under said department or establishment who shall be at any time in a nonpay status, showing the dates such employee was in a nonpay status, and the amount of salary, pay, or compensation lost by the employee by reason of such absence. The Civil Service Commission shall keep a record of appointments, transfers, changes in grade, separations from the service, reinstatements, loss of pay, and such other information concerning individual service as may be deemed essential to a proper determination of rights under this Act, and shall furnish the Commissioner of Pensions such reports therefrom as he shall from time to time request as necessary to the proper adjustment of any claim hereunder, and shall prepare and keep all needful tables and records required for carrying out the provisions of this Act, including data showing the mortality experience of the employees in the service and the percentage of withdrawal from such service, and any other information that may serve as a guide for future valuations and adjustments of the plan for the retirement of employees under this Act.

The Commissioner of Pensions shall make a detailed comparative report annually showing all receipts and disbursements on account of refunds, allowances, and annuities, together with the total number of persons receiving annuities and the amounts paid them. [41 Stat. L. 619.]

SEC. 14. [Annuities — assignment — attachment, etc.] That none of the moneys mentioned in this Act shall be assignable, either in law or equity, or be subject to execution, levy, or attachment, garnishment, or other legal process. [41 Stat. L. 620.]

SEC. 15. [Appropriation for expenses, etc — annual estimates.] That there is hereby authorized to be appropriated, from any moneys in the Treasury not otherwise appropriated, the sum of \$100,000 for salaries and for clerical and other services, the purchase of books, office equipment, stationery, and other supplies, and all other expenses necessary in carrying out the provisions of this Act, including traveling expenses and expenses of medical and other examinations as provided in section 5 hereof.

The Secretary of the Interior shall submit annually to the Secretary of the Treasury estimates of the appropriations necessary to continue this Act in full force and effect. [41 Stat. L. 620.]

SEC. 16. [Actuaries — selection — duties — compensation.] That the Commissioner of Pensions, with the approval of the Secretary of the Interior, is hereby authorized and directed to select three actuaries, one of whom shall be the Government actuary, to be known as the Board of Actuaries, whose duty it shall be to annually report upon the actual operations of this Act, with authority to recommend to the Commissioner of Pensions such changes as in its judgment may be deemed necessary to protect the public interest and maintain the system upon a sound financial basis. It shall be the duty of the Commissioner of Pensions to submit with his annual report to Congress the recommendations of the Board of Actuaries. It shall be the duty of the Board of Actuaries to make a valuation of the "civil-service retirement and disability fund" at the end of the first year following the passage of this Act and at intervals of every five years thereafter, or oftener, if deemed necessary by the Commissioner of Pensions. The compensation of the members of the Board of Actuaries, exclusive of the Government actuary, shall be fixed by the Commissioner of Pensions with the approval of the Secretary of the Interior. [41 Stat. L. 620.]

SEC. 17. [**Laws repealed.**] That all laws and parts of laws inconsistent with this Act are hereby repealed. [*41 Stat. L. 620.*]

[SEC. 1.] * * * [**Civil Service Commission — detail of clerks and employees.**] No detail of clerks or other employees from the executive departments or other Government establishments in the District of Columbia, to the Civil Service Commission or its field force, excepting the fourth district, for the performance of duty in the District of Columbia, shall be made for or during the fiscal year 1921. The Civil Service Commission shall, however, have power in case of emergency to transfer or detail any of its employees herein provided for to or from its office force, field force, or rural carrier examining board. [*41 Stat. L. 641.*]

This and the following paragraph are from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214.

* * * [**Civil Service Commission — rooms and accommodations — Act of Jan. 16, 1883, amended.**] The duty placed upon the Secretary of the Interior by section 4 of an Act entitled "An Act to regulate and improve the civil service of the United States," approved January 16, 1883, shall be performed on and after July 1, 1920, by the Civil Service Commission. [*41 Stat. L. 642.*]

See note to preceding paragraph.

For section 4 amended by the above paragraph see 2 Fed. Stat. Ann (2d ed.) 159.

CLAIMS

See INDIANS

CLAYTON ACT

See PUBLIC LANDS; TRADE COMBINATIONS AND TRUSTS

COAL

See INDIANS

COAST AND GEODETIC SURVEY

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 26.

Sec. 1. Hydrographic Office—Receipts from Sale of Maps, Charts, and Other Publications, 26.

Act of June 4, 1920, ch. 228 (Naval Appropriation Act), 26.

Sec. 1. Superintendent—Appointment—Rank, etc., 26.

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 26.

Sec. 1. Instruments—Transfer to Educational Institutions, 26.

Act of June 5, 1920, ch. 256, 27.

Claims for Damages—Adjustment by Superintendent, 27.

CROSS-REFERENCE

See also **WAR DEPARTMENT AND MILITARY ESTABLISHMENT**

[SEC. 1.] * * * [Hydrographic Office—receipts from sale of maps, charts, and other publications.] All sums received from the sale of maps, charts, and other publications issued by the Hydrographic Office after June 30, 1921, shall be covered into the Treasury of the United States as miscellaneous receipts. [41 Stat. L. 665.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214.

[SEC. 1.] * * * [Superintendent—appointment—rank, etc.] That the Superintendent of the Coast and Geodetic Survey shall have the relative rank, pay, and allowances of a captain in the Navy, and that hereafter he shall be appointed by the President, by and with the advice and consent of the Senate, from the list of commissioned officers of the Coast and Geodetic Survey not below the rank of commander for a term of four years, and may be reappointed for further periods of four years each. [41 Stat. L. 825.]

This is from the Naval Appropriation Act of June 4, 1920, ch. 228.

[SEC. 1.] * * * [Instruments—transfer to educational institutions.] The Secretary of Commerce is authorized to transfer, under such rules and regulations as he may deem advisable, to educational institutions and to museums, such instruments of the United States Coast and Geodetic Survey as, in his judgment, are of historical value but of no further use in the work of that survey, except such historical instruments as may be needed by the Smithsonian Institution for exhibit at the National Museum. [41 Stat. L. 930.]

This is from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

An Act Authorizing the Superintendent of the Coast and Geodetic Survey, subject to the approval of the Secretary of Commerce, to consider, ascertain, adjust, and determine claims for damages occasioned by acts for which said survey is responsible in certain cases.

[*Act of June 5, 1920, ch. 256, 41 Stat. L. 1054.*]

[Claims for damages — adjustment by superintendent.] That the Superintendent of the Coast and Geodetic Survey, subject to the approval of the Secretary of Commerce, is hereby authorized to consider, ascertain, adjust, and determine all claims for damages, where the amount of the claim does not exceed \$500, hereafter occasioned by acts for which the Coast and Geodetic Survey shall be found to be responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor. [*41 Stat. L. 1054.*]

COAST GUARD

Act of Feb. 27, 1920, ch. 88, 27.

Leave of Absence to Officers — Employment with Venezuelan Government, 27.

Act of March 6, 1920, ch. 94 (Deficiency Appropriation Act), 28.

Sec. 1. Rations — Commutation, 28.

Act of May 6, 1920, ch. 168, 28.

Station on Coast of Lake Superior, Minn., 28.

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 28.

Sec. 1. Detail of Enlisted Personnel, 28.

Services of Skilled Draftsmen, etc., 28.

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 28.

Sec. 1. Detail of Enlisted Men, 28.

Commissioned Officers — Change of Titles, 29.

Lighthouse Service — Co-operation in Marking Anchorage Grounds, 29.

Administration of Oaths — Designation of Officers, 29.

“Deck Courts” — Organization — Procedure, 29.

CROSS-REFERENCES

See also **NAVY; WAR DEPARTMENT AND MILITARY ESTABLISHMENT**

An Act Granting leave of absence to officers of the Coast Guard and for other purposes.

[*Act of Feb. 27, 1920, ch. 88, 41 Stat. L. 452.*]

[Leave of absence to officers — employment with Venezuelan Government.] That the President of the United States be, and he is hereby, authorized to grant leave of absence without pay to such officer or officers of the United States

Coast Guard as he may deem advisable, and to permit him or them to accept employment with the Venezuelan Government with such compensation and emoluments as may be agreed upon between the Venezuelan Government and such officer or officers thus granted leave of absence. [41 Stat. L. 452.]

[SEC. 1.] * * * [Rations — commutation.] That hereafter when rations for the Coast Guard are commuted they shall be commuted at a rate not to exceed the average cost of the ration for the preceding six months, as determined by the Secretary of the Treasury. [41 Stat. L. 506.]

This is from the Deficiency Appropriation Act of March 6, 1920, ch. 94.

An Act To authorize the establishment of a Coast Guard station on the coast of Lake Superior, in Cook County, Minnesota.

[Act of May 6, 1920, ch. 168, 41 Stat. L. 588.]

[Station on coast of Lake Superior, Minn.] That the Secretary of the Treasury be, and he is hereby, authorized to establish a Coast Guard station on the coast of Lake Superior, in Cook County, Minnesota, in such locality as the captain commandant of the Coast Guard may recommend. [41 Stat. L. 588.]

[SEC. 1.] * * * [Detail of enlisted personnel.] That hereafter enlisted personnel of the Coast Guard shall not be detailed for duty in the office of the Coast Guard in the District of Columbia. [41 Stat. L. 650.]

This and the paragraph that follows are from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214.

[Services of skilled draftsmen, etc.] The services of skilled draftsmen, and such other technical services as the Secretary of the Treasury may deem necessary, may be employed only in the office of the Coast Guard in connection with the construction and repair of Coast Guard cutters, to be paid from the appropriation "Repairs to Coast Guard cutters": *Provided*, That the expenditures on this account for the fiscal year 1921 shall not exceed \$8,000. A statement of the persons employed hereunder, their duties, and the compensation paid to each shall be made to Congress each year in the annual estimate [41 Stat. L. 650.]

See note to preceding paragraph.

[SEC. 1.] * * * [Detail of enlisted men.] That not more than ten enlisted men at one time may be detailed to duty in the District of Columbia; [41 Stat. L. 879.]

This and the following four paragraphs are from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

[Commissioned officers — change of titles.] Titles of commissioned officers of the Coast Guard are hereby changed as follows: Senior captain to commander, captain to lieutenant commander, first lieutenant to lieutenant, second lieutenant to lieutenant junior grade, third lieutenant to ensign, captain of engineers to lieutenant commander (engineering), first lieutenant of engineers to lieutenant (engineering), second lieutenant of engineers to lieutenant, junior grade (engineering), and third lieutenant of engineers to ensign (engineering): *Provided*, That all laws applicable to the titles hereby abolished in the Coast Guard shall apply to the titles hereby established. [41 Stat. L. 879.]

See note to preceding paragraph.

*** * * [Lighthouse service — co-operation in marking anchorage grounds.]** The Lighthouse Service shall cooperate with the Coast Guard in marking anchorage grounds in the harbors of New York and Hampton Roads by furnishing and maintaining buoys necessary for such purposes. Appropriations for the Lighthouse Service for the fiscal year 1921 are made available therefor. [41 Stat. L. 880.]

See note to first paragraph of section.

[Administration of oaths — designation of officers.] Such commissioned and warrant officers of the Coast Guard as may be designated by the commandant of the Coast Guard are hereby authorized to administer such oaths as may be necessary in connection with recruiting and for the proper conduct of said service. [41 Stat. L. 880.]

See note to first paragraph of section.

[“ Deck courts ” — organization — procedure.] “ Deck courts,” to consist of one commissioned officer only, may be ordered by or under the direction of the Secretary of the Treasury for the trial of enlisted men in the Coast Guard for minor offenses now triable by Coast Guard courts; and said courts shall be governed in their organization and procedure substantially in accordance with naval “ deck courts,” and shall have the same power to impose punishment. [41 Stat. L. 880.]

See note to first paragraph of section.

COMPTROLLER OF TREASURY

See TREASURY DEPARTMENT

CONGRESS

Act of March 6, 1920, ch. 94 (Deficiency Appropriation Act), 30.

Sec. 1. Enrolled Bills and Resolutions — Printing, 30.

Act of June 5, 1920, ch. 253 (Deficiency Appropriation Act), 30.

Sec. 1. Supplies for Senate and House — Purchase, 30.

CROSS-REFERENCES

See also *AGRICULTURE; EXECUTIVE DEPARTMENTS; POSTAL SERVICE*

[SEC. 1.] * * * [Enrolled bills and resolutions — printing.] Hereafter enrolled bills and resolutions of either House of Congress shall be printed on parchment or paper of suitable quality as shall be determined by the Joint Committee on Printing. [41 Stat. L. 520.]

This is from Deficiency Appropriation Act of March 6, 1920, ch. 94.

[SEC. 1.] * * * [Supplies for Senate and House — purchase.] Hereafter supplies for use of the Senate and the House of Representatives may be purchased in accordance with the schedule of contract articles and prices of the General Supply Committee authorized by section 4 of the Act approved June 17, 1910, concerning the purchase of supplies for the executive departments and other Government establishments in Washington: *Provided*, That paper, envelopes, and blank-books required by the stationery rooms of the Senate and House of Representatives for sale to Senators and Members for official use may be purchased from the Public Printer at actual cost thereof and payment therefor shall be made before delivery. [41 Stat. L. 1036.]

This is from the Deficiency Appropriation Act of June 5, 1920, ch. 253.

For Act of June 17, 1910, sec. 4, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 398.

CONSERVATION

See *FOOD AND FUEL*

CONTRACTS

See *INTERSTATE COMMERCE; PUBLIC CONTRACTS; WAR DEPARTMENT AND MILITARY ESTABLISHMENT*

CORPORATIONS

Act of May 8, 1920, ch. 172 (Deficiency Appropriation Act), 30.

War Finance Corporation — Taking Over Government Bonds in Hands of Railroad Administration, 30.

* * * [War Finance Corporation — taking over Government bonds in hands of Railroad Administration.] The War Finance Corporation, as rapidly as funds become available, shall take over from the United States Railroad Administration, at par value and accrued interest, such of the bonds of the United States of the various Liberty loan issues and the Victory loan issue as are held by the said administration at the time of the approval of this Act and which it does not desire to retain. [41 Stat. L. 589.]

This is from the Deficiency Appropriation Act of May 8, 1920, ch. 172.

COTTON

See INTERNAL REVENUE

COUNCIL OF NATIONAL DEFENSE

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

COURTS

See COAST GUARD; INDIANS; JUDICIAL OFFICERS; JUDICIARY

CUSTER STATE PARK GAME SANCTUARY

See PUBLIC PARKS

CUSTOMS DUTIES

Act of Feb. 7, 1920, ch. 61, 31.

Lading or Unlading of Vessels at Night — Compensation of Inspectors, etc.— Oaths, 31.

Act of March 24, 1920, ch. 107, 32.

Sec. 1. Temporary Laborers in Customs Service — Fixing Compensation, 32.

2. Expiration of Act, 33.

3. Repeal of Inconsistent Acts, 33.

Act of April 23, 1920, ch. 158, 33.

Sec. 1. Printing Paper — Rates of Duty — Sec. 600 of Act of Sept. 8, 1916, Amended, 33.

2. Continuance of Act, 33.

CROSS-REFERENCES

See also *IMPORTS AND EXPORTS; SHIPPING AND NAVIGATION*

An Act To amend an Act entitled "An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes," approved February 13, 1911.

[Act of Feb. 7, 1920, ch. 61, 41 Stat. L. 402.]

[Lading or unlading of vessels at night — compensation of inspectors, etc.— oaths.] That section 5 of an Act entitled "An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes," approved February 13, 1911, be, and is hereby, amended to read as follows:

"SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided*, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: *Provided further*, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed." [41 Stat. L. 402.]

For Act of Feb. 13, 1911, here amended, see 2 Fed. Stat. Ann. (2d ed.) 1043.

An Act To authorize the Secretary of the Treasury to fix compensation of certain laborers in the Customs Service.

[Act of March 24, 1920, ch. 107, 41 Stat. L. 536.]

[SEC. 1.] [Temporary laborers in Customs Service — fixing compensation.] That the Secretary of the Treasury be, and he is hereby, authorized to fix the compensation of temporary laborers in the Customs Service as he may think advisable, at a rate not exceeding the local rates prevailing in the various ports and districts for the same classes of labor: *Provided*, That it shall not exceed in any event 80 cents per hour, and credit for amounts paid since July 1, 1919, in excess of the rate of \$2.50 per day shall be allowed in the accounts of customs officers. [41 Stat. L. 536.]

SEC. 2. [**Expiration of Act.**] That this Act shall expire December 31, 1920. [41 Stat. L. 536.]

SEC. 3. [**Repeal of inconsistent Acts.**] That all Acts and parts of Acts inconsistent herewith are hereby suspended while this Act remains in force. [41 Stat. L. 536.]

An Act To amend section 600 of the Act approved September 8, 1916, entitled "An Act to increase the revenue, and for other purposes."

[Act of April 23, 1920, ch. 158, 41 Stat. L. 573.]

[SEC. 1.] [**Printing paper — rates of duty — sec. 600 of Act of Sept. 8, 1916, amended.**] That section 600 of the Act approved September 8, 1916, entitled "An Act to increase the revenue, and for other purposes," be amended so as to read as follows:

"SEC. 600. That paragraph 322, schedule M, and paragraph 567 of the free list of the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, be amended so that the same shall read as follows:

"322. Printing paper (other than paper commercially known as handmade or machine handmade, japan paper, and imitation japan paper by whatever name known), unsized, sized, or glued, suitable for the printing of books and newspapers, but not for covers or bindings, not specially provided for in this section, valued above 8 cents per pound, 12 per centum ad valorem: *Provided, however,* That if any country, dependency, Province, or other subdivision of government shall impose any export duty, export license fee, or other charge of any kind whatsoever (whether in the form of additional charge or license fee or otherwise) upon printing paper, wood pulp, or wood for use in the manufacture of wood pulp, there shall be imposed upon printing paper, valued above 8 cents per pound, when imported either directly or indirectly from such country, dependency, Province, or other subdivision of government, an additional duty equal to the amount of the highest export duty or other export charge imposed by such country, dependency, Province, or other subdivision of government, upon either printing paper or upon an amount of wood pulp or wood for use in the manufacture of wood pulp necessary to manufacture such printing paper.

"567. Printing paper (other than paper commercially known as handmade or machine handmade paper, japan paper, and imitation japan paper by whatever name known), unsized, sized, or glued, suitable for printing of books and newspapers, but not for covers or bindings, not especially provided for in this section, valued at not above 8 cents per pound, decalcomania paper not printed." [41 Stat. L. 573.]

For sec. 600, amended by the text, see 1918 Supp. Fed. Stat. Ann. (2d ed.) 142.

SEC. 2. [**Continuance of Act.**] That this Act shall expire by limitation at the end of two years from the date of its passage, and section 600 of the Act approved September 8, 1916, entitled "An Act to increase the revenue, and for other purposes," as in effect prior to the passage of this Act, shall again become operative in its stead. [41 Stat. L. 573.]

DEATH BY WRONGFUL ACT

See SEAMEN; SHIPPING AND NAVIGATION

DENTAL CORPS

See NAVY

DIPLOMATIC AND CONSULAR OFFICERS

Act of June 4, 1920, ch. 223 (Diplomatic and Consular Appropriation Act), 34.
Secretaries in Diplomatic Service — Classification — Salaries, 34.
Consuls, etc.— American Citizens, 34.
Consular Inspectors — Expenses, 34.
Clerks at Consulates — Civil Service Rules, 34.

An Act Making appropriations for the Diplomatic and Consular Service for the fiscal year ending June 30, 1921.

[*Act of June 4, 1920, ch. 223, 41 Stat. L. 739.*]

* * * [**Secretaries in Diplomatic Service — classification — salaries.**] That secretaries in the Diplomatic Service shall hereafter be graded and classified as follows: Secretaries of class one, \$4,000 per annum; secretaries of class two, \$3,625 per annum; secretaries of class three, \$3,000 per annum; secretaries of class four, \$2,500 per annum; in all, \$418,375. [*41 Stat. L. 740.*]

* * * [**Consuls, etc.—American citizens.**] Every consul general, consul, vice consul, and, wherever practicable, every consular agent shall be an American citizen. [*41 Stat. L. 748.*]

* * * [**Consular inspectors — expenses.**] That inspectors shall be allowed actual and necessary expenses for subsistence, itemized, not exceeding an average of \$8 per day. [*41 Stat. L. 748.*]

* * * [**Clerks at consulates — civil service rules.**] Clerks, whenever hereafter appointed, shall, so far as practicable, be appointed under civil-service rules and regulations. [*41 Stat. L. 749.*]

DISTRICT ATTORNEYS

See JUDICIAL OFFICERS

DRAINAGE

See PUBLIC LANDS

DUTIES

See CUSTOMS DUTIES

EDUCATION

See COAST AND GEODETIC SURVEY; INDIANS; NAVY; VOCATIONAL REHABILITATION

EMERGENCY FLEET CORPORATION

See LABOR; SHIPPING AND NAVIGATION

EMPLOYEES

See CIVIL SERVICE; EXECUTIVE DEPARTMENTS; LABOR; POSTAL SERVICE; PUBLIC OFFICERS AND EMPLOYEES

EXECUTIVE DEPARTMENTS

Act of May 21, 1920, ch. 194 (Fortifications Appropriation Act), 36.

Sec. 7. *Government Bureaus or Departments — Interchange of Supplies and Services — Requisitions from Funds*, 36.

Act of May 29, 1920, ch. 214 (Legislative, Executive, and Judicial Appropriation Act), 36.

Sec. 1. *Detail of Employees to Office of President*, 36.

Typewriters and Computing Machines, 36.

4. *Typewriters*, 36.

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 37.

Sec. 4. *Departmental Publications — Discontinuance*, 37.

7. *Disposal of Typewriters*, 37.

Act of June 5, 1920, ch. 253 (Deficiency Appropriation Act), 37.

Annual Reports to Congress — Data of Publications Issued, 37.

CROSS-REFERENCES

See also *CIVIL SERVICE; INTERIOR DEPARTMENT; NAVY; TREASURY DEPARTMENT; WAR DEPARTMENT AND MILITARY ESTABLISHMENT*

SEC. 7. [Government bureaus or departments — interchange of supplies and services — requisitions from funds.] That whenever any Government bureau or department procures, by purchase or manufacture, stores or materials of any kind, or performs any service for another bureau or department, the funds of the bureau or department for which the stores or materials are to be procured or the service performed may be placed subject to the requisitions of the bureau or department making the procurement or performing the service for direct expenditure: *Provided*, That funds so placed with the procuring bureau shall remain available for a period of two years for the purposes for which the allocation was made unless sooner expended. [41 Stat. L. 613.]

This is from the Fortifications Appropriation Act of May 21, 1920, ch. 194.

[SEC. 1.] * * * **[Detail of employees to office of President.]** That employees of the executive departments and other establishments of the executive branch of the Government may be detailed from time to time to the office of the President of the United States for such temporary assistance as may be necessary. [41 Stat. L. 640.]

This and the following paragraph and also sec. 4 are from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214.

* * * **[Typewriters and computing machines.]** That typewriters and computing machines transferred to the General Supply Committee as surplus may, in the discretion of the Secretary of the Treasury, be issued to other Government departments and establishments at exchange prices quoted in the current general schedule of supplies where such machines have become unfit for further use. [41 Stat. L. 645.]

See note to preceding paragraph.

SEC. 4. [Typewriters.] That no part of any money appropriated by this or any other Act shall be used during the fiscal year 1921 for the purchase of any typewriting machine at a price in excess of the lowest price paid by the Government of the United States for the same make and substantially the same model of machine during the fiscal year 1919; such price shall include the value of any typewriting machine or machines given in exchange, but shall not apply to special prices granted on typewriting machines used in schools of the District of Columbia or of the Indian Service, the lowest of which special prices paid for typewriting machines shall not be exceeded in future purchases for such schools: *Provided*, That in construing this section the Commissioner of Patents shall advise the Comptroller of the Treasury as to whether the changes in any typewriter are of such structural character as to constitute a new machine not within the limitations of this section.

All purchases of typewriting machines during the fiscal year 1921 by the various branches of the Government of the United States for use in the District of Columbia or in the field, except as hereinafter provided, shall be made from the

surplus machines in the stock of the General Supply Committee. The War Department shall furnish the General Supply Committee, immediately upon the approval of this Act, a complete inventory of the various makes, models, and classes of typewriters in its possession, the condition of such machines, and the point of storage, and shall turn over to the General Supply Committee such typewriting machines in such quantities as the Secretary of the Treasury from time to time may call for by specific requisition for sale to the various services of the Government. If the General Supply Committee is unable to furnish serviceable machines to any branch of the Government, it shall furnish unserviceable machines at current exchange prices and such machines shall then be applied by the branch of the Government receiving them as part payment for new machines from commercial sources in accordance with the prices fixed in the preceding paragraph. After the approval of this Act and until June 30, 1921, the War Department shall not dispose of any typewriting machines except to the General Supply Committee as authorized herein: *Provided*, That hereafter no typewriter that has been used less than three years shall be sold, exchanged, or given as part payment for another typewriter. [41 Stat. L. 688.]

See note to preceding sec. 1.

SEC. 4. [Departmental publications — discontinuance.] Any journal, magazine, periodical, or similar publication which is now being issued by a department or establishment of the Government may, in the discretion of the head thereof, be continued, within the limitation of available appropriations or other Government funds, until June 30, 1921, when, if it shall not have been specifically authorized by Congress before that date, such journal, magazine, periodical, or similar publication shall be discontinued. [41 Stat. L. 945.]

This and sec. 7 which follows are from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

SEC. 7. [Disposal of typewriters.] Hereafter no department or other Government establishment shall dispose of any typewriting machines by sale, exchange, or as part payment for another typewriter, that has been used less than three years. [41 Stat. L. 947.]

See note to preceding section.

* * * **[Annual reports to Congress — data of publications issued.]** Hereafter the head of each department and independent establishment of the Government shall on the first day of each regular session submit in writing a report to the Congress giving the aggregate number of the various publications it has issued during the preceding fiscal year giving same in detail, and shall also report the cost of paper used for such publications, cost of printing and the cost of preparation of each publication, and the number of each which has been distributed. [41 Stat. L. 1037.]

This is from the Deficiency Appropriation Act of June 5, 1920, ch. 253.

EXPLOSIVES

See MINERAL LANDS, MINES AND MINING; PENAL LAWS

FARM LOAN ACT

See AGRICULTURE

FEDERAL CONTROL ACT

See INTERSTATE COMMERCE

FEDERAL POWER COMMISSION

See WATERS

FEDERAL RESERVE BANKS

See NATIONAL BANKS

FISH AND GAME

See PUBLIC PARKS

FLYING

See NAVY; POSTAL SERVICE; WAR DEPARTMENT AND MILITARY ESTABLISHMENT

FOOD AND FUEL

Act of Dec. 31, 1919, ch. 33, 38.

United States Sugar Equalization Board — Continuance — Distribution of Sugar — Act of Aug. 10, 1917, Amended, 38.

An Act To provide for the national welfare by continuing the United States Sugar Equalization Board until December 31, 1920, and for other purposes.

[Act of Dec. 31, 1919, ch. 33, 41 Stat. L. 386.]

[United States Sugar Equalization Board — continuance — distribution of sugar — Act of Aug. 10, 1917, amended.] That the President is authorized to continue during the year ending December 31, 1920, the United States Sugar

Equalization Board (Incorporated), a corporation organized under the laws of the State of Delaware, and to vote or use the stock in such corporation held by him for the benefit of the United States, or otherwise exercise his control over the corporation and its directors, in such a manner as to authorize and require them to adopt and carry out until December 31, 1920, plans and methods of securing, if found necessary for the public good, an adequate supply and an equitable distribution of sugar at a fair and reasonable price to the people of the United States. Sections 5 and 10 of the Act entitled "An Act to further provide for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved August 10, 1917, as far as the same relates to raw or refined sugar, syrups, or molasses, are hereby continued in full force and effect until December 31, 1920, notwithstanding the provisions of section 24 of said Act: *Provided*, That the provisions of this Act shall expire as to the domestic product June 30, 1920: *And provided further*, That the zone system of sale and distribution of sugars heretofore established by the said United States Sugar Equalization Board shall be abolished and shall not be reestablished or maintained, and that sugars shall be permitted to be sold and to circulate freely in every portion of the United States. The termination of this Act shall not affect any act done, or any right or obligation accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said termination pursuant to this Act; but all rights and liabilities under this Act arising before its termination shall continue and may be enforced in the same manner as if the Act had not terminated. Any offense committed and all penalties, forfeitures, or liabilities incurred prior to such termination may be prosecuted or punished in the same manner and with the same effect as if this Act had not been terminated. [41 Stat. L. 386.]

For Act of Aug. 10, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 181.

FOREIGN RELATIONS

See DIPLOMATIC AND CONSULAR OFFICERS

FOREST RESERVES

See PUBLIC PARKS; TIMBER LANDS AND FOREST RESERVES

FOURTEENTH CENSUS

See CENSUS

GAS

See PUBLIC LANDS

GENERAL GRANT NATIONAL PARK

See PUBLIC PARKS

GEODETIC SURVEY

See COAST AND GEODETIC SURVEY

GOVERNMENT BUILDINGS

See PUBLIC PROPERTY, BUILDINGS AND GROUNDS

HARBORS

See RIVERS, HARBORS AND CANALS

HAWAII

See PUBLIC PARKS

HEALTH AND QUARANTINE

Act of March 6, 1920, ch. 94 (Deficiency Appropriation Act), 40.

Sec. 1. Public Health Service — Articles Produced by Patients — Disposal, 40.

Officers of Public Health Service — Quartermaster Supplies — Purchase Price, 41.

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 41.

Sec. 1. Officers of Public Health Service — Allotments from Pay, 41.

CROSS-REFERENCES

See also *AGRICULTURE; ANIMALS; HOSPITALS AND ASYLUMS*

[SEC. 1.] * * * [Public Health Service — articles produced by patients — disposal.] That the Secretary of the Treasury is authorized to make regulations governing the disposal of articles produced by patients in the course of their curative treatment, either by allowing the patient to retain same or by selling the articles and depositing the money received to the credit of the appropriation from which the materials for making the articles were purchased. [41 Stat. L. 507.]

This and the following paragraph are from the Deficiency Appropriation Act of March 6, 1920, ch. 94.

[Officers of Public Health Service — quartermaster supplies — purchase price.] Hereafter officers of the Public Health Service may purchase quartermaster supplies from the Army, Navy, and Marine Corps at the same price as is charged officers of the Army, Navy, and Marine Corps. [41 Stat. L. 507.]

See note to preceding paragraph.

[SEC. 1.] * * * [Officers of Public Health Service — allotments from pay.] Hereafter the Secretary of the Treasury is authorized to permit officers of the Public Health Service to make allotments from their pay under such regulations as he may prescribe. [41 Stat. L. 883.]

This is from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235. An identical provision appears in the Sundry Civil Appropriation Act of July 19, 1919, ch. 24, 1919 Supp. Fed. Stat. Ann. 65, and in the Sundry Civil Appropriation Act of July 1, 1918, 1918 Supp. Fed. Stat. Ann. 204.

HOMESTEADS

See ALASKA; INDIANS; PUBLIC LANDS

HOSPITALS AND ASYLUMS

Act of Jan. 27, 1920, ch. 56, 42.

Aid to State or Territorial Homes, 42.

Act of March 6, 1920, ch. 94 (Deficiency Appropriation Act), 42.

Sec. 1. Saint Elizabeths Hospital — Readjustment of Salaries — Accounting Officers of Treasury, 42.

Articles Produced by Patients — Disposal, 43.

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 43.

Sec. 1. Marine Hospitals — Admission of Persons for Study, 43.

National Home for Disabled Volunteer Soldiers — Transfer of Furniture by Secretary of War, 43.

Persons Entitled to Admission to Home, 43.

Rules Governing Assignment of Classes Eligible to Admission to Home, 44.

Allotments by Bureau of War Risk Insurance to Home — Expenditures, 44.

State and Territorial Homes for Disabled Soldiers and Sailors — Aid — Sums Collected from Inmates — Deductions, 44.

Act of June 5, 1920, ch. 267, 44.

Appropriations for Specific Hospital Projects — Act of March 3, 1919, Amended, 44.

CROSS-REFERENCE

See also *HEALTH AND QUARANTINE*

An Act To amend an Act entitled "An Act to provide aid to State or Territorial homes for the support of disabled soldiers and sailors of the United States," approved August 27, 1888, as amended March 2, 1889.

[*Act of Jan. 27, 1920, ch. 56, 41 Stat. L. 399.*]

[Aid to State or Territorial Homes.] That section 1 of an Act entitled "An Act to provide aid to State or Territorial homes for the support of disabled soldiers and sailors of the United States," approved August 27, 1888, as amended March 2, 1889, is hereby amended to read as follows:

"That all States or Territories which have established, or which shall hereafter establish, State homes for disabled soldiers and sailors of the United States who served in the Civil War or in any previous or subsequent war who are disabled by age, disease, or otherwise, and by reason of such disability are incapable of earning a living, provided such disability was not incurred in service against the United States, shall be paid for every such disabled soldier or sailor who may be admitted and cared for in such home at the rate of \$120 per annum.

"The number of such persons for whose care any State or Territory shall receive the said payment under this Act shall be ascertained by the Board of Managers of the National Home for Disabled Volunteer Soldiers under such regulations as it may prescribe, but the said State or Territorial homes shall be exclusively under the control of the respective State or Territorial authorities, and the board of managers shall not have nor assume any management or control of said State or Territorial homes.

"The board of managers of the national home shall, however, have power to have the said State or Territorial homes inspected at such times as it may consider necessary, and shall report the result of such inspections to Congress in its annual report: *Provided*, That no State shall be paid a sum exceeding one-half the cost of maintenance of each soldier or sailor by such State: *Provided further*, That one-half of any sum or sums retained by State homes on account of pensions received from inmates shall be deducted from the aid herein provided for. That no money shall be apportioned to any State or Territorial home that maintains a bar or canteen where intoxicating liquors are sold: *Provided further*, That for any sum or sums collected in any manner from inmates of such State or Territorial homes to be used for the support of said homes a like amount shall be deducted from the aid herein provided for, but this proviso shall not apply to any State or Territorial home into which the wives or widows of soldiers are admitted and maintained." [41 Stat. L. 399.]

For Act of Aug. 27, 1888, amended by the text, see 3 Fed. Stat. Ann. (2d ed.) 596.

[SEC. 1.] * * * **[Saint Elizabeths Hospital — readjustment of salaries — accounting officers of Treasury.]** Hereafter the accounting officers of the Treasury are authorized to credit the accounts of the special disbursing agent of Saint Elizabeths Hospital with such amounts as he has or may hereafter pay in carrying out the provision of the Sundry Civil Act of July 19, 1919, relating to the readjustment of salaries at the hospital, and the schedule of salaries and

allowances for maintenance, where the latter is not provided by the hospital, approved by the Secretary of the Interior August 1 and November 25, 1919, respectively, or as may be modified hereafter by him, notwithstanding [sic] the Act of April 6, 1914, or section 4839, Revised Statutes, United States, as amended. [41 Stat. L. 513.]

This and the succeeding paragraph are from the Deficiency Appropriation Act of March 6, 1920, ch. 94.

The Act of July 19, 1919, mentioned in the text, provided: "That the Secretary of the Interior is authorized to adjust the compensation of officers and employees at Saint Elizabeths Hospital."

For R. S. sec. 4839, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 598.

For Act of April 6, 1914, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 958.

[Articles produced by patients — disposal.] The Secretary of the Interior is authorized to make regulations governing the disposal of articles produced by patients of Saint Elizabeths Hospital in the course of their curative treatment, either by allowing the patient to retain same or by selling the articles and depositing the money received to the credit of the appropriation from which the materials for making the articles were purchased. [41 Stat. L. 513.]

See note to preceding paragraph.

[Sec. 1.] * * * [Marine Hospitals — admission of persons for study.] That there may be admitted into said hospitals for study persons with infectious or other diseases affecting the public health, and not to exceed ten cases in any one hospital at one time. [41 Stat. L. 884.]

This and the five paragraphs which follow are from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235. An identical provision with that above appears in the Sundry Civil Appropriation Act of March 3, 1915, ch. 75, 3 Fed. Stat. Ann. (2d ed.) 571; in the Sundry Civil Appropriation Act of July 1, 1916, ch. 209, 1918 Supp. Fed. Stat. Ann. 208, and in the Sundry Civil Appropriation Act of July 19, 1919, ch. 24, 1919 Supp. Fed. Stat. Ann. 71.

* * * [National Home for Disabled Volunteer Soldiers — transfer of furniture by Secretary of War.] The Secretary of War is hereby authorized and directed to transfer without charge to the National Home for Disabled Volunteer Soldiers for its use all the furniture and equipment in good condition, including hospital and medical supplies, quartermaster, motor transport and utilities, ordnance and Signal Corps property, at Army General Hospital Numbered Forty-three at Hampton, Virginia, which is not required by the Army. [41 Stat. L. 903.]

See note to first paragraph of this section.

* * * [Persons entitled to admission to Home.] The following persons shall be entitled to the benefits of the National Home for Disabled Volunteer Soldiers, and may be admitted thereto upon the order of a member of the board of managers, namely: Honorably discharged officers, soldiers, sailors, and marines who served in the regular, volunteer, or other forces of the United States in any war in which the country has been engaged in campaigns against hostile Indians, or who served in any of the extraterritorial possessions of the United States, in foreign countries, including Mexican border service, or in the Organized Militia or National Guard when called into the Federal service, and

who are disabled by diseases or wounds and by reason of such disability are either temporarily or permanently incapacitated from earning a living. [41 Stat. L. 905.]

See note to first paragraph of this section.

[Rules governing assignment of classes eligible to admission to Home.] To increase the comfort of the members, the Board of Managers, National Home for Disabled Volunteer Soldiers, is authorized to make such rules governing the assignment to the different branches of the various classes of those eligible to admission to the home as it deems advisable and best for the public service. [41 Stat. L. 905.]

See note to first paragraph of this section.

[Allotments by Bureau of War Risk Insurance to Home — expenditures.] The allotments made by the Bureau of War Risk Insurance to the Board of Managers of the National Home for Disabled Volunteer Soldiers for the care of beneficiaries of that bureau by the said board shall also be available for expenditure by the board on that account at such of the homes and for such of the objects of expenditure at such homes as are hereinbefore enumerated, including the sums allotted for alteration and improvement of existing facilities so as to provide adequate accommodations for the beneficiaries of the Bureau of War Risk Insurance. [41 Stat. L. 906.]

See note to first paragraph of this section.

[State and Territorial homes for disabled soldiers and sailors — aid — sums collected from inmates — deductions.] State and Territorial homes for disabled soldiers and sailors: For continuing aid to State or Territorial homes for the support of disabled volunteer soldiers, in conformity with the Act approved August 27, 1888, as amended, including all classes of soldiers admissible to the National Home for Disabled Volunteer Soldiers, \$1,000,000: *Provided*, That for any sum or sums collected in any manner from inmates of such State or Territorial homes to be used for the support of said homes a like amount shall be deducted from the aid herein provided for, but this proviso shall not apply to any State or Territorial home into which the wives or widows of soldiers are admitted and maintained. [41 Stat. L. 906.]

See note to first paragraph of this section.

An Act To amend paragraph (e) of section 7 of the Act approved March 3, 1919, entitled “An Act to authorize the Secretary of the Treasury to provide hospital and sanatorium facilities for discharged sick and disabled soldiers, sailors, and marines.”

[Act of June 5, 1920, ch. 267, 41 Stat. L. 1060.]

[Appropriations for specific hospital projects — Act of March 3, 1919, amended.] That paragraph (e) of section 7 of the Act approved March 3, 1919, entitled “An Act to authorize the Secretary of the Treasury to provide hospital and sanatorium facilities for discharged sick and disabled soldiers, sailors, and marines,” is hereby amended to read as follows:

“(e) The sum of \$550,000 is hereby authorized for the purchase of the land and buildings of the National School of Domestic Arts and Science, located at 2650 Wisconsin Avenue, in the District of Columbia, now under lease to the United States Government as a hospital, and for the construction of such additions and improvements thereto as may be necessary to suitably adapt them to the needs and purposes of the Public Health Service: *Provided*, That the purchase price of said land and buildings shall not exceed \$460,000: *Provided further*, That in addition to the \$550,000 hereby authorized, the sum of \$250,000 from the amount appropriated by section 5 of the Act hereby amended and of \$6,000 and of \$154,000 from the amounts appropriated by section 6, paragraphs 1 and 2, respectively, of said Act, are hereby made available for the above mentioned purposes and shall remain available until expended.” [41 Stat. L. 1060.]

For par. (e) of sec. 7, here amended, see 1919 Supp. Fed. Stat. Ann. 69.

HOT SPRINGS RESERVATION

See PUBLIC PARKS

HOUSING

See LABOR

HYDROGRAPHIC OFFICE

See COAST AND GEODETIC SURVEY; NAVY

IMMIGRATION

Act of May 10, 1920, ch. 174, 46.

Sec. 1. *Deportation of Undesirable Aliens — Classes Enumerated*, 46.

2. *Finality of Decision of Secretary of Labor*, 47.

3. *Deported Aliens — Readmission — Denial*, 47.

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 47.

Sec. 1. *Immigration Officials — Inspection of Aliens in Foreign Contiguous Territory — Reimbursement*, 47.

Commissioner of Immigration at New Orleans — Compensation, 47.

Act of June 5, 1920, ch. 243 (Amending Act of Feb. 5, 1917), 48.

Exclusion of Undesirable Aliens — Alien Unable to Read — Marriage to Soldier or Sailor in World War — Sec. 3 of Act of Feb. 5, 1917, Amended, 48.

Act of June 5, 1920, ch. 251 (Amending Act of Oct. 16, 1918), 48.

Exclusion and Expulsion of Undesirable Aliens — Members of Anarchistic and Similar Classes — Sec. 1 of Act of Oct. 16, 1918, Amended, 48.

An Act To deport certain undesirable aliens and to deny readmission to those deported.

[*Act of May 10, 1920, ch. 174, 41 Stat. L. 593.*]

[SEC. 1.] [Deportation of undesirable aliens — classes enumerated.] That aliens of the following classes, in addition to those for whose expulsion from the United States provision is made in the existing law, shall, upon the warrant of the Secretary of Labor, be taken into his custody and deported in the manner provided in sections 19 and 20 of the Act of February 5, 1917, entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States," if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States, to wit:

For secs. 19 and 20, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 230, 232.

(1) All aliens who are now interned under section 4067 of the Revised Statutes of the United States and the proclamations issued by the President in pursuance of said section under date of April 6, 1917, November 16, 1917, December 11, 1917, and April 19, 1918, respectively.

For R. S. sec. 4067, mentioned in the text, see 1 Fed. Stat. Ann. (2d ed.) 364.

(2) All aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following Acts or parts of Acts, the judgment on such conviction having become final, namely:

(a) An Act entitled "An Act to punish acts of interference with the foreign relations; the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, or the amendment thereof approved May 16, 1918;

For Act of June 15, 1917, and amendment, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 120.

(b) An Act entitled "An Act to prohibit the manufacture, distribution, storage, use, and possession in time of war of explosives, providing regulations for the safe manufacture, distribution, storage, use, and possession of the same, and for other purposes," approved October 6, 1917;

For Act of Oct. 6, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 173.

(c) An Act entitled "An Act to prevent in time of war departure from and entry into the United States contrary to the public safety," approved May 22, 1918;

For Act of May 22, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 136.

(d) An Act entitled "An Act to punish the willful injury or destruction of war material or of war premises or utilities used in connection with war material, and for other purposes," approved April 20, 1918;

For Act of April 20, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 134.

(e) An Act entitled "An Act to authorize the President to increase temporarily the Military Establishment of the United States," approved May 18, 1917, or any amendment thereof or supplement thereto;

For Act of May 18, 1917, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1136.

(f) An Act entitled "An Act to punish persons who make threats against the President of the United States," approved February 14, 1917;

For Act of Feb. 14, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 667.

(g) An Act entitled "An Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, or any amendment thereof;

For Act of Oct. 6, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 847.

(h) Section 6 of the Penal Code of the United States.

For sec. 6, mentioned in the text, see 7 Fed. Stat. Ann. (2d ed.) 423.

(3) All aliens who have been or may hereafter be convicted of any offense against section 13 of the said Penal Code committed during the period of August 1, 1914, to April 6, 1917, or of a conspiracy occurring within said period to commit an offense under said section 13, or of any offense committed during said period against the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, in aid of a belligerent in the European war. [41 Stat. L. 593.]

For sec. 13, mentioned in the text, see 7 Fed. Stat. Ann. (2d ed.) 460.

For Act of July 2, 1890, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 644.

SEC. 2. [Finality of decision of Secretary of Labor.] That in every case in which any such alien is ordered expelled or excluded from the United States under the provisions of this Act the decision of the Secretary of Labor shall be final. [41 Stat. L. 594.]

SEC. 3. [Deported aliens — readmission — denial.] That in addition to the aliens who are by law now excluded from admission into the United States all persons who shall be expelled under any of the provisions of this Act shall also be excluded from readmission. [41 Stat. L. 594.]

[SEC. 1.] * * * [Immigration officials — inspection of aliens in foreign contiguous territory — reimbursement.] Nothing in the proviso contained in the Legislative, Executive, and Judicial Appropriation Act of March 3, 1917, relative to augmenting salaries of Government officials from outside sources shall prevent receiving reimbursements for services of immigration officials incident to the inspection of aliens in foreign contiguous territory, and such reimbursement shall be credited to the appropriation, "Expenses of regulating immigration." [41 Stat. L. 936.]

This and the paragraph which follows are from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

For Act of March 3, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 720.

[Commissioner of Immigration at New Orleans — compensation.] The limitation specified in the Act approved August 1, 1914 (Thirty-eighth Statutes, page 666), upon the compensation of the Commissioner of Immigration at the port of New Orleans, Louisiana, is hereby removed. [41 Stat. L. 936.]

See note to preceding paragraph.

For Act of Aug. 1, 1914, mentioned in text, see 3 Fed. Stat. Ann. (2d ed.) 702.

An Act To amend section 3 of an Act entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States," approved February 5, 1917.

[*Act of June 5, 1920, ch. 243, 41 Stat. L. 981.*]

[**Exclusion of undesirable aliens — alien unable to read — marriage to soldier or sailor in World War — sec. 3 of Act of Feb. 5, 1917, amended.**] That section 3 of an Act entitled "An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States," approved February 5, 1917, is hereby amended by adding at the end thereof the following:

"*Provided further*, That an alien who can not read may, if otherwise admissible, be admitted if, within five years after this Act becomes law, a citizen of the United States who has served in the military or naval forces of the United States during the war with the Imperial German Government, requests that such alien be admitted, and with the approval of the Secretary of Labor, marries such alien at a United States immigration station. [41 Stat. L. 981.]

For sec. 3, here amended, see 1918 Supp. Fed. Stat. Ann. 214.

An Act To amend the Act entitled "An Act to exclude and expel from the United States aliens who are members of the anarchistic and similar classes," approved October 16, 1918.

[*Act of June 5, 1920, ch. 251, 41 Stat. L. 1008.*]

[**Exclusion and expulsion of undesirable aliens — members of anarchistic and similar classes — sec. 1 of Act of Oct. 16, 1918, amended.**] That section 1 of the Act entitled "An Act to exclude and expel from the United States aliens who are members of the anarchistic and similar classes," approved October 16, 1918, is amended to read as follows:

"That the following aliens shall be excluded from admission into the United States:

"(a) Aliens who are anarchists;

"(b) Aliens who advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that advises, advocates, or teaches, opposition to all organized government;

"(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage;

"(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, oppo-

sition to all organized government, or advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage;

"(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (d).

"For the purpose of this section: (1) the giving, loaning, or promising of money or any thing of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; and (2) the giving, loaning or promising of money or any thing of value to any organization, association, society, or group, of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation." [41 Stat. L. 1005.]

For this section as originally enacted, see 1919 Supp. Fed. Stat. Ann. 71.

IMPORTS AND EXPORTS

Act of May 31, 1920, ch. 217 (Agricultural Appropriation Act), 49.

Tea — Restrictions on Importation — Secretary of Agriculture — Importers' Bond — Board of Tea Appeals, 49.

CROSS-REFERENCE

See also *SHIPPING AND NAVIGATION*

* * * [Tea — restrictions on importation — Secretary of Agriculture — importers' bond — Board of Tea Appeals.] The Secretary of Agriculture shall, from and after the taking effect of this Act, execute and perform all the powers and duties conferred on the Secretary of the Treasury by the Act approved March 2, 1897 (Twenty-ninth Statutes at Large, page 604), entitled "An Act to prevent the importation of impure and unwholesome tea," as amended by the Act approved May 16, 1908 (Thirty-fifth Statutes at Large, page 163), entitled "An Act to amend an Act entitled 'An Act to prevent the importation of impure and unwholesome tea,' approved March 2, 1897": *Provided*, That the bonds given to the United States as security in pursuance of section 1, as amended, shall be subject to the approval only of the collector of customs at the port of entry; that in place of the Board of United States General Appraisers provided for by section 6 of the Act, there shall be designated by the Secretary of Agriculture three employees of the Department of Agriculture to serve as the United States Board of Tea Appeals with all the powers and duties conferred by the Act on the Board of United States General Appraisers.

There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of \$40,000 for carrying into effect the provisions of the aforesaid Act until the end of the fiscal year ending June 30, 1921, including payment of compensation and expenses of the members of the board appointed under section 2 of the Act and all other necessary officers and employees. [41 Stat. L. 712.]

This is from the Agricultural Appropriation Act of May 31, 1920, ch. 217.
For Acts of March 2, 1897, and May 16, 1908, affected by the text, see 3 Fed. Stat. Ann. (2d ed.) 716.

INDIANS

Act of Feb. 14, 1920, ch. 75, 51.

- Sec. 1. Irrigation of Indian Reservations — Reimbursement of Construction Charges — Disposition of Reimbursable Moneys, 51.*
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- Sec. 1. Crow Indian Reservation — Allotments — Method — Patents — Priority of Selection — Joinder of Wives in Applications, 57.*
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17. Town Sites—Reservation—Park of Crow Agency Excepted, 63.

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An Act Making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1921.

[Act of Feb. 14, 1920, ch. 75, 41 Stat. L. 408.]

[SEC. 1.] * * * [Irrigation of Indian reservations—reimbursement of construction charges—disposition of reimbursable moneys.] The Secretary of the Interior is hereby authorized and directed to require the owners of irrigable land under any irrigation system heretofore or hereafter constructed for the benefit of Indians and to which water for irrigation purposes can be delivered to begin partial reimbursement of the construction charges, where reimbursement is required by law, at such times and in such amounts as he may deem best; all payments hereunder to be credited on a per acre basis in favor of the land in behalf of which such payments shall have been made and to be deducted from the total per acre charge assessable against said land: *Provided*, That no reimbursable moneys appropriated in this Act for irrigation works shall be used for any purpose other than operation and maintenance unless the Secretary of the Interior has prescribed rules and regulations for the payment of the per acre charge by all the users of water under the project, to apply on the reimbursement of the total amount expended: *And provided further*, That the said Secretary shall submit a report to Congress on the first Monday in December, 1921, showing the irrigation projects or units thereof where repayment of the construction charge has been required. [41 Stat. L. 409.]

* * * [Boarding and day schools—discontinuance—disposition of moneys appropriated.] That all reservation and nonreservation boarding schools, with an average attendance of less than forty-five and eighty pupils, respectively, shall be discontinued on or before the beginning of the fiscal year

1921. The pupils in schools so discontinued shall be transferred first, if possible, to Indian day schools or State public schools; second, to adjacent reservation or nonreservation boarding schools, to the limit of the capacity of said schools: *Provided further*, That all day schools with an average attendance of less than eight be, and are hereby, discontinued on or before the beginning of the fiscal year 1921: *And provided further*, That all moneys appropriated for any school discontinued pursuant to this Act or for other cause, shall be returned immediately to the Treasury of the United States. [41 Stat. L. 410.]

* * * [Schools — attendance — rules and regulations.] That hereafter the Secretary of the Interior is authorized to make and enforce such rules and regulations as may be necessary to secure the enrollment and regular attendance of eligible Indian children who are wards of the Government in schools maintained for their benefit by the United States or in public schools. [41 Stat. L. 410.]

* * * [Employees in Indian Service — quarters — heat and light.] That the Secretary of the Interior is authorized to allow employees in the Indian Service, who are furnished quarters, necessary heat and light for such quarters without charge, such heat and light to be paid for out of the fund chargeable with the cost of heating and lighting other buildings at the same place. [41 Stat. L. 411.]

* * * [Coal for Indian Service.] That the cost of inspection, storage, transportation, and so forth, of coal for the Indian Service shall be paid from the support fund of the school or agency for which the coal is purchased. [41 Stat. L. 412.]

* * * [Heirs to trust or restricted Indian property — determination — fees.] That hereafter upon a determination of the heirs to any trust or restricted Indian property of the value of \$250 or more, or to any allotment, or, after approval by the Secretary of the Interior of any will covering such trust or restricted property, there shall be paid by such heirs, or by the beneficiaries under such will, or from the estate of the decedent, or from the proceeds of sale of the allotment, or from any trust funds belonging to the estate of the decedent, the sum of \$15 where the appraised value of the estate of the decedent does not exceed the sum of \$1,000. Where the appraised value of the estate of decedent is more than \$1,000 and less than \$3,000, \$20; where the appraised value of the estate of the decedent is \$3,000 but not more than \$5,000, the sum of \$25, and where the appraised value of the estate of the decedent is \$5,000 or over, the sum of \$50, which amount shall be accounted for and paid in the Treasury of the United States; and a report shall be made annually to Congress by the Secretary of the Interior on or before the first Monday in December of all moneys collected and deposited as herein provided: *Provided further*, That the provisions of this paragraph shall not apply to the Osage Indians nor to the Five Civilized Tribes of Oklahoma. [41 Stat. L. 413.]

* * * [Industry among Indians — encouragement — appropriation.] For the purpose of encouraging industry and self-support among the Indians and to aid them in the culture of fruits, grains, and other crops, \$100,000, or so much thereof as may be necessary, which sum may be used for the purchase of

seed, animals, machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable Indians to become self-supporting: *Provided*, That said sum shall be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States on or before June 30, 1930: *Provided further*, That not to exceed \$20,000 of the amount herein appropriated shall be expended on any one reservation or for the benefit of any one tribe of Indians, and that no part of this appropriation shall be used for the purchase of tribal herds. [41 Stat. L. 413.]

* * * [Disbursing agents of Indian service — substitutes — bond.] That any disbursing agent of the Indian Service, with the approval of the Commissioner of Indian Affairs, may authorize a clerk employed in his office to act in his place and discharge all the duties devolved upon him by law or regulations during such time as he may be unable to perform the duties of his position because of absence, physical disability, or other disqualifying circumstances: *Provided*, That the official bond given by the disbursing agent to the United States shall be held to cover and apply to the acts of the employee authorized to act in his place, who shall give bond to the disbursing agent in such sums as the latter may require, and with respect to any and all acts performed by him while acting for his principal, shall be subject to all the liabilities and penalties prescribed by law for official misconduct of disbursing agents. [41 Stat. L. 414.]

[Tribal or allotted lands — sales and leases — fees.] That hereafter in the sale of all Indian allotments, or in leases, or assignment of leases, covering tribal or allotted lands for mineral, farming, grazing, business or other purposes, or in the sale of timber thereon, the Secretary of the Interior be, and he is hereby, authorized and directed, under such regulations as he may prescribe, to charge a reasonable fee for the work incident to the sale, leasing, or assigning of such lands, or in the sale of the timber, or in the administration of Indian forests, to be paid by vendees, lessees, or assignees, or from the proceeds of sales, the amounts collected to be covered into the Treasury as miscellaneous receipts. [41 Stat. L. 415.]

[Abandoned school and agency plants — sale.] That the Secretary of the Interior is hereby authorized to sell and convey at public sale, to the highest bidder, under such regulations and under such terms and conditions as he may prescribe, at not less than the appraised value thereof, any abandoned day or boarding school plant, or any abandoned agency buildings, situated on lands belonging to any Indian tribe and not longer needed for Indian or administrative purposes, and to sell therewith not to exceed one hundred and sixty acres of land on which such plant or buildings may stand. Title to all lands disposed of under the provisions of this Act shall pass to the purchaser by deed or by patent in fee, with such reservations or conditions as the said Secretary may deem just and proper, no purchaser to acquire more than one hundred and sixty acres in any one tract: *Provided*, That the proceeds of all such sales shall be deposited in the Treasury of the United States to the credit of the Indians to whom said lands belong, to be disposed of in accordance with existing law. [41 Stat. L. 415.]

SEC. 18. * * * [Five Civilized Tribes — undisputed claims — settlement.] That hereafter no undisputed claims to be paid from individual moneys of restricted allottees, or their heirs, or uncontested agricultural and mineral leases

(excluding oil and gas leases) made by individual restricted Indian allottees, or their heirs, shall be forwarded to the Secretary of the Interior for approval, but all such undisputed claims or uncontested leases (except oil and gas leases) heretofore required to be approved under existing law by the Secretary of the Interior shall hereafter be paid, approved, rejected, or disapproved by the Superintendent for the Five Civilized Tribes of Oklahoma: *Provided, however*, That any party aggrieved by any decision or order of the Superintendent for the Five Civilized Tribes of Oklahoma may appeal from the same to the Secretary of the Interior within thirty days from the date of said decision or order. [41 Stat. L. 426.]

[Choctaw and Chickasaw Tribes — per capita payments by government.] That the Secretary of the Interior be, and he is hereby, authorized to pay to the enrolled members of the Choctaw and Chickasaw Tribes of Indians of Oklahoma entitled under existing law to share in the funds of said tribes, or to their lawful heirs, out of any moneys belonging to said tribes in the United States Treasury, or deposited in any bank or held by any official under the jurisdiction of the Secretary of the Interior, not to exceed \$100 per capita, said payment to be made under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That in cases where such enrolled members, or their heirs, are Indians who by reason of their degree of Indian blood belong to the restricted class, the Secretary of the Interior may, in his discretion withhold such payments and use the same for the benefit of such restricted Indians: *Provided further*, That the money paid to the enrolled members or their heirs, as provided herein, shall be exempt from any lien for attorneys' fees or other debt contracted prior to the passage of this Act: *Provided further*, That the Secretary of the Interior is hereby authorized to use not to exceed \$8,000 out of the Choctaw and Chickasaw tribal funds for the expenses and the compensation of all necessary employees for the distribution of the said per capita payments: *Provided further*, That until further provided by Congress, the Secretary of the Interior, under rules and regulations to be prescribed by him, is authorized to make per capita payments of not to exceed \$200 annually hereafter to the enrolled members of the Choctaw and Chickasaw Tribes of Indians of Oklahoma, entitled under existing law to share in the funds of said tribes, or to their lawful heirs, of all the available money held by the Government of the United States for the benefit of said tribes in excess of that required for expenditures authorized by annual appropriations made therefrom or by existing law. [41 Stat. L. 426.]

• • • **[Five Civilized Tribes — tribal funds — expenditures — appropriation by Congress.]** That hereafter no money shall be expended from tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes, tribal and other Indian schools for the current fiscal year under existing law, salaries and contingent expenses of governors, chiefs, assistant chiefs, secretaries, interpreters, and mining trustees of the tribes for the current fiscal year at salaries at the rate heretofore paid, and one attorney each for the Choctaw, Chickasaw, and Creek Tribes employed under contract approved by the President, under existing law for the current fiscal year: *Provided further*, That the Secretary of the Interior is hereby authorized to continue during the ensuing fiscal year the tribal and other schools among the Choctaw, Chickasaw, Creek, and Seminole

Tribes from the tribal funds of those nations, within his discretion and under such rules and regulations as he may prescribe: *And provided further*, That the Secretary of the Interior is hereby empowered, during the fiscal year ending June 30, 1921, to expend funds of the Choctaw, Chickasaw, Creek, and Seminole Nations available for school purposes under existing law for such repairs, improvements, or new buildings as he may deem essential for the proper conduct of the several schools of said tribes. [41 Stat. L. 427.]

An Act To amend an Act entitled "An Act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1914," approved June 30, 1913.

[Act of May 26, 1920, ch. 204, 41 Stat. L. 625.]

[Improvement of unsold lots of certain tribes — payment of cost.] That the Secretary of the Interior is hereby authorized to pay out of any funds of the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations on deposit in the Treasury of the United States, the proportionate cost of street paving, construction of sidewalks and sewers abutting on unsold lots belonging to any of said tribes and as may be properly chargeable against said town lots, said payments to be made upon submission of proof to said Secretary of the Interior showing the entire cost of the said street paving, sidewalk, and sewer construction and that said improvement was duly authorized and undertaken in accordance with law: *Provided*, That the Secretary of the Interior shall be satisfied that the charges made are reasonable and that the lots belonging to the above-mentioned tribes against which the charges were made have been enhanced in value by said improvements to not less than the amount of said charges. [41 Stat. L. 625.]

An Act Authorizing the Sioux Tribe of Indians to submit claims to the Court of Claims.

[Act of June 3, 1920, ch. 222, 41 Stat. L. 738.]

[SEC. 1.] [Sioux tribe — claims — Court of Claims — appeal.] That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon. [41 Stat. L. 738.]

SEC. 2. [Statute of limitations as bar — presentation of claims — allegations of petition — evidence.] That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said tribe or bands of Indians. [41 Stat. L. 738.]

SEC. 3. [Attorneys' fees — contracts therefor — approval — payment.] That upon the final determination of such suit, cause, or action the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said tribe or bands of Indians under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said tribes or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of such fees shall be taken from any money in the Treasury of the United States belonging to such tribe or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: *Provided*, That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause. [41 Stat. L. 739.]

An Act To provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes.

[*Act of June 4, 1920, ch. 224, 41 Stat. L. 751.*]

[SEC. 1.] [**Crow Indian Reservation — allotments — method — patents — priority of selection — joinder of wives in applications.**] That the Secretary of the Interior be, and he hereby is, authorized and directed to cause to be allotted the surveyed lands and such unsurveyed lands as the commission hereinafter provided for may find to be suitable for allotment, within the Crow Indian Reservation in Montana (not including the Big Horn and Pryor Mountains, the boundaries whereof to be determined by said commission with the approval of the Secretary of the Interior) and not herein reserved as hereinafter provided, among the members of the Crow Tribe, as follows namely, one hundred and sixty acres to the heirs of every enrolled member, entitled to allotment, who died unallotted after December 31, 1905, and before the passage of this Act; next, one hundred and sixty acres to every allotted member living at the date of the passage of this Act, who may then be the head of a family and has not received allotment as such head of a family; and thereafter to prorate the remaining unallotted allottable lands and allot them so that every enrolled member living on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allottable tribal lands for his total allotment of land of the Crow Tribe. Allotments made hereunder shall vest title in the allottee subject only to existing tribal leases, which leases in no event shall be renewed or extended by the Secretary of the Interior after the passage of this Act, and shall as hereinafter provided be evidenced by patents in fee to competent Indians, except as to homesteads as hereinafter provided, but by trust patent to minors and incompetent Indians, the force and legal effect of the trust patents to be as is prescribed by the General Allotment Act of February 8, 1887 (Twenty-fourth Statutes, page 388). Priority of selection, up to three hundred and twenty acres, is hereby given to the members of the tribe who have as yet received no allotment on the Crow Reservation, and thereafter all members enrolled for allotment hereunder shall in all respects be entitled to equal rights and privileges, as far as possible, in regard to the time, manner, and amount of their respective selections: *Provided*, That Crow Indians who are found to be competent may elect, in writing, to have their allotments, except as herein provided, patented to them in fee. Otherwise trust patents shall be issued to them. No patent in fee shall be issued for homestead lands of a husband unless the wife joins in the application, who shall be examined separately and apart from her husband and a certificate of the officer taking her acknowledgment shall fully set forth compliance with this requirement. [41 Stat. L. 751.]

SEC. 2. [**Conveyances — grantees — classification of lands for purpose of allotment.**] No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such conveyance, would become the owner of more than one thousand two hundred and eighty acres of agricultural or one thousand

nine hundred and twenty acres of grazing land within said reservation. Any conveyance by any such Indian made either directly or indirectly to any such person, company, or corporation of any land within said reservation as the same now exists, whether held by trust patent or by patent in fee shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than \$5,000 or imprisonment not more than six months or by both such fine and imprisonment.

The classification of the lands of such reservation for the purpose of allotment and the allotment thereof shall be made as provided in the Act of Congress approved June 25, 1910 (Thirty-sixth Statutes at Large, page 859) which classification with any heretofore made by authority of law as to lands heretofore allotted shall be conclusive, for the purposes of this section, as to the character of the land involved. [41 Stat. L. 752.]

SEC. 3. [Preparation of rolls — final allotment rolls — information contained therein — completion.] That the Secretary of the Interior shall, as speedily as possible, after the passage of this Act, prepare a complete roll of the members of the Crow Tribe who died unallotted after December 31, 1905, and before the passage of this Act; also, a complete roll of the allotted members of the Crow Tribe who six months after the date hereof are living and are heads of families but have not received full allotments as such; also, a complete roll of the unallotted members of the tribe living six months after the approval of this Act who are entitled to allotments. Such rolls when completed shall be deemed the final allotment rolls of the Crow Tribe, on which allotment of all tribal lands and distribution of all tribal funds existing at said date shall be made. The rolls shall show the English, as well as the Indian, name of the allottee; the age, if living; the sex, whether declared competent or incompetent; the description or descriptions of the allotments; and any other fact deemed by the Secretary of the Interior necessary or proper. Said rolls shall be completed within one year after the approval of this Act, and allotments shall be completed within one year and six months from the date of the approval of this Act. [41 Stat. L. 752.]

SEC. 4. [Striking out fraudulent names — cancellation of fraudulent allotments.] That any names found to be on the tribal rolls fraudulently, may, at any time within one year from the passage of this Act, be stricken therefrom by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, after giving all parties in interest a full opportunity to be heard in regard thereto; and any allotment made to such fraudulent allottee shall be canceled and shall then be subject to disposition under the provision of this Act: *Provided*, That nothing herein contained shall be construed to deprive any such persons of the protection in the premises provided under existing law. [41 Stat. L. 752.]

SEC. 5. [Unallotted land used for certain purposes — patents to religious organizations — reservation for Crow Agency and recreation purposes.] That such of the unallotted lands as are now used for agency, school, cemetery, or religious purposes shall remain reserved from allotment so long as such agency, school, cemetery, or religious institutions, respectively, are maintained for the benefit of the tribe: *Provided*, That the Secretary of the Interior, upon the

request of the tribal council, is hereby authorized and directed to cause to be issued a patent in fee to the duly authorized missionary board or other proper authority of any religious organization heretofore engaged in mission or school work on the reservation for such lands thereon as have been heretofore set aside and are now occupied by such organizations for missionary or school purposes: *Provided further*, That not more than six hundred and forty acres may be reserved for administrative purposes at the Crow Agency, and six tracts of not exceeding eighty acres each, in different districts on the reservation, may be reserved for recreation grounds for the common use of the tribe, or purchased from the tribal funds if no tribal lands are available, and all such lands shall be definitely described and made a matter of record by the Indian Office. [41 Stat. L. 753.]

SEC. 6. [Minerals — leases for mining purposes — allotment of lands valuable chiefly for minerals — minerals as property of allottees.] That any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may be leased for mining purposes, upon the request of the tribal council under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, but no lease shall be made for a longer period than ten years, but the lessees shall have the right to renewal thereof for a further period of ten years upon such terms and conditions as the Secretary of the Interior may prescribe: *Provided, however*, That allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe: *And provided further*, That at the expiration of fifty years from the date of approval of this Act unless otherwise ordered by Congress the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs. [41 Stat. L. 753.]

SEC. 7. [Appropriation for surveys, etc.] That there is hereby appropriated the sum of \$50,000, or so much thereof as may be necessary, from any funds in the Treasury of the United States to the credit of the Crow Tribe of Indians not otherwise appropriated, for the purpose of making the surveys and allotments and for other expenses provided for herein. [41 Stat. L. 753.]

SEC. 8. [Irrigation — construction, etc., charges — conveyance of irrigable lands.] That any allotment, or part of allotment, provided for under this Act, irrigable from any irrigation system now existing or hereafter constructed by the Government on the said reservation, shall bear its pro rata share, computed on a per acre basis, of the cost of constructing such system: *Provided*, That no additional irrigation system shall be established or constructed by the Government for the irrigation of Indian lands on the Crow Reservation until the consent of the tribal council thereto has been duly obtained. All charges against allotments authorized by this section shall be reimbursed in not less than twenty annual payments, and the Secretary of the Interior may fix such operation and maintenance charges against such allotments as may be reasonable and just, to be paid as provided in rules and regulations to be prescribed by him. Unless otherwise paid, these latter charges may be paid from or made a charge

upon his individual share of the tribal fund, when said fund is available for distribution; and if any allottee shall receive patent in fee to his allotment before the amount so charged against his land has been paid, such unpaid amount shall become and be a lien upon his allotment, of which a record shall be kept in the office of the superintendent of the reservation at the agency; and should any Indian sell any part of his allotment, with the approval of the Secretary of the Interior, the amount of such unpaid charges against the land so sold shall remain a first lien thereon, and may be enforced by the Secretary of the Interior by foreclosure as a mortgage. All expenditures for irrigation work on the Crow Reservation, Montana, heretofore or hereafter made, are hereby declared to be reimbursable under such rules and regulations as the Secretary of the Interior may prescribe and shall constitute a lien against the land benefited, regardless of ownership, and including all lands which have heretofore been sold or patented. All patents or other instruments of conveyance hereafter issued for lands under any irrigation project on the said Crow Indian Reservation, whether to individual Indians or to purchasers of Indian land, shall recite a lien for repayment of the irrigation charges, if any, remaining unpaid at the time of issuance of such patent or other instrument of conveyance, and such lien may be enforced or, upon payment of the delinquent charges, may be released by the Secretary of the Interior. In the case of lands under any project purchased in the bona fide belief on the part of the purchaser that by his purchase he acquired a right to have water from the system for the irrigation of the land purchased by him in the same manner as the Indian owner, the Secretary may, after notice to the Indians interested, determine the value of the land at the time of the purchase from the Indian, and give to the purchaser or his assigns credit on the charge for construction against the land to the amount of the difference between the price paid and the value as so determined, and shall withhold for the benefit of the tribe from the Indian or Indians of whom the purchase was made, an equal amount from any funds which may be due or distributable to them [sic] hereunder. Delivery of water to such land may be refused, within the discretion of the Secretary of the Interior, until all dues are paid: *Provided*, That no right to water or to the use of any irrigation ditch or other structure on said reservation shall vest until the owner of the land to be irrigated shall comply with such rules and regulations as the Secretary of the Interior may prescribe, and he is hereby authorized to prescribe such rules and regulations as may be deemed reasonable and proper for making effective the foregoing provisions: *Provided, however*, That in no case shall any allottee be required to pay either construction, operation, or maintenance charges for such irrigation privileges, or any of them, until water has been actually delivered to his allotment: *Provided further*, That the Secretary of the Interior shall cause to be made immediately, if not already made, an itemized statement showing in detail the cost of the construction of the several irrigation systems now existing on the Crow Indian Reservation separately, the same to be placed at the Crow Agency, and with the Government farmers of each of the districts of the reservation, for the information of the Indians affected by this section. [41 Stat. L. 753.]

SEC. 9. [Introduction of intoxicating liquors prohibited.] That lands within said reservation, whether allotted, unallotted, or otherwise disposed of, shall be subject to all laws of the United States prohibiting the introduction of intoxicating liquors into the Indian country until otherwise provided by Congress. [41 Stat. L. 754.]

SEC. 10. [Lands valuable for development of water power — reservation.] That any unallotted lands on the Crow Reservation chiefly valuable for the development of water power shall be reserved from allotment or other disposition hereunder, for the benefit of the Crow Tribe of Indians. [41 Stat. L. 754.]

SEC. 11. [Consolidation of trust funds — use — withdrawal of live stock from tribal herd — Act of April 27, 1904, in part repealed.] That so much of article 2 of the Act of April 27, 1904 entitled "An Act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect" (Thirty-third Statutes, page 353), as relates to the disposition of the trust funds of the tribe at the expiration of the fifteen-year period named in the Act, to the purchase of cattle, to the distribution of cattle among the Indians of the reservation, to the purchase of jackasses, stallions, and ewes, to the building of fences, the erection of schoolhouses and hospitals, the purchase of additional cattle or sheep, the construction of ditches, dams, and canals, and to the establishment of a trust fund for the benefit of the Crow Indians thereunder, be, and the same is hereby, repealed, effective from and after June 30, 1920: *Provided*, That all unexpended balances of trust funds arising under said agreement shall thereupon be consolidated into one fund to the credit of the tribe, the same to bear interest at the rate of 4 per centum per annum: *Provided further*, That there shall be reserved and set aside from such consolidated fund, or any other funds to the credit of the tribe, a sufficient sum to pay the administrative expenses of the agency for a period of five years; \$100,000 for the support of the agency boarding school; \$50,000 for the support of the agency hospital, and not to exceed \$4,000 of this amount shall be expended in any one year for the support of said hospital; and \$50,000 for a revolving fund to be used for the purchase of seed, animals, machinery, tools, implements, and other equipment for sale to individual members of the tribe, under conditions to be prescribed by the Secretary of the Interior for its repayment to the tribe on or before June 30, 1925: *Provided further*, That the expenditure of the sums so reserved are hereby specifically authorized, except those for administrative expenses of the agency, which shall be subject to annual appropriations by Congress: *Provided further*, That after said sums have been reserved and set aside, together with a sufficient amount to pay all other expenses authorized by this Act, the balance of such consolidated fund, and all other funds to the credit of the tribe or placed to its credit thereafter, shall be distributed per capita to the Indians entitled: *Provided further*, That the Secretary of the Interior is hereby authorized to permit competent Indians who have received patents in fee and other Indians who have demonstrated their ability to properly care for live stock to withdraw their pro rata share of cattle out of the tribal herd within one year after the approval of this Act, under such rules and regulations as the Secretary of the Interior may prescribe and on condition that said Indians shall execute a stipulation relinquishing all their right, title, and interest in said tribal herd thereafter: *Provided further*, That any Indian who has received his share of live stock in accordance with the above provision and who has also demonstrated his ability to properly care for and handle live stock may also be permitted to withdraw the pro rata shares of his wife and minor children under the same rules and regulations as applied to the live stock already issued to him and on condition that such cattle be branded with the individual brands of his wife and minor children, which shall be recorded in

the names of the respective members of his family. It shall be the duty of the superintendent of the Crow Reservation to observe closely the manner in which such stock are handled and cared for, and in case of failure or neglect to properly care for the same the Secretary of the Interior is authorized to take charge of such shares and sell them for the benefit of the individual owners, to whose credit the proceeds of the sale shall be placed, or return them to the tribal herd or handle them with tribal cattle for the minor or incompetent owners and charge a fee to cover the cost of caring for such live stock. [41 Stat. L. 754.]

SEC. 12. [Commission of enrollment — organization — salaries.] That upon the approval of this Act the Secretary of the Interior shall forthwith appoint a commission consisting of three persons to complete the enrollment of the members of the tribe as herein provided for, and to divide them into two classes, competents and incompetents, said commission to be constituted as follows: Two of said commissioners shall be enrolled members of the Crow Indian Tribe and shall be selected by a majority vote of three delegates from each of the districts on the Crow Reservation; and one commissioner shall be a representative of the Department of the Interior, to be selected by the Secretary of the Interior. Said commission shall be governed by regulations prescribed by the Secretary of the Interior, and the classification of the members of the tribe hereunder shall be subject to his approval. That within thirty days after their appointment said commissioners shall meet at some point within the Crow Indian Reservation and organize by the election of one of their number as chairman. That said commissioners shall then proceed personally to classify the members as above indicated. They shall be paid a salary of not to exceed \$10 per day each, and necessary expenses while actually employed in the work of making this classification, exclusive of subsistence, to be approved by the Secretary of the Interior, such classification to be completed within six months from the date of organizing the commission. [41 Stat. L. 755.]

SEC. 13. [Homesteads — allotments of incompetents — sale.] That every member of the Crow Tribe shall designate as a homestead six hundred and forty acres, already allotted or to be allotted hereunder, which homestead shall remain inalienable for a period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee: *Provided*, That the trust period on such homestead allotments of incompetent Indians may be extended in accordance with the provisions of existing law: *Provided further*, That any Crow Indian allottee may sell not to exceed three hundred and twenty acres of his homestead, upon his application in writing and with the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe: *And provided further*, That said land to be sold by said Indian allottee shall not exceed more than one-half of his irrigable nor more than one-half of his agricultural land and shall not include the improvements consisting of his home. [41 Stat. L. 756.]

SEC. 14. [Exchanges of allotments.] That exchanges of allotments by and among the members of the tribe may be made under the supervision of the Secretary of the Interior with a view to enabling allottees to group their allotted lands on the Crow Reservation, but always with due regard for the value of the lands involved. And in cases where patents have already been issued for such allot-

ments proper conveyance shall be made back to the United States by the allottee, whereupon the land shall become subject to disposition in the same manner as other lands under the provisions of this Act. [41 Stat. L. 756.]

SEC. 15. [Sale to war veterans — payment.] That the Secretary of the Interior be, and he is hereby, authorized to sell allotted and inherited Indian land held in trust by the United States on the Crow Reservation, Montana, with the consent of the Indian allottee or the heirs, respectively, to any soldier, seaman, or marine who served under the President of the United States for ninety days during the late war against the Imperial German Government, or in any war in which the United States was engaged with a foreign power, or in the Civil War, who will actually settle on said land, on annual payments covering a period not to exceed twenty years, as may be agreed upon under such rules, regulations, and conditions as the said Secretary of the Interior may prescribe and in accordance with the provisions of this Act. [41 Stat. L. 756.]

SEC. 16. [School lands — grant to Montana — payment — school attendance by Crow Indian children.] That there is hereby granted to the State of Montana for common-school purposes sections sixteen and thirty-six, within the territory described herein, or such parts of said sections as may be nonmineral or nontimbered, and for which the said State has not heretofore received indemnity lands under existing laws; and in case either of said sections or parts thereof is lost to the State by reason of allotment or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral, nontimbered lands within said reservation, not exceeding two sections in any one township. The United States shall pay the Indians for the lands so granted \$5 per acre, and sufficient money is hereby appropriated out of the Treasury of the United States not otherwise appropriated to pay for said school lands granted to the said State: *Provided*, That the mineral rights in said school lands are hereby reserved for the benefit of the Crow Tribe of Indians as herein authorized: *Provided further*, That the Crow Indian children shall be permitted to attend the public schools of said State on the same condition as the children of white citizens of said State. [41 Stat. L. 756.]

SEC. 17. [Town sites — reservation — park of Crow agency excepted.] That the Secretary of the Interior (with the approval of the Crow Tribal Council) is authorized to set aside for administrative purposes (at the Crow Agency and at Pryor subagency) such tracts for town-site purposes as in his opinion may be required for the public interests, not to exceed eighty acres at each town site, and he may cause the same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe; and he is authorized also to set apart and reserve for school, park, and other public purposes not more than ten acres in said town sites; and patents shall be issued for the lands so set apart and reserved for school, park, and other purposes to the municipality or school district legally charged with the care and custody of lands donated for such purposes: *Provided, however*, That the present park at Crow Agency shall not be included in such town site or be subject to such disposition. The purchase price of all town lots sold in town sites shall be paid at such time as the Secretary of the Interior may direct and placed to the credit of the Crow Tribe of Indians. [41 Stat. L. 757.]

SEC. 18. [**Appropriation for expenses of councils, etc.**] That the sum of \$10,000, or so much thereof as may be necessary, of the tribal funds of the Crow Indians of the State of Montana, is hereby appropriated to pay the expenses of the general council, or councils, or business committee, in looking after the affairs of said tribe, including the actual and necessary expenses and the per diems paid its legislative committee when visiting Washington on tribal business at the request of the Commissioner of Indian Affairs or a committee of Congress, said sum and the actual and necessary expenses to be approved by and certified by the Secretary of the Interior, and when so approved and certified to be paid: *Provided*, That not to exceed \$2,500 shall be expended in any one fiscal year. [41 Stat. L. 757.]

INSURANCE

See CIVIL SERVICE; SHIPPING AND NAVIGATION; WAR DEPARTMENT AND MILITARY ESTABLISHMENT

INTERIOR DEPARTMENT

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 64.

Sec. 1. Sand, etc.—Hauling in District of Columbia—Use of Government Trucks, 64.

Fuel—Delivery to Branches of Federal Government—Payment, 64.

[SEC. 1.] * * * [**Sand, etc.—hauling in District of Columbia—use of government trucks.**] Hereafter the Secretary of the Interior may have sand, gravel, stone, and other material hauled for the municipal government of the District of Columbia and for branches of the Federal service in the District of Columbia, whenever it may be practicable and economical to have such work performed by using trucks of the Government fuel yards not needed at the time for the hauling of fuel. Payment for such work shall be made on the basis of the actual cost to the Government fuel yards; [41 Stat. L. 913.]

This and the paragraph which follows are from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

[**Fuel—delivery to branches of federal government—payment.**] Hereafter the Secretary of the Interior is authorized to deliver, during the months of April, May, and June of each year, to all branches of the Federal service and the municipal government in the District of Columbia, such quantities of fuel for their use during the following fiscal year as it may be practicable to store at the points of consumption, payment therefor to be made by these branches of the Federal service and municipal government from their applicable appropriations for such fiscal year. [41 Stat. L. 913.]

See note to preceding paragraph.

INTERNAL REVENUE

Act of May 31, 1920, ch. 217 (Agricultural Appropriation Act), 65.

Cotton Futures Act Amended — Exemption of Contracts from Tax — Information Furnished by Cotton Dealers — Secs. 5 and 8 Affected, 65.

CROSS-REFERENCE

See also *CUSTOMS DUTIES*

* * * [Cotton Futures Act amended — exemption of contracts from tax — information furnished by cotton dealers — secs. 5 and 8 affected.] That the amendments relating to cotton provided for in section 6 of the Act known as the wheat guarantee Act, approved March 4, 1919, are hereby recognized and declared to be permanent legislation. [41 Stat. L. 725.]

This is from the Agricultural Appropriation Act of May 31, 1920, ch. 217.

For amendments to Cotton Futures Act, made permanent legislation by the text, see 1919 Supp. Fed. Stat. Ann. 195.

For Cotton Futures Act, see 1918 Supp. Fed. Stat. Ann. 359 et seq.

Another provision of the Agricultural Appropriation Act relating to contracts tenderable under sec. 5 was repealed by Resolution of June 2, 1920. The resolution read as follows: "That the provision of the Act entitled 'An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1921,' approved May 31, 1920, which reads as follows: 'That hereafter each lot of cotton classified as tenderable in whole or in part on a section 5 contract of said Act as amended, shall give to the buyer the right to demand that one half of the contract shall be delivered in the official cotton standard grades of the United States from the grades of middling fair, strict good middling, good middling, strict middling, and middling, and that the seller shall have the option of delivering the other half of said contract from any of the official cotton standard grades as established in said Act,' be, and the same is hereby, repealed."

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CROSS-REFERENCES

See also *ANIMALS; SHIPPING AND NAVIGATION*

An Act To provide for the termination of Federal control of railroads and systems of transportation; to provide for the settlement of disputes between carriers and their employees; to further amend an Act entitled “An Act to regulate commerce,” approved February 4, 1887, as amended, and for other purposes.

[Act of Feb. 28, 1920, ch. 91, 41 Stat. L. 456, as amended by Act of June 5, 1920, ch. 235, 41 Stat. L. 946.]

TITLE I.—DEFINITIONS.

SECTION 1. [Name of Act.] This Act may be cited as the “Transportation Act, 1920.” *[41 Stat. L. 456.]*

SEC. 2. [Terms defined.] When used in this Act—

The term “Interstate Commerce Act” means the Act entitled “An Act to regulate commerce,” approved February 4, 1887, as amended;

The term “Commerce Court Act” means the Act entitled “An Act to create a commerce court, and to amend an Act entitled ‘An Act to regulate commerce,’ approved February 4, 1887, as heretofore amended, and for other purposes,” approved June 18, 1910;

The term “Federal Control Act” means the Act entitled “An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,” approved March 21, 1918, as amended;

The term “Federal control” means the possession, use, control, and operation of railroads and systems of transportation, taken over or assumed by the President under section 1 of the Act entitled “An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes,” approved August 29, 1916, or under the Federal Control Act; and

The term “Commission” means the Interstate Commerce Commission. *[41 Stat. L. 457.]*

For Act of Feb. 4, 1887, including amendments in the text, see 4 Fed. Stat. Ann. (2d ed.) 337.

For Act of March 21, 1918, see 1918 Supp. Fed. Stat. Ann. 757.

For Act of Aug. 29, 1916, see 9 Fed. Stat. Ann. (2d ed.) 1095.

TITLE II.—TERMINATION OF FEDERAL CONTROL.

SEC. 200. (a) [Time of termination.] Federal control shall terminate at 1201 a. m., March 1, 1920; and the President shall then relinquish possession and control of all railroads and systems of transportation then under Federal control and cease the use and operation thereof. [41 Stat. L. 457.]

(b) [Enumeration of powers withdrawn from President.] Thereafter the President shall not have or exercise any of the powers conferred upon him by the Federal Control Act relating —

(1) To the use or operation of railroads or systems of transportation;

(2) To the control or supervision of the carriers owning or operating them, or of the business or affairs of such carriers;

(3) To their rates, fares, charges, classifications, regulations, or practices;

(4) To the purchase, construction, or other acquisition of boats, barges, tugs, and other transportation facilities on the inland, canal, or coastwise waterways; or (except in pursuance of contracts or agreements entered into before the termination of Federal control) of terminals, motive power, cars, or equipment, on or in connection with any railroad or system of transportation;

(5) To the utilization or operation of canals;

(6) To the purchase of securities of carriers, except in pursuance of contracts or agreements entered into before the termination of Federal control, or as a necessary or proper incident to the adjustment, settlement, liquidation and winding up of matters arising out of Federal control; or

(7) To the use for any of the purposes above stated (except in pursuance of contracts or agreements entered into before the termination of Federal control, and except as a necessary or proper incident to the winding up or settling of matters arising out of Federal control, and except as provided in section 202) of the revolving fund created by such Act, or of any of the additions thereto made under such Act, or by the Act entitled "An Act to supply a deficiency in the appropriation for carrying out the Act entitled 'An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' approved March 21, 1918," approved June 30, 1919. [41 Stat. L. 457.]

(c) [Effect on war powers of President.] Nothing in this Act shall be construed as affecting or limiting the power of the President in time of war (under section 1 of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916) to take possession and assume control of any system of transportation and utilize the same. [41 Stat. L. 457.]

For Act of Aug. 29, 1916, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1095.

GOVERNMENT-OWNED BOATS ON INLAND WATERWAYS.

SEC. 201. [Operation of transportation facilities by Secretary of War.] (a) On the termination of Federal control, as provided in section 200, all boats, barges, tugs, and other transportation facilities, on the inland, canal, and coastwise waterways (hereinafter in this section called "transportation facilities") acquired by the United States in pursuance of the fourth paragraph of section 6 of the Federal Control Act (except the transportation facilities constituting

parts of railroads or transportation systems over which Federal control was assumed) are transferred to the Secretary of War, who shall operate or cause to be operated such transportation facilities so that the lines of inland water transportation established by or through the President during Federal control shall be continued, and assume and carry out all contracts and agreements in relation thereto entered into by or through the President in pursuance of such paragraph prior to the time above fixed for such transfer. All payments under the terms of such contracts, and for claims arising out of the operation of such transportation facilities by or through the President prior to the termination of Federal control, shall be made out of moneys available under the provisions of this Act for adjusting, settling, liquidating, and winding up matters arising out of or incident to Federal control. Moneys required for such payments shall, from time to time, be transferred to the Secretary of War as required for payment under the terms of such contracts.

(b) All other payments after such transfer in connection with the construction, utilization, and operation of any such transportation facilities, whether completed or under construction, shall be made by the Secretary of War out of funds now or hereafter made available for that purpose.

(c) The Secretary of War is hereby authorized, out of any moneys hereafter made available therefor, to construct or contract for the construction of terminal facilities for the interchange of traffic between the transportation facilities operated by him under this section and other carriers whether by rail or water, and to make loans for such purposes under such terms and conditions as he may determine to any State whose constitution prohibits the ownership of such terminal facilities by other than the State or a political subdivision thereof.

(d) Any transportation facilities owned by the United States and included within any contract made by the United States for operation on the Mississippi River above Saint Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above Saint Louis.

(e) The operation of the transportation facilities referred to in this section shall be subject to the provisions of the Interstate Commerce Act as amended by this Act or by subsequent legislation, and to the provisions of the "Shipping Act, 1916," as now or hereafter amended, in the same manner and to the same extent as if such transportation facilities were privately owned and operated; and all such vessels while operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels, whether the United States is interested therein as owner, in whole or in part, or holds any mortgage, lien, or interest therein. For the performance of the duties imposed by this section the Secretary of War is authorized to appoint or employ such number of experts, clerks, and other employees as may be necessary for service in the District of Columbia or elsewhere, and as may be provided for by Congress. [41 Stat. L. 458.]

For "Shipping Act, 1916," mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 785.

SETTLEMENT OF MATTERS ARISING OUT OF FEDERAL CONTROL.

SEC. 202. [Funds available.] The President shall, as soon as practicable after the termination of Federal control, adjust, settle, liquidate, and wind up all matters, including compensation, and all questions and disputes of whatso-

ever nature, arising out of or incident to Federal control. For these purposes and for the purpose of making the payments specified in subdivision (a) of section 201, all unexpended balances in the revolving fund created by the Federal Control Act or of the moneys appropriated by the Act entitled "An Act to supply a deficiency in the appropriation for carrying out the Act entitled 'An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' approved March 21, 1918," approved June 30, 1919, are hereby reappropriated and made available until expended; and all moneys derived from the operation of the carriers or otherwise arising out of Federal control, and all moneys that have been or may be received in payment of the indebtedness of any carrier to the United States arising out of Federal control, shall be and remain available until expended for the aforesaid purposes; and there is hereby appropriated for the aforesaid purposes, out of any money in the Treasury not otherwise appropriated, \$200,000,000 in addition to the above, to be available until expended. [41 Stat. L. 459.]

For Federal Control Act, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 757.

This section was affected by a provision of the Deficiency Appropriation Act of May 8, 1920, set out *infra*, p. 126.

COMPENSATION OF CARRIERS WITH WHICH NO CONTRACT MADE.

SEC. 203. (a) [Measure of compensation.] Upon the request of any carrier entitled to just compensation under the Federal Control Act, but with which no contract fixing or waiving compensation has been made and which has made no waiver of compensation, the President: (1) shall pay to it so much of the amount he may determine to be just compensation as may be necessary to enable such carrier to have the sums required for interest, taxes, and other corporate charges and expenses referred to in paragraph (b) of section 7 of the standard contract between the United States and the carriers, accruing during the period for which such carrier is entitled to just compensation under the Federal Control Act, and also the sums required for dividends declared and paid during the same period, including, also, in addition, a sum equal to that proportion of such last dividend which the period between its payment and the termination of the period for which the carrier is entitled to just compensation under the Federal Control Act bears to the last dividend period; and (2) may, in his discretion, pay to such carrier the whole or any part of the remainder of such estimated amount of just compensation. [41 Stat. L. 459.]

(b) [Effect of acceptance of benefits.] The acceptance of any benefits by a carrier under this section —

(1) shall not deprive it of the right to claim additional compensation, which, unless agreed upon, shall be ascertained in the manner provided in section 3 of the Federal Control Act; but

(2) shall constitute an acceptance by the carrier of all the provisions of the Federal Control Act as modified by this Act, and obligate the carrier to pay to the United States, with interest at the rate of 6 per centum per annum from a date or dates fixed in proceedings under section 3 of the Federal Control Act, the amount by which the sums received on account of such compensation, under this section or otherwise, exceed the sum found due in such proceedings. [41 Stat. L. 459.]

For Federal Control Act, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 757.

REIMBURSEMENT OF DEFICITS DURING FEDERAL CONTROL.

SEC. 204. [Manner of arriving at deficits — “test period” — certification to Secretary of Treasury of amounts payable to carrier.] (a) When used in this section —

The term “carrier” means a carrier by railroad which, during any part of the period of Federal control, engaged as a common carrier in general transportation, and competed for traffic, or connected, with a railroad under Federal control, and which sustained a deficit in its railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation; but does not include any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both; and

The term “test period” means the three years ending June 30, 1917.

(b) For the purposes of this section —

Railway operating income or any deficit therein for the period of Federal control shall be computed in a manner similar to that provided in section 209 with respect to such income or deficit for the guaranty period; and

Railway operating income or any deficit therein for the test period shall be computed in the manner provided in section 1 of the Federal Control Act.

(c) As soon as practicable after March 1, 1920, the Commission shall ascertain for every carrier, for every month of the period of Federal control during which its railroad or system of transportation was not under Federal operation, its deficit in railway operating income, if any, and its railway operating income, if any, (hereinafter called “Federal control return”), and the average of its deficit in railway operating income, if any, and of its railway operating income, if any, for the three corresponding months of the test period taken together, (hereinafter called “test period return”): *Provided*, That “test period return,” in the case of a carrier which operated its railroad or system of transportation for at least one year during, but not for the whole of, the test period, means its railway operating income, or the deficit therein, for the corresponding month during the test period, or the average thereof for the corresponding months during the test period taken together, during which the carrier operated its railroad or system of transportation.

(d) For every month of the period of Federal control during which the railroad or system of transportation of the carrier was not under Federal operation, the Commission shall then ascertain (1) the difference between its Federal control return, if a deficit, and its test period return, if a smaller deficit, or (2) the difference between its test period return, if an income, and its Federal control return, if a smaller income, or (3) the sum of its Federal control return, if a deficit, plus its test period return, if an income. The sum of such amounts shall be credited to the carrier.

(e) For every such month the Commission shall then ascertain (1) the difference between the carrier’s Federal control return, if an income, and its test period return, if a smaller income, or (2) the difference between its test period return, if a deficit, and its Federal control return, if a smaller deficit, or (3) the sum of its Federal control return, if an income, plus its test period return, if a deficit. The sum of such amounts shall be credited to the United States.

(f) If the sum of the amounts so credited to the carrier under subdivision (d) exceeds the sum of the amounts so credited to the United States under sub-

division (e), the difference shall be payable to the carrier. In the case of a carrier which operated its railroad or system of transportation for less than a year during, or for none of, the test period, the foregoing computations shall not be used, but there shall be payable to such carrier its deficit in railway operating income for that portion (as a whole) of the period of Federal control during which it operated its own railroad or system of transportation.

(g) The Commission shall promptly certify to the Secretary of the Treasury the several amounts payable to carriers under paragraph (f). The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated. [41 Stat. L. 460.]

This section was affected by a provision of the Deficiency Appropriation Act of May 8, 1920, set out *infra*, p. 126.

INSPECTION OF CARRIERS' RECORDS.

SEC. 205. [Carriers' property and records as subject to inspection by President — duty of carriers to furnish information.] The President shall have the right, at all reasonable times until the affairs of Federal control are concluded, to inspect the property and records of all carriers whose railroads or systems of transportation were at any time under Federal control, whenever such inspection is necessary or appropriate (1) to protect the interests of the United States, or (2) to supervise matters being handled for the United States by agents of the carriers, or (3) to secure information concerning matters arising during Federal control, and such carriers shall provide all reasonable facilities therefor, including the issuance of free transportation to all agents of the President while traveling on official business for these purposes.

Such carriers shall, at their expense, upon the request of the President, or those duly authorized by him, furnish all necessary and proper information and reports compiled from the records made or kept during the period of Federal control affecting their respective lines, and shall keep and continue such records and furnish like information and reports compiled therefrom.

Any carrier which refuses or obstructs such inspection, or which willfully fails to provide reasonable facilities therefor, or to furnish such information or reports shall be liable to a penalty of \$500 for each day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action to be brought by the United States. [41 Stat. L. 461.]

CAUSES OF ACTION ARISING OUT OF FEDERAL CONTROL.

SEC. 206. (a) [Actions against agent of President — period of limitation — courts having jurisdiction.] Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of

limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier. [41 Stat. L. 461.]

For Federal Control Act, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 757.

(b) **[Process — statement filed by agent of President with clerk of District Court.]** Process may be served upon any agent or officer of the carrier operating such railroad or system of transportation, if such agent or officer is authorized by law to be served with process in proceedings brought against such carrier and if a contract has been made with such carrier by or through the President for the conduct of litigation arising out of operation during Federal control. If no such contract has been made process may be served upon such agents or officers as may be designated by or through the President. The agent designated by the President under subdivision (a) shall cause to be filed, upon the termination of Federal control, in the office of the Clerk of each District Court of the United States, a statement naming all carriers with whom he has contracted for the conduct of litigation arising out of operation during Federal control, and a like statement designating the agents or officers upon whom process may be served in actions, suits, and proceedings arising in respect to railroads or systems of transportation with the owner of which no such contract has been made; and such statements shall be supplemented from time to time, if additional contracts are made or other agents or officers appointed. [41 Stat. L. 461.]

(c) **[Complaints affecting rates, etc.— filing with Interstate Commerce Commission.]** Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission, within one year after the termination of Federal control, against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a). [41 Stat. L. 462.]

(d) **[Abatement of pending actions, etc.— substitution of agent of President.]** Actions, suits, proceedings, and reparation claims, of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a). [41 Stat. L. 462.]

(e) **[Judgments, etc., against agent of President — payment.]** Final judgments, decrees, and awards in actions, suits, proceedings, or reparation claims,

of the character above described, rendered against the agent designated by the President under subdivision (a), shall be promptly paid out of the revolving fund created by section 210. [41 Stat. L. 462.]

(f) [Computing period of limitation of actions—period of Federal control.] The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control. [41 Stat. L. 462.]

(g) [Levy of execution or process on property of carrier.] No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control. [41 Stat. L. 462.]

REFUNDING OF CARRIERS' INDEBTEDNESS TO UNITED STATES.

SEC. 207. (a) [Ascertainment of carriers' indebtedness to United States—set-off.] As soon as practicable after the termination of Federal control the President shall ascertain (1) the amount of the indebtedness of each carrier to the United States, which may exist at the termination of Federal control, incurred for additions and betterments made during Federal control and properly chargeable to capital account; (2) the amount of indebtedness of such carrier to the United States otherwise incurred; and (3) the amount of the indebtedness of the United States to such carrier arising out of Federal control. The amount under clause (3) may be set off against either or both of the amounts under clauses (1) and (2), so far as deemed wise by the President, but only to the extent permitted under any contract now or hereafter made between such carrier and the United States in respect to the matters of Federal control, or, where no such contract exists, to the extent permitted under paragraph (b) of section 7 of the standard contract between the United States and the carriers relative to deductions from compensation: *Provided*, That such right of set-off shall not be so exercised as to prevent such carrier from having the sums required for interest, taxes, and other corporate charges and expenses referred to in paragraph (b) of section 7 of such standard contract, accruing during Federal control, and also the sums required for dividends declared and paid during Federal control, including, also in addition, a sum equal to that proportion of such last dividend which the period between its payment and the termination of Federal control bears to the last regular dividend period: *And provided further*, That such right of set-off shall not be exercised unless there shall have first been paid such sums in addition as may be necessary to provide the carrier with working capital in amount not less than one twenty-fourth of its operating expenses for the calendar year 1919. [41 Stat. L. 462.]

(b) [Funding of indebtedness.] Any remaining indebtedness of the carrier to the United States in respect to such additions and betterments shall, at the request of the carrier, be funded for a period of ten years from the termination of Federal control, or a shorter period at the option of the carrier, with interest at the rate of 6 per centum per annum, payable semiannually, subject to the

right of such carrier to pay, on any interest-payment day, the whole or any part of such indebtedness. Any carrier obtaining the funding of such indebtedness as aforesaid shall give, in the discretion of the President, such security, in such form and upon such terms, as he may prescribe. [41 Stat. L. 463.]

(c) **[Indebtedness incurred for equipment—effect of funding.]** If the President and the various carriers, or any of them, shall enter into an agreement for funding, through the medium of car trust certificates, or otherwise, the indebtedness of any such carrier to the United States incurred for equipment ordered for the benefit of such carrier, such indebtedness so funded shall not be refundable under the foregoing provisions. [41 Stat. L. 463.]

(d) **[Short term notes evidencing indebtedness.]** Any other indebtedness of any such carrier to the United States which may exist after the settlement of accounts between the United States and the carrier and is then due shall be evidenced by notes payable in one year from the termination of Federal control, or a shorter period at the option of the carrier, with interest at the rate of 6 per centum per annum, and secured by such collateral security as the President may deem it advisable to require. [41 Stat. L. 463.]

(e) **[Payment of securities — extension of time — exchange.]** With respect to any bonds, notes, or other securities, acquired under the provisions of this section or of the Federal Control Act or of the Act entitled “An Act to provide for the reimbursement of the United States for motive power, cars and other equipment ordered for railroads and systems of transportation under Federal control, and for other purposes,” approved November 19, 1919, the President shall have the right to make such arrangements for extension of the time of payment or for the exchange of any of them for other securities, or partly for cash and partly for securities, as may be provided for in any agreement entered into by him or as may in his judgment seem desirable. [41 Stat. L. 463.]

For Federal Control Act, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 757.

For Act of Nov. 19, 1919, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 337.

(f) **[Evidences of indebtedness secured by equipment trust agreements.]** Carriers may, by agreement with the President, issue notes or other evidences of indebtedness, secured by equipment trust agreements, for equipment purchased during Federal control by or through the President under section 6 of the Federal Control Act, and allocated to such carriers respectively; and the filing of such equipment trust agreements with the Commission shall constitute notice thereof to all the world. [41 Stat. L. 463.]

(g) **[Authorization or approval of evidences of indebtedness.]** A carrier may issue evidences of indebtedness pursuant to this section without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification. [41 Stat. L. 464.]

EXISTING RATES TO CONTINUE IN EFFECT.

SEC. 208. (a) **[Rates, etc.—continuance — changes.]** All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or

the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission. [41 Stat. L. 464.]

(b) **[Joint rates, fares, or charges.]** All divisions of joint rates, fares, or charges, which on February 29, 1920, are in effect between the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by mutual agreement between the interested carriers or by State or Federal authorities, respectively. [41 Stat. L. 464.]

(c) **[Land grant railroads — transportation of property and troops of United States.]** Any land grant railroad organized under the Act of July 28, 1866 (chapter 300), shall receive the same compensation for transportation of property and troops of the United States as is paid to land grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278). [41 Stat. L. 464.]

GUARANTY TO CARRIERS AFTER TERMINATION OF FEDERAL CONTROL.

SEC. 209. (a) **[Terms used in section defined.]** When used in this section —

The term "carrier" means (1) a carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal control at the time Federal control terminates, or which has heretofore engaged as a common carrier in general transportation and competed for traffic, or connected, with a railroad at any time under Federal control; and (2) a sleeping car company whose system of transportation is under Federal control at the time Federal control terminates; but does not include a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power, heat, and light, or both;

The term "guaranty period" means the six months beginning March 1, 1920.

The term "test period" means the three years ending June 30, 1917; and

The term "railway operating income" and other references to accounts of carriers by railroad shall, in the case of a sleeping car company, be construed as indicating the appropriate corresponding accounts in the accounting system prescribed by the Commission. [41 Stat. L. 464.]

(b) **[Statement by carrier accepting provisions of section.]** This section shall not be applicable to any carrier which does not on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this section. [41 Stat. L. 464.]

(c) **[Guaranty to carriers — determination.]** The United States hereby guarantees —

(1) With respect to any carrier with which a contract (exclusive of so-called cooperative contracts or waivers) has been made fixing the amount of just compensation under the Federal Control Act, that the railway operating income of

such carrier for the guaranty period as a whole shall not be less than one-half the amount named in such contract as annual compensation, or, where the contract fixed a lump sum as compensation for the whole period of Federal operation, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than an amount which shall bear the same proportion to the lump sum so fixed as six months bears to the number of months during which such carrier was under Federal operation, including in both cases the increases in such compensation provided for in section 4 of the Federal Control Act;

(2) With respect to any carrier entitled to just compensation under the Federal Control Act, with which such a contract has not been made, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half of the annual amount estimated by the President as just compensation for such carrier under the Federal Control Act, including the increases in such compensation provided for in section 4 of the Federal Control Act. If any such carrier does not accept the President's estimate respecting its just compensation, and if in proceedings under section 3 of the Federal Control Act it is determined that a larger or smaller annual amount is due as just compensation, the guaranty under this paragraph shall be increased or decreased accordingly;

(3) With respect to any carrier, whether or not entitled to just compensation under the Federal Control Act, with which such a contract has not been made, and for which no estimate of just compensation is made by the President, and which for the test period as a whole sustained a deficit in railway operating income, the guaranty shall be a sum equal to (a) the amount by which any deficit in its railway operating income for the guaranty period as a whole exceeds one-half of its average annual deficit in railway operating income for the test period, plus (b) an amount equal to one-half the annual sum fixed by the President under section 4 of the Federal Control Act;

(4) With respect to any carrier not entitled to just compensation under the Federal Control Act, which for the test period as a whole had an average annual railway operating income, that the railway operating income of such carrier for the guaranty period as a whole shall not be less than one-half the average annual railway operating income of such carrier during the test period. [41 Stat. L. 464.]

For Federal Control Act, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 757.

(d) **[Effect of payments in excess of guaranty.]** If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (1), (2), or (4) of subdivision (c) is in excess of the minimum railway operating income guaranteed in such paragraph, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. If for the guaranty period as a whole the railway operating income of any carrier entitled to a guaranty under paragraph (3) of subdivision (c) is in excess of one-half of the annual sum fixed by the President with respect to such carrier under section 4 of the Federal Control Act, such carrier shall forthwith pay the amount of such excess into the Treasury of the United States. The amounts so paid into the Treasury of the United States shall be added to the funds made available under section 202 for the purposes indicated in such section. Notwithstanding the provisions of this subdivision, any carrier may retain out of any such excess any amount necessary to enable it to pay its fixed charges accruing during the guaranty period. [41 Stat. L. 465.]

(e) **[Manner of computing railway operating income, or deficit therein.]** For the purposes of this section railway operating income, or any deficit therein, for the test period shall be computed in the manner provided for in section 1 of the Federal Control Act. [41 Stat. L. 465.]

(f) **[Elements considered in computing railway operating income or deficit therein.]** In computing railway operating income, or any deficit therein, for the guaranty period for the purposes of this section —

(1) Debits and credits arising from the accounts, called in the monthly reports to the Commission equipment rents and joint facility rents, shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are not under Federal control at the time of termination thereof, shall be excluded;

(2) Proper adjustments shall be made (a) in case any lines which were, during any portion of the period of Federal control, a part of the railroad or system of transportation of the carrier, and whose railway operating income was included in such income of the carrier for the test period, do not continue to be a part of such railroad or system of transportation during the entire guaranty period, and (b) in case of any lines acquired by, leased to, or consolidated with, the railroad or system of transportation of the carrier at any time since the end of the test period and prior to the expiration of the guaranty period, for which separate operating returns to the Commission are not made in respect to the entire portion of the guaranty period;

(3) There shall not be included in operating expenses, for maintenance of way and structures, or for maintenance of equipment, more than an amount fixed by the Commission. In fixing such amount the Commission shall so far as practicable apply the rule set forth in the proviso in paragraph (a) of section 5 of the "standard contract" between the United States and the carriers (whether or not such contract has been entered into with the carrier whose railway operating income is being computed);

(4) There shall not be included any taxes paid under Title I or II of the Revenue Act of 1917, or such portion of the taxes paid under Title II or III of the Revenue Act of 1918 as by the terms of such Act are to be treated as levied by an Act in amendment of Title I or II of the Revenue Act of 1917; and

(5) The Commission shall require the elimination and restatement of the operating expenses and revenues (other than for maintenance of way and structures, or maintenance of equipment) for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period. [41 Stat. L. 465.]

For Revenue Act of 1917 and 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 270 et seq.

(g) **[Ascertaining and paying guaranty.]** The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty to each carrier. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such

certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated. [41 Stat. L. 466.]

(h) [Advances to carriers during guaranty period.] Upon application of any carrier to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its fixed charges and operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by the carrier of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this section such carrier will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision. [41 Stat. L. 466.]

(i) [American Railway Express Company — guaranty.] If the American Railway Express Company shall, on or before March 15, 1920, file with the Commission a written statement that it accepts all the provisions of this subdivision, the contract of June 26, 1918, between such company and the Director General of Railroads, as amended and continued by agreement dated November 21, 1918, shall remain in full force and effect during the guaranty period in so far as the same constitutes a guaranty on the part of the United States to such company against a deficit in operating income.

In computing operating income, and any deficit therein, for the guaranty period for the purposes of this subdivision, the Commission shall require the elimination and restatement of the operating expenses and revenues for the guaranty period, to the extent necessary to correct and exclude any disproportionate or unreasonable charge to such expenses or revenues for such period, or any charge to such expenses or revenues for such period which under a proper system of accounting is attributable to another period, and to exclude from operating expenses so much of the charge for payment for express privileges to carriers on whose lines the express traffic is carried as is in excess of 50.25 per centum of gross express revenue.

For the guaranty period the American Railway Express Company shall pay to every carrier which accepts the provisions of this section, as provided in subdivision (b) hereof, 50.25 per centum of the gross revenue earned on the transportation of all its express traffic on the carrier's lines, and every such carrier shall accept from the American Railway Express Company such percentage of the gross revenue as its compensation. In arriving at the gross revenue on through or joint express traffic, the method of dividing the revenue between the carriers shall be that agreed upon between the carriers and such express company and approved by the Commission.

If for the guaranty period as a whole the American Railway Express Company does not have a deficit in operating income, it shall forthwith pay the amount of its operating income for such period into the Treasury of the United States. The amount so paid shall be added to the funds made available under section 202 for the purposes indicated in such section.

The Commission shall, as soon as practicable after the expiration of the guaranty period, certify to the Secretary of the Treasury the amount necessary to make good the foregoing guaranty to the American Railway Express Company. The Secretary of the Treasury is hereby authorized and directed thereupon to draw warrants in favor of such company upon the Treasury of the United States for the amount shown in such certificate as necessary to make good such guaranty. An amount sufficient to pay such warrants is hereby appropriated out of any money in the Treasury not otherwise appropriated.

Upon application of the American Railway Express Company to the Commission, asking that during the guaranty period there may be advanced to it from time to time such sums, not in excess of the estimated amount necessary to make good the guaranty, as are necessary to enable it to meet its operating expenses, the Commission may certify to the Secretary of the Treasury the amount of, and times at which, such advances, if any, shall be made. The Secretary of the Treasury, on receipt of such certificate, is authorized and directed to make the advances in the amounts and at the times specified in the certificate, upon the execution by such company of a contract, secured in such manner as the Secretary may determine, that upon final determination of the amount of the guaranty provided for by this subdivision such company will repay to the United States any amounts which it has received from such advances in excess of the guaranty, with interest at the rate of 6 per centum per annum from the time such excess was paid. There is hereby appropriated out of any money in the Treasury not otherwise appropriated a sum sufficient to enable the Secretary of the Treasury to make the advances referred to in this subdivision. [41 Stat. L. 467.]

NEW LOANS TO RAILROADS.

SEC. 210. (a) [Loans by United States to railroads — application to Interstate Commerce Commission.] For the purpose of enabling carriers by railroad subject to the Interstate Commerce Act properly to serve the public during the transition period immediately following the termination of Federal control, any such carrier may, at any time after the passage of this Act, and before the expiration of two years after the termination of Federal control make application to the commission for a loan from the United States to meet its maturing indebtedness, or to provide itself with equipment or other additions and betterments, setting forth the amount of the loan; the term for which it is desired; the purpose of the loan and the use to which it will be applied; the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard; the character and value of the security offered; and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts in detail as the commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for, and

the ability of the applicant to make good the obligation as the commission may deem pertinent to the inquiry. [41 Stat. L. 468, as amended by 41 Stat. L. 946.]

(b) **[Investigation by Commission — certifying findings, etc., to Secretary of Treasury.]** If the commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan by the United States, for one or more of the aforesaid purposes, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan the commission shall certify to the Secretary of the Treasury its findings of such facts; also the amount of the loan which is to be made; the time, not exceeding fifteen years from the making thereof, within which it is to be repaid; the terms and conditions of the loan, including the security to be given for repayment; that the prospective earning power of the applicant, together with the character and value of the security offered, furnish, in the opinion of the commission, reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor and reasonable protection to the United States; and that the applicant, in the opinion of the commission, is unable to provide itself with the funds necessary for the aforesaid purposes from other sources. [41 Stat. L. 468, as amended by 41 Stat. L. 946.]

(c) **[Loan by Secretary of Treasury on receipt of certificate — terms.]** Upon receipt of such certificate from the commission the Secretary of the Treasury shall immediately, or soon as practicable, make a loan of the amount recommended in such certificate out of any funds in the revolving fund provided for in this section and accept the security prescribed therefor by the commission. All such loans shall bear interest at the rate of 6 per centum per annum, payable semiannually, to the Secretary of the Treasury, and to be placed to the credit of said revolving fund. The form of obligation to be entered into shall be prescribed by the Secretary of the Treasury, but the time, not exceeding fifteen years from the making thereof, within which such loan is to be repaid, the security which is to be taken therefor, and the terms and the conditions of the loan shall be in accordance with the findings and the certificate of the commission. [41 Stat. L. 468, as amended by 41 Stat. L. 946.]

(d) **[Advice and assistance of Federal Reserve Board.]** The Commission or the Secretary of the Treasury may call upon the Federal Reserve Board for advice and assistance with respect to any such application or loan. [41 Stat. L. 468.]

(e) **[Revolving fund for loan purposes, etc.]** There is hereby appropriated out of any moneys in the Treasury not otherwise appropriated the sum of \$300,000,000, which shall be used as a revolving fund for the purpose of making the loans provided for in this section, and for paying the judgments, decrees, and awards referred to in subdivision (e) of section 206. [41 Stat. L. 468.]

(f) **[Evidences of indebtedness — issuance by carriers.]** A carrier may issue evidences of indebtedness to the United States pursuant to this section without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification. [41 Stat. L. 469.]

Paragraphs (a), (b) and (c) of this section were amended by sec. 5 of the Sundry Civil Appropriation Act of June 5, 1920, ch. 235. Section 5 further provided as follows: "The loans for equipment authorized by section 210, Transportation Act, 1920, may be made to or through such organization, car trust or other agency as may be determined upon or approved or organized for the purpose by the commission as most appropriate in the public interest for the construction, and sale or lease of equipment to carriers, upon such general terms as to security and payment or lease as provided in this section or in subsections 11 and 13 of section 422 of the Transportation Act, 1920." [41 Stat. L. 947.]

EXECUTION OF POWERS OF PRESIDENT.

SEC. 211. [Execution of powers by agents.] All powers and duties conferred or imposed upon the President by the preceding sections of this Act, except the designation of the agent under section 206, may be executed by him through such agency or agencies as he may determine. [41 Stat. L. 469.]

TITLE III.—DISPUTES BETWEEN CARRIERS AND THEIR EMPLOYEES AND SUBORDINATE OFFICIALS.

SEC. 300. [Terms used in title defined.] When used in this title —

(1) The term "carrier" includes any express company, sleeping car company, and any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation;

(2) The term "Adjustment Board" means any Railroad Board of Labor Adjustment established under section 302;

(3) The term "Labor Board" means the Railroad Labor Board;

(4) The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation; and

(5) The term "subordinate official" includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations. [41 Stat. L. 469.]

SEC. 301. [Disputes — conference between representatives of parties — reference to official board.] It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in

the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute. [41 Stat. L. 469.]

SEC. 302. [Railroad Boards of Labor Adjustment — establishment.] Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof. [41 Stat. L. 469.]

SEC. 303. [Disputes within jurisdiction of Adjustment Board — how initiated.] Each such Adjustment Board shall, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon the written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, (3) upon the Adjustment Board's own motion, or (4) upon the request of the Labor Board whenever such board is of the opinion that the dispute is likely substantially to interrupt commerce, receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving only grievances, rules, or working conditions, not decided as provided in section 301, between the carrier and its employees or subordinate officials, who are, or any organization thereof which is, in accordance with the provisions of section 302, represented upon any such Adjustment Board. [41 Stat. L. 469.]

SEC. 304. ["Railroad Labor Board" — composition — nominations by employees, employers, and President — vacancies.] There is hereby established a board to be known as the "Railroad Labor Board" and to be composed of nine members as follows:

(1) Three members constituting the labor group, representing the employees and subordinate officials of the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by such employees in such manner as the Commission shall by regulation prescribe;

(2) Three members, constituting the management group, representing the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by the carriers in such manner as the Commission shall by regulation prescribe; and

(3) Three members, constituting the public group, representing the public, to be appointed directly by the President, by and with the advice and consent of the Senate.

Any vacancy on the Labor Board shall be filled in the same manner as the original appointment. [41 Stat. L. 470.]

SEC. 305. [Failure of employees or carriers to make nominations for Labor Board — considerations determining selection of members by President.] If either the employees or the carriers fail to make nominations and offer nominees in accordance with the regulations of the Commission, as provided in paragraphs (1) and (2) of section 304, within thirty days after the passage of this Act in case of any original appointment to the office of member of the Labor

Board, or in case of a vacancy in any such office within fifteen days after such vacancy occurs, the President shall thereupon directly make the appointment, by and with the advice and consent of the Senate. In making any such appointment the President shall, as far as he deems it practicable, select an individual associated in interest with the carriers or employees thereof, whichever he is to represent. [41 Stat. L. 470.]

SEC. 306. (a) [Membership on Labor Board—subsequent ineligibility.] Any member of the Labor Board who during his term of office is an active member or in the employ of or holds any office in any organization of employees or subordinate officials, or any carrier, or owns any stock or bond thereof, or is pecuniarily interested therein, shall at once become ineligible for further membership upon the Labor Board; but no such member is required to relinquish honorary membership in, or his rights in any insurance or pension or other benefit fund maintained by, any organization of employees or subordinate officials or by a carrier. [41 Stat. L. 470.]

(b) [Terms of members of Labor Board—salary—removal from office.] Of the original members of the Labor Board, one from each group shall be appointed for a term of three years, one for two years, and one for one year. Their successors shall hold office for terms of five years, except that any member appointed to fill a vacancy shall be appointed only for the unexpired term of the member whom he succeeds. Each member shall receive from the United States an annual salary of \$10,000. A member may be removed by the President for neglect of duty or malfeasance in office, but for no other cause. [41 Stat. L. 470.]

SEC. 307. [Disputes within jurisdiction of Labor Board—hearings and decisions.] (a) The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any Adjustment Board certifies to the Labor Board that in its opinion the Adjustment Board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board has so failed or is not using due diligence in its consideration thereof. In case the appropriate Adjustment Board is not organized under the provisions of section 302, the Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions which is not decided as provided in section 301 and which such Adjustment Board would be required to receive for hearing and decision under the provisions of section 303.

(b) The Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of

the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, all disputes with respect to the wages or salaries of employees or subordinate officials of carriers, not decided as provided in section 301. The Labor Board may upon its own motion within ten days after the decision, in accordance with the provisions of section 301, of any dispute with respect to wages or salaries of employees or subordinate officials of carriers, suspend the operation of such decision if the Labor Board is of the opinion that the decision involves such an increase in wages or salaries as will be likely to necessitate a substantial readjustment of the rates of any carrier. The Labor Board shall hear any decision so suspended and as soon as practicable and with due diligence decide to affirm or modify such suspended decision.

(c) A decision by the Labor Board under the provisions of paragraphs (a) or (b) of this section shall require the concurrence therein of at least 5 of the 9 members of the Labor Board: *Provided*, That in case of any decision under paragraph (b), at least one of the representatives of the public shall concur in such decision. All decisions of the Labor Board shall be entered upon the records of the board and copies thereof, together with such statement of facts bearing thereon as the board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each Adjustment Board, and the Commission, and shall be given further publicity in such manner as the Labor Board may determine.

(d) All the decisions of the Labor Board in respect to wages or salaries and of the Labor Board or an Adjustment Board in respect to working conditions of employees or subordinate officials of carriers shall establish rates of wages and salaries and standards of working conditions which in the opinion of the board are just and reasonable. In determining the justness and reasonableness of such wages and salaries or working conditions the board shall, so far as applicable, take into consideration among other relevant circumstances:

- (1) The scales of wages paid for similar kinds of work in other industries;
- (2) The relation between wages and the cost of living;
- (3) The hazards of the employment;
- (4) The training and skill required;
- (5) The degree of responsibility;
- (6) The character and regularity of the employment; and
- (7) Inequalities of increases in wages or of treatment, the result of previous wage orders or adjustments. [41 Stat. L. 470.]

SEC. 308. [Powers of Labor Board as to chairmanship, office, etc.—investigations—regulations—reports.] The Labor Board—

- (1) Shall elect a chairman by majority vote of its members;
- (2) Shall maintain central offices in Chicago, Illinois, but the Labor Board may, whenever it deems it necessary, meet at such other place as it may determine;
- (3) Shall investigate and study the relations between carriers and their employees, particularly questions relating to wages, hours of labor, and other conditions of employment and the respective privileges, rights, and duties of carriers and employees, and shall gather, compile, classify, digest, and publish, from time to time, data and information relating to such questions to the end that the Labor Board may be properly equipped to perform its duties under

this title and that the members of the Adjustment Boards and the public may be properly informed;

(4) May make regulations necessary for the efficient execution of the functions vested in it by this title; and

(5) Shall at least annually collect and publish the decisions and regulations of the Labor Board and the Adjustment Boards and all court and administrative decisions and regulations of the Commission in respect to this title, together with a cumulative index-digest thereof. [41 Stat. L. 472.]

SEC. 309. [Right of parties to disputes to hearing.] Any party to any dispute to be considered by an Adjustment Board or by the Labor Board shall be entitled to a hearing either in person or by counsel. [41 Stat. L. 472.]

SEC. 310. (a) [Witnesses in investigations by Labor Board — documentary evidence — depositions — fees and mileage.] For the efficient administration of the functions vested in the Labor Board by this title, any member thereof may require, by subpoena issued and signed by himself, the attendance of any witness and the production of any book, paper, document, or other evidence from any place in the United States at any designated place of hearing, and the taking of a deposition before any designated person having power to administer oaths. In the case of a deposition the testimony shall be reduced to writing by the person taking the deposition or under his direction, and shall then be subscribed to by the deponent. Any member of the Labor Board may administer oaths and examine any witness. Any witness summoned before the board and any witness whose deposition is taken shall be paid the same fees and mileage as are paid witnesses in the courts of the United States. [41 Stat. L. 472.]

(b) [Failure to comply with subpoena — contumacy of witness — contempt.] In case of failure to comply with any subpoena or in case of the contumacy of any witness appearing before the Labor Board, the board may invoke the aid of any United States district court. Such court may thereupon order the witness to comply with the requirements of such subpoena, or to give evidence touching the matter in question, as the case may be. Any failure to obey such order may be punished by such court as a contempt thereof. [41 Stat. L. 472.]

(c) [Incriminating testimony.] No person shall be excused from so attending and testifying or deposing, nor from so producing any book, paper, document, or other evidence on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, as to which in obedience to a subpoena and under oath, he may so testify or produce evidence, documentary or otherwise. But no person shall be exempt from prosecution and punishment for perjury committed in so testifying. [41 Stat. L. 472.]

SEC. 311. (a) [Books, etc., relating to matters under investigation by Labor Board — right of access.] When necessary to the efficient administration of the functions vested in the Labor Board by this title, any member, officer,

employee, or agent thereof, duly authorized in writing by the board, shall at all reasonable times for the purpose of examination have access to and the right to copy any book, account, record, paper, or correspondence relating to any matter which the board is authorized to consider or investigate. Any person who upon demand refuses any duly authorized member, officer, employee, or agent of the Labor Board such right of access or copying, or hinders, obstructs, or resists him in the exercise of such right, shall upon conviction thereof be liable to a penalty of \$500 for each such offense. Each day during any part of which such offense continues shall constitute a separate offense. Such penalty shall be recoverable in a civil suit brought in the name of the United States, and shall be covered into the Treasury of the United States as miscellaneous receipts. [41 Stat. L. 472.]

(b) **[Records of officers and employees of United States — right of Labor or Adjustment Board to data.]** Every officer or employee of the United States, whenever requested by any member of the Labor Board or an Adjustment Board duly authorized by the board for the purpose, shall supply to such board any data or information pertaining to the administration of the functions vested in it by this title, which may be contained in the records of his office. [41 Stat. L. 473.]

(c) **[Transfer of books, etc., by President to Labor Board.]** The President is authorized to transfer to the Labor Board any books, papers, or documents pertaining to the administration of the functions vested in the board by this title, which are in the possession of any agency, or railway board of adjustment in connection therewith, established for executing the powers granted the President under the Federal Control Act and which are no longer necessary to the administration of the affairs of such agency. [41 Stat. L. 473.]

SEC. 312. **[Wages or salaries of employees of carriers — rate — payment.]** Prior to September 1, 1920, each carrier shall pay to each employee or subordinate official thereof wages or salary at a rate not less than that fixed by the decision of any agency, or railway board of adjustment in connection therewith, established for executing the powers granted the President under the Federal Control Act, in effect in respect to such employee or subordinate official immediately preceding 12.01 a. m. March 1, 1920. Any carrier acting in violation of any provision of this section shall upon conviction thereof be liable to a penalty of \$100 for each such offense. Each such action with respect to any such employee or subordinate official and each day or portion thereof during which the offense continues shall constitute a separate offense. Such penalty shall be recoverable in a civil suit brought in the name of the United States, and shall be covered into the Treasury of the United States as miscellaneous receipts. [41 Stat. L. 473.]

SEC. 313. **[Violation of decisions of Labor or Adjustment Board.]** The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine. [41 Stat. L. 473.]

SEC. 314. [Employees of Labor Board — expenditures by Board.] The Labor Board may (1) appoint a secretary, who shall receive from the United States an annual salary of \$5,000; and (2) subject to the provisions of the civil-service laws, appoint and remove such officers, employees, and agents; and make such expenditures for rent, printing, telegrams, telephone, law books, books of reference, periodicals, furniture, stationery, office equipment, and other supplies and expenses, including salaries, traveling expenses of its members, secretary, officers, employees, and agents, and witness fees, as are necessary for the efficient execution of the functions vested in the board by this title and as may be provided for by Congress from time to time. All of the expenditures of the Labor Board shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman of the Labor Board. [41 Stat. L. 473.]

SEC. 315. [Appropriation to defray expenses of Labor Board.] There is hereby appropriated for the fiscal year ending June 30, 1920, out of any money in the Treasury not otherwise appropriated, the sum of \$50,000, or so much thereof as may be necessary, to be expended by the Labor Board, for defraying the expenses of the maintenance and establishment of the board, including the payment of salaries as provided in this title. [41 Stat. L. 473.]

SEC. 316. [Board of Mediation and Conciliation — power as extending to disputes under this title.] The powers and duties of the Board of Mediation and Conciliation created by the Act approved July 15, 1913, shall not extend to any dispute which may be received for hearing and decision by any Adjustment Board or the Labor Board. [41 Stat. L. 474.]

For Act of July 15, 1913, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 260.

TITLE IV.—AMENDMENTS TO INTERSTATE COMMERCE ACT.

SEC. 400. [First four paragraphs of section 1 amended.] The first four paragraphs of section 1 of the Interstate Commerce Act, as such paragraphs appear in section 7 of the Commerce Court Act, are hereby amended to read as follows:

For paragraphs of section 1, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 337 et seq.

[Common carriers affected by Act — transporters of persons or property by railroad, water or pipe line — transmitters of intelligence by wire or wireless.] “(1) That the provisions of this Act shall apply to common carriers engaged in —

“(a) The transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

“(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

“(c) The transmission of intelligence by wire or wireless; — from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other

place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States. [41 Stat. L. 474.]

[Transportation or transmission within United States — wholly within one State — carriers by water.] “(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply —

“(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

“(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

“(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district. [41 Stat. L. 474.]

[Terms used defined — “ common carrier ” — “ carrier ” — “ railroad ” — “ transportation ” — “ transmission.”] “(3) The term ‘ common carrier ’ as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word ‘ carrier ’ is used in this Act it shall be held to mean ‘ common carrier.’ The term ‘ railroad ’ as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term ‘ transportation ’ as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term ‘ transmission ’ as used in this Act shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages. [41 Stat. L. 474.]

[Duty of carriers as to transportation, routes, rates, etc.] “(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers. [41 Stat. L. 475.]

[Charges to be just and reasonable — rates for classified telegraph, etc., messages — contracts for exchange of services.] “(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided*, That messages by wire or wireless subject to the provisions of this Act may be classified into day, night, repeated, un-repeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further*, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services. [41 Stat. L. 475.]

[Classification of property to be just and reasonable — regulations — unjust, etc., classification of interstate and foreign commerce.] “(6) It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful. [41 Stat. L. 475.]

SEC. 401. [Fifth, sixth and seventh paragraphs of section 1 numbered.] The fifth, sixth, and seventh paragraphs of section 1 of the Interstate Commerce Act, as such paragraphs appear in section 7 of the Commerce Court Act, are hereby amended by inserting “(7)” at the beginning of such fifth paragraph, “(8)” at the beginning of such sixth paragraph, and “(9)” at the beginning of such seventh paragraph. [41 Stat. L. 475.]

For paragraphs of section 1, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 359 et seq.

SEC. 402. [Paragraphs added to section 1 by Act of May 29, 1917, amended.] The paragraphs added to section 1 of the Interstate Commerce Act by the Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' as amended, in respect of car service, and for other purposes," approved May 29, 1917, are hereby amended to read as follows:

For Act of May 29, 1917, here amended, see 1918 Supp. Fed. Stat. Ann. 389.

[**"Car service" defined.**] "(10) The term 'car service' in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act. [41 Stat. L. 476.]

[**Safe and adequate car service — duty of carrier — rules, regulations and practices.**] "(11) It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful. [41 Stat. L. 476.]

[**Distribution of coal cars.**] "(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of \$100 for each offense, which may be recovered in a civil action brought by the United States. [41 Stat. L. 476.]

[**Rules and regulations with respect to car service — filing, etc.**] "(13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this Act relating thereto. [41 Stat. L. 476.]

[**Rules, regulations and practices with respect to car service — establishment by Commission.**] "(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations or practices. [41 Stat. L. 476.]

[Shortage of equipment, congestion of traffic or other emergency — power of Commission to relieve — preference or priority in time of war.] “(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main linetrack or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded. [41 Stat. L. 476.]

[Routing of traffic over other railroad lines — power of Commission.] “(16) Whenever the Commission is of opinion that any carrier by railroad subject to this Act is for any reason unable to transport the traffic offered it so as properly to serve the public, it may, upon the same procedure as provided in paragraph (15), make such just and reasonable directions with respect to the handling, routing, and movement of the traffic of such carrier and its distribution over other lines of roads, as in the opinion of the Commission will best promote the service in the interest of the public and the commerce of the people, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable. [41 Stat. L. 477.]

[Directions of Commission as to car service by whom carried out — violations by carriers — rights of states with respect to intrastate business.] “(17) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this Act, and of their officers, agents and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal

on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than \$100 nor more than \$500 for each such offense and \$50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: *Provided, however,* That nothing in this Act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this Act. [41 Stat. L. 477.]

[New and extended lines of railroads — abandonment of lines — certificate from Commission.] “(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. [41 Stat. L. 477.]

[Application for certificate from Commission — notice of application.] “(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates. [41 Stat. L. 478.]

[Authority of Commission with respect to issuance of certificate — construction, operation or abandonment of lines without approval of Commission — injunction — penalty.] “(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the

construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than \$5,000 or by imprisonment for not more than three years, or both. [41 Stat. L. 478.]

[Safe and adequate car service — power of Commission to require.] “(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this Act, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this Act, and to extend its line or lines: *Provided*, That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this Act which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of \$100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States. [41 Stat. L. 478.]

[Construction or abandonment of side tracks, etc., wholly within State—electric railways.] “(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.” [41 Stat. L. 478.]

SEC. 403. [Paragraphs added to section 1 by Act of Aug. 10, 1917, numbered.] The fifteenth and sixteenth paragraphs of section 1 of the Interstate Commerce Act, added to such section by the Act entitled “An Act to amend the Act to regulate commerce, as amended, and for other purposes,” approved August 10, 1917, are hereby amended by inserting “(23)” at the beginning of such fifteenth paragraph and “(24)” at the beginning of such sixteenth paragraph. [41 Stat. L. 479.]

For Act of Aug. 10, 1917, here amended, see 1918 Supp. Fed. Stat. Ann. 392.

SEC. 404. [Section 2 amended — special rates, rebates, etc., prohibited.] Section 2 of the Interstate Commerce Act is hereby amended to read as follows:

“Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater

or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." [41 Stat. L. 479.]

For section 2, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 371.

SEC. 405. [First paragraph of section 3 numbered.] The first paragraph of section 3 of the Interstate Commerce Act is hereby amended by inserting "(1)" after the section number at the beginning thereof. [41 Stat. L. 479.]

For first paragraph of section 3, see 4 Fed. Stat. Ann. (2d ed.) 379.

[New paragraph added — payment of tariff rates and charges a prerequisite to delivery of freight.] Section 3 of the Interstate Commerce Act is hereby amended by adding after the first paragraph a new paragraph to read as follows:

"(2) From and after July 1, 1920, no carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination: *Provided*, That the provisions of this paragraph shall not be construed to prohibit any carrier from extending credit in connection with rates and charges on freight transported for the United States, for any department, bureau, or agency thereof, or for any State or Territory or political subdivision thereof, or for the District of Columbia." [41 Stat. L. 479.]

[Second paragraph amended — interchange of traffic — terminal facilities.] The second paragraph of section 3 of the Interstate Commerce Act is hereby amended to read as follows:

"(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

"(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier, by another carrier or other carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in con-

demnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be." [41 Stat. L. 479.]

SEC. 406. [Section 4 amended.] Section 4 of the Interstate Commerce Act is hereby amended to read as follows:

For section 4, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 396.

[Long and short hauls.] "SEC. 4. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuitry, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further*, That rates, fares, or charges existing at the time of the passage of this amendatory Act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission. [41 Stat. L. 480.]

[Competition of railroads with water routes — rates.] "(2) Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points it

shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition." [41 Stat. L. 480.]

SEC. 407. [First paragraph of section 5 amended — pooling agreements — consolidation of carriers.] The first paragraph of section 5 of the Interstate Commerce Act is hereby amended to read as follows:

"SEC. 5. (1) That, except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this Act, it shall be unlawful for any common carrier subject to this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

"(2) Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

"(3) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

"(4) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

"(5) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest. The consolidations herein provided for shall be in harmony with such plan.

"(6) It shall be lawful for two or more carriers by railroad, subject to this Act, to consolidate their properties or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership, management, and operation, under the following conditions:

"(a) The proposed consolidation must be in harmony with and in furtherance of the complete plan of consolidation mentioned in paragraph (5) and must be approved by the Commission;

"(b) The bonds at par of the corporation which is to become the owner of the consolidated properties, together with the outstanding capital stock at par of such corporation, shall not exceed the value of the consolidated properties as determined by the Commission. The value of the properties sought to be consolidated shall be ascertained by the Commission under section 19a of this Act, and it shall be the duty of the Commission to proceed immediately to the ascertainment of such value for the properties involved in a proposed consolidation upon the filing of the application for such consolidation.

"(c) Whenever two or more carriers propose a consolidation under this section, they shall present their application therefor to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties sought to be consolidated is situated and the carriers involved in the proposed consolidation, of the time and place for a public hearing. If after such hearing the Commission finds that the public interest will be promoted by the consolidation and that the conditions of this section have been or will be fulfilled, it may enter an order approving and authorizing such consolidation, with such modifications and upon such terms and conditions as it may prescribe, and thereupon such consolidation may be effected, in accordance with such order, if all the carriers involved assent thereto, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

"(7) The power and authority of the Commission to approve and authorize the consolidation of two or more carriers shall extend and apply to the consolidation of four express companies into the American Railway Express Company, a Delaware corporation, if application for such approval and authority is made to the Commission within thirty days after the passage of this amendatory Act; and pending the decision of the Commission such consolidation shall not be dissolved.

"(8) The carriers affected by any order made under the foregoing provisions of this section and any corporation organized to effect a consolidation approved and authorized in such order shall be, and they are hereby, relieved from the operation of the 'antitrust laws,' as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all

other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section." [41 Stat. L. 480.]

For first paragraph of section 5, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 404.

SEC. 408. [Second paragraph of section 5 amended — paragraph numbered.] The paragraph of section 5 of the Interstate Commerce Act, added to such section by section 11 of the Act entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the sanitation and government of the Canal Zone," approved August 24, 1912, is hereby amended by inserting "(9)" at the beginning thereof. [41 Stat. L. 482.]

For paragraph of section 5, amended by text, see 4 Fed. Stat. Ann. (2d ed.) 404.

[Two paragraphs added to section 5 — water competition.] The two paragraphs of section 11 of such Act of August 24, 1912, which follow the paragraph added by such section to section 5 of the Interstate Commerce Act. are hereby made a part of section 5 of the Interstate Commerce Act. The first paragraph so made a part of section 5 of the Interstate Commerce Act is hereby amended by inserting "(10)" at the beginning thereof and the second such paragraph is hereby amended by inserting "(11)" at the beginning thereof. [41 Stat. L. 482.]

For the two paragraphs of Act of Aug. 24, 1912, added to section 5, see 4 Fed. Stat. Ann. (2d ed.) 572, par. [A], [B].

SEC. 409. [Paragraphs of section 6 numbered.] Section 6 of the Interstate Commerce Act is hereby amended by inserting "(1)" after the section number at the beginning of the first paragraph, "(2)" at the beginning of the second paragraph, "(3)" at the beginning of the third paragraph, "(4)" at the beginning of the fourth paragraph, "(5)" at the beginning of the fifth paragraph, "(6)" at the beginning of the sixth paragraph, "(7)" at the beginning of the seventh paragraph, "(8)" at the beginning of the eighth paragraph, "(9)" at the beginning of the ninth paragraph, "(10)" at the beginning of the tenth paragraph, "(11)" at the beginning of the eleventh paragraph, "(12)" at the beginning of the twelfth paragraph, and "(13)" at the beginning of the thirteenth paragraph. [41 Stat. L. 483.]

For section 6, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 406 et seq.

SEC. 410. [Third paragraph of section 6 amended — proviso added — change of rates, etc.— schedules.] The third paragraph of section 6 of the Interstate Commerce Act is hereby amended by striking out the period at the end thereof and inserting in lieu thereof a colon and the following: "Provided further, That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classifications not changed if, in its judgment, not inconsistent with the public interest." [41 Stat. L. 483.]

For third paragraph of section 6, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 419.

SEC. 411. [Seventh paragraph of section 6 amended — proviso stricken out — "carrier."] The seventh paragraph of section 6 of the Interstate Commerce Act is hereby amended by striking out the proviso at the end. [41 Stat. L. 483.]

SEC. 412. [Thirteenth paragraph of section 6 amended — dock connections between rail and water carriers — construction and operation.] The two paragraphs under (a) of the thirteenth paragraph of section 6 of the Interstate Commerce Act are hereby amended so as to be combined into one paragraph to read as follows:

"(a) To establish physical connection between the lines of the rail carrier and the dock at which interchange of passenger or property is to be made by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of the railroad right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a track or tracks to the dock. The Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier: *Provided*, That construction required by the Commission under the provisions of this paragraph shall be subject to the same restrictions as to findings of public convenience and necessity and other matters as is construction required under section 1 of this Act." [41 Stat. L. 483.]

For thirteenth paragraph of section 6, amended by text, see 4 Fed. Stat. Ann. (2d ed.) 426.

SEC. 413. [Thirteenth paragraph of section 6 further amended — proportional rates.] Paragraph (c) of the thirteenth paragraph of section 6 of the Interstate Commerce Act is hereby amended to read as follows:

"(c) To establish proportional rates or maximum, or minimum, or maximum and minimum proportional rates, by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water." [41 Stat. L. 483.]

For paragraph c of the thirteenth paragraph of section 6, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 427.

SEC. 414. [Section 10 amended — paragraphs numbered — proviso amended — unlawful discrimination in rates.] Section 10 of the Interstate Commerce Act is hereby amended by inserting "(1)" after the section number at the beginning of the first paragraph, "(2)" at the beginning of the second paragraph, "(3)" at the beginning of the third paragraph, and "(4)" at the beginning of the fourth paragraph, and by inserting after the words "transportation of passengers or property," in the proviso in the first paragraph thereof, the words "or the transmission of intelligence." [41 Stat. L. 483.]

For section 10, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 439.

SEC. 415. [Paragraphs of section 12 numbered.] Section 12 of the Interstate Commerce Act is hereby amended by inserting “(1)” after the section number at the beginning of the first paragraph, “(2)” at the beginning of the second paragraph, “(3)” at the beginning of the third paragraph, “(4)” at the beginning of the fourth paragraph, “(5)” at the beginning of the fifth paragraph, “(6)” at the beginning of the sixth paragraph, and “(7)” at the beginning of the seventh paragraph. [41 Stat. L. 484.]

For section 12, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 448.

SEC. 416. [Section 13 amended — paragraphs numbered — two paragraphs added — investigation by Commission.] Section 13 of the Interstate Commerce Act is hereby amended by inserting “(1)” after the section number at the beginning of the first paragraph and “(2)” at the beginning of the second paragraph, and by adding at the end thereof two new paragraphs to read as follows:

“(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

“(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.” [41 Stat. L. 484.]

For section 13, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 453.

SEC. 417. [Paragraphs of section 14 numbered.] Section 14 of the Interstate Commerce Act is hereby amended by inserting “(1)” after the section

number at the beginning of the first paragraph, “(2)” at the beginning of the second paragraph, and “(3)” at the beginning of the third paragraph. [41 Stat. L. 484.]

Sec. 418. [First four paragraphs of section 15 amended.] The first four paragraphs of section 15 of the Interstate Commerce Act are hereby amended to read as follows:

For section 15, amended by text, see 4 Fed. Stat. Ann. (2d ed.) 458 et seq.

[Violations — Commission to determine if charges, classifications, etc., are unjust, discriminatory, etc.— just and reasonable rates.] “SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. [41 Stat. L. 484.]

[Orders to carriers — taking effect of orders — continuance.] “(2) Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. [41 Stat. L. 485.]

[Commission may establish through routes, joint classifications, and rates, etc., on failure of carriers — water connection — electric roads not carrying freight — water transportation.] “(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after

full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water. [41 Stat. L. 485.]

[Through routes — lines embraced — temporary through routes.] “(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest. [41 Stat. L. 485.]

[Transportation of livestock — service required of carrier.] “(5) Transportation wholly by railroad of ordinary livestock in car-load lots destined to or received at public stockyards shall include all necessary service of unloading; and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. The Commission may prescribe or approve just and reasonable rules governing each of such excepted services. Nothing in this paragraph shall be construed to affect the duties and liabilities of the carriers now existing by virtue of law respecting the transportation of other than ordinary livestock, or the duty of performing service as to shipments other than those to or from public stockyards. [41 Stat. L. 486.]

[Divisions of joint rates, fares, or charges by Commission.] “(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge. [41 Stat. L. 486.]

[New rates, classification, etc.—Commission to determine propriety of — suspension until decision — final determination — extension of suspension — hearing on rates increased since January 1, 1910.] “(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change

of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period, but, in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible." [41 Stat. L. 486.]

SEC. 419. [Fifth paragraph of section 15 numbered.] The fifth paragraph of section 15 of the Interstate Commerce Act is hereby amended by inserting "(8)" at the beginning of such paragraph. [41 Stat. L. 487.]

For section 15, amended by text, see 4 Fed. Stat. Ann. (2d ed.) 458 et seq.

SEC. 420. [New paragraphs added to section 15.] Section 15 of the Interstate Commerce Act is hereby amended by inserting after the fifth paragraph two new paragraphs, to read as follows:

For section 15, amended by text, see 4 Fed. Stat. Ann. (2d ed.) 458 et seq.

[Property diverted or delivered contrary to routing instructions.] "(9) Whenever property is diverted or delivered by one carrier to another carrier contrary to routing instructions in the bill of lading, unless such diversion or delivery is in compliance with a lawful order, rule, or regulation of the Commission, such carriers shall, in a suit or action in any court of competent jurisdiction, be jointly and severally liable to the carrier thus deprived of its right to participate in the haul of the property, for the total amount of the rate or charge it would have received had it participated in the haul of the property. The carrier to which the property is thus diverted shall not be liable in such suit or action if it can show, the burden of proof being upon it, that before carrying the property it had no notice, by bill of lading, waybill or otherwise, of the routing instructions. In any judgment which may be rendered the plaintiff shall be allowed to recover against the defendant a reasonable attorney's fee to be taxed in the case. [41 Stat. L. 487.]

[Unrouted traffic — authority of Commission to direct route.] "(10) With respect to traffic not routed by the shipper, the Commission may, whenever the public interest and a fair distribution of the traffic require, direct the route which such traffic shall take after it arrives at the terminus of one carrier or at a junction point with another carrier, and is to be there delivered to another carrier." [41 Stat. L. 488.]

SEC. 421. [Sixth, seventh, eighth and ninth paragraphs of section 15 numbered.] Section 15 of the Interstate Commerce Act is hereby further

amended by inserting "(11)" at the beginning of the sixth paragraph, "(12)" at the beginning of the seventh paragraph, "(13)" at the beginning of the eighth paragraph, and "(14)" at the beginning of the ninth paragraph. [41 Stat. L. 488.]

For section 15, amended by text, see 4 Fed. Stat. Ann. (2d ed.) 458 et seq.

SEC. 422. [Section 15a added.] The Interstate Commerce Act is further amended by inserting after section 15 a new section to be known as section 15a and to read as follows:

[Terms used in section defined — "rates" — "carrier" — "net railway operating income."] "SEC. 15a. (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents. [41 Stat. L. 488.]

[Adjustment of rates by Commission — fair return upon aggregate value of railway property.] "(2) In the exercise of its powers to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country. [41 Stat. L. 488.]

[Determination of what is fair return.] "(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to

5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account. [41 Stat. L. 488.]

[Aggregate value of property of carriers — determination by Commission from time to time.] “(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value. [41 Stat. L. 488.]

[Net railway operating income received by carriers in excess of fair return — holding excess as trustee.] “(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States. [41 Stat. L. 489.]

[Net railway operating income received by carriers in excess of 6 per centum — effect.] “(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of section 209 of this amendatory Act the provisions of this paragraph

shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4). [41 Stat. L. 489.]

[Right of carriers to draw from reserve fund — payment of dividends, interest, rent, etc.] “(7) For the purpose of paying dividends or interest on its stocks, bonds, or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose. [41 Stat. L. 489.]

[Reserve fund of carriers — accumulation.] “(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose. [41 Stat. L. 489.]

[Rules and regulations by Commission — determination and recovery of excess income.] “(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective. [41 Stat. L. 489.]

[General railroad contingent fund paid to Commission — disposition.] “(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositories of the United States subject to the rules promulgated from time to time by the Secretary of the Treasury relating to Government deposits. [41 Stat. L. 490.]

[Loans to carriers from general railroad contingent fund — application.] “(11) A carrier may at any time make application to the Commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in

that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operations, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry. [41 Stat. L. 490.]

[Loans when granted by Commission — terms and conditions.] “(12) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished, which shall be adequate to secure the loan. All such loans shall bear interest at the rate of 6 per centum per annum, payable semiannually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund. [41 Stat. L. 490.]

[Leases of transportation equipment or facilities by carriers — application.] “(13) A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon and to meet the requirements of its obligations under the lease, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry. [41 Stat. L. 490.]

[Leases when made by Commission — terms and conditions.] “(14) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under such lease, the Commission may lease such equipment or facilities purchased by

it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper. The rental charges provided in every such lease shall be at least sufficient to pay a return of 6 per centum per annum, plus allowance for depreciation determined as provided in paragraph (5) of section 20 of this Act, upon the value of the equipment or facilities leased thereunder. All rental charges and other payments received by the Commission in connection with such equipment and facilities, including amounts received under any sale thereof, shall be placed in the general railroad contingent fund. [41 Stat. L. 491.]

[Authority of Commission with respect to purchasing, maintaining, selling, etc., equipment and facilities.] “(15) The Commission may from time to time purchase, contract for the construction, repair and replacement of, and sell, equipment and facilities, and enter into and carry out contracts and other obligations in connection therewith, to the extent that moneys included in the general railroad contingent fund are available therefor, and in so far as necessary to enable it to secure and supply equipment and facilities to carriers whose applications therefor are approved under the provisions of this section, and to maintain and dispose of such equipment and facilities. [41 Stat. L. 491.]

[Rules and regulations by Commission — loans and leases of equipment and facilities.] “(16) The Commission may from time to time prescribe such rules and regulations as it deems necessary to carry out the provisions of this section respecting the making of loans and the lease of equipment and facilities. [41 Stat. L. 491.]

[Reparation for overcharges, etc.—right of shippers.] “(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section. [41 Stat. L. 491.]

[Earnings of carriers from new construction — permission to retain.] “(18) Any carrier, or any corporation organized to construct and operate a railroad, proposing to undertake the construction and operation of a new line of railroad may apply to the Commission for permission to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the completion of the work of construction within a period to be designated by the Commission in its order granting such permission.” [41 Stat. L. 491.]

Subsections 11 and 13 of this section are referred to in an amendment to sec. 210 of the “Transportation Act,” set out in a note under that section on p. 87 of this title.

SEC. 423. [First paragraph of section 16 amended — paragraph numbered.] The first paragraph of section 16 of the Interstate Commerce Act is hereby amended by inserting “(1)” after the section number at the beginning of such paragraph. [41 Stat. L. 491.]

For section 16, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 475 et seq.

SEC. 424. [Second paragraph of section 16 amended — paragraph numbered and last sentence eliminated — new paragraph added relating to limitation of actions by carriers.] The second paragraph of section 16 of the Interstate Commerce Act is hereby amended by inserting "(2)" at the beginning of such paragraph, and by striking out the last sentence thereof and inserting in lieu thereof the following as a new paragraph:

"(3) All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration, begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the district court or State court within one year from the date of the order, and not after." [41 Stat. L. 491.]

For section 16, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 475.

SEC. 425. [Third, fourth, fifth and sixth paragraphs of section 16 numbered.] The third, fourth, fifth, and sixth paragraphs of section 16 of the Interstate Commerce Act are hereby amended by inserting "(4)" at the beginning of the third paragraph, "(5)" at the beginning of the fourth paragraph, "(6)" at the beginning of the fifth paragraph, and "(7)" at the beginning of the sixth paragraph. [41 Stat. L. 492.]

For paragraphs of section 16, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 486, 487.

SEC. 426. [Seventh paragraph of section 16 amended—penalty for carrier not obeying orders.] The seventh paragraph of section 16 of the Interstate Commerce Act is hereby amended to read as follows:

"(8) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this Act shall forfeit to the United States the sum of \$5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense." [41 Stat. L. 492.]

For seventh paragraph, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 487.

SEC. 427. [Eighth and ninth paragraphs of section 16 numbered.] The eighth and ninth paragraphs of section 16 of the Interstate Commerce Act are hereby amended by inserting "(9)" at the beginning of the eighth paragraph and "(10)" at the beginning of the ninth paragraph. [41 Stat. L. 492.]

For paragraphs of section 16, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 487, 488.

SEC. 428. [Tenth paragraph of section 16 amended — employment of attorneys, etc., by Commission — expenses.] The tenth paragraph of section 16 of the Interstate Commerce Act is hereby amended to read as follows:

"(11) The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission." [41 Stat. L. 492.]

For paragraphs of section 16, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 488.

SEC. 429. [Eleventh and twelfth paragraphs of section 16 numbered.] The eleventh and twelfth paragraphs of section 16 of the Interstate Commerce Act are hereby amended by inserting "(12)" at the beginning of the eleventh paragraph and "(13)" at the beginning of the twelfth paragraph. [41 Stat. L. 492.]

For paragraphs of section 16, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 488.

SEC. 430. [First paragraph of section 17 numbered.] Section 17 of the Interstate Commerce Act is hereby amended by inserting "(1)" after the section number at the beginning of the first paragraph. [41 Stat. L. 492.]

For the first paragraph of section 17, amended by the text, see 1918 Supp. Fed. Stat. Ann. 390.

SEC. 431. [Second paragraph of section 17 amended — Commission — divisions — assignments — vacancies.] The second paragraph of section 17 of the Interstate Commerce Act is hereby amended to read as follows:

"(2) The Commission is hereby authorized by its order to divide the members thereof into as many divisions (each to consist of not less than three members) as it may deem necessary, which may be changed from time to time. Such divisions shall be denominated, respectively, division one, division two, and so forth. Any Commissioner may be assigned to and may serve upon such division or divisions as the Commission may direct, and the senior in service of the Commissioners constituting any of said divisions shall act as chairman thereof. In case of vacancy in any division, or of absence or inability to serve thereon of any Commissioner thereto assigned, the chairman of the Commission or any Commissioner designated by him for that purpose, may temporarily serve on said division until the Commission shall otherwise order." [41 Stat. L. 492.]

For the paragraph of section 17, amended by the text, see 1918 Supp. Fed. Stat. Ann. 390.

SEC. 432. [Third and fourth and seventh paragraphs of section 17 numbered — fifth and sixth paragraphs repealed.] The third and fourth paragraphs of section 17 of the Interstate Commerce Act are hereby amended by inserting "(3)" at the beginning of the third paragraph, and "(4)" at the beginning of the fourth paragraph.

The fifth and sixth paragraphs of such section are hereby repealed.

The seventh paragraph of such section is hereby amended by inserting "(5)" at the beginning of such paragraph. [41 Stat. L. 493.]

For paragraphs of section 17, amended by the text, see 1918 Supp. Fed. Stat. Ann. 391, 392.

SEC. 433. [Paragraphs of sections 18 and 19a numbered.] Section 18 of the Interstate Commerce Act is hereby amended by inserting "(1)" after the section number at the beginning of the first paragraph, and "(2)" at the beginning of the second paragraph.

Section 19a of the Interstate Commerce Act is hereby amended by inserting “(a)” after the section number at the beginning of the first paragraph, “(b)” at the beginning of the second paragraph, “(c)” at the beginning of the seventh paragraph, “(d)” at the beginning of the eighth paragraph, “(e)” at the beginning of the ninth paragraph, “(f)” at the beginning of the tenth paragraph, “(g)” at the beginning of the eleventh paragraph, “(h)” at the beginning of the twelfth paragraph, “(i)” at the beginning of the thirteenth paragraph, “(j)” at the beginning of the fourteenth paragraph, “(k)” at the beginning of the fifteenth paragraph, and “(l)” at the beginning of the sixteenth paragraph. [41 Stat. L. 493.]

For paragraphs of sections amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 494, 495.

SEC. 434. [First four paragraphs of section 20 numbered.] Section 20 of the Interstate Commerce Act is hereby amended by inserting “(1)” after the section number at the beginning of the first paragraph, “(2)” at the beginning of the second paragraph, “(3)” at the beginning of the third paragraph, and “(4)” at the beginning of the fourth paragraph. [41 Stat. L. 493.]

For paragraphs of section 20, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 499 et seq.

SEC. 435. [Fifth paragraph of section 20 amended — form of accounts, etc., kept by carriers — depreciation charges — access to records, etc., by Commission.] The fifth paragraph of section 20 of the Interstate Commerce Act is hereby amended to read as follows:

“(5) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses. The Commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by carriers subject to this Act, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda, including

all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers. This provision shall apply to receivers of carriers and operating trustees. The provisions of this section shall also apply to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, kept during the period of Federal control, and placed by the President in the custody of carriers subject to this Act." [41 Stat. L. 493.]

For paragraph of section 20, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 502.

SEC. 436. [Other paragraphs of section 20 numbered.] The sixth paragraph of section 20 of the Interstate Commerce Act is hereby amended by inserting "(6)" at the beginning of such paragraph.

The seventh paragraph of section 20 of the Interstate Commerce Act is hereby amended by striking out "Par. 7," at the beginning of such paragraph and inserting "(7)" in lieu thereof.

The eighth to twelfth paragraphs, inclusive, of section 20 of the Interstate Commerce Act are hereby amended by inserting "(8)" at the beginning of the eighth paragraph, "(9)" at the beginning of the ninth paragraph, "(10)" at the beginning of the tenth paragraph, "(11)" at the beginning of the eleventh paragraph, and "(12)" at the beginning of the twelfth paragraph. [41 Stat. L. 494.]

For paragraphs of section 20, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 504 et seq.

SEC. 437. [Eleventh paragraph of section 20 amended — proviso inserted — loss, etc., on water.] The eleventh paragraph of section 20 of the Interstate Commerce Act is hereby amended by inserting immediately before the first proviso thereof the following:

"*Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by and under the laws and regulations applicable to transportation by water, and the liability of the initial carrier shall be the same as that of such carrier by water." [41 Stat. L. 494.]

For paragraph of section 20, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 506.

SEC. 438. [Eleventh paragraph of section 20 further amended — third proviso — limitation on time as to giving notice of and filing claims and instituting suits.] The third proviso of the eleventh paragraph of section 20 of the Interstate Commerce Act (not counting the proviso added by section 437 of this Act) is hereby amended to read as follows:

"*Provided further*, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice." [41 Stat. L. 494.]

For paragraph of section 20, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 506.

SEC. 439. [Section 20a added.] The Interstate Commerce Act is further amended by inserting therein a new section between section 20 and section 21 to be designated section 20a, and to read as follows:

[**“Carrier” as used in section defined.**] “SEC. 20a. (1) That as used in this section the term ‘carrier’ means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act. [41 Stat. L. 494.]

[**Issuance of securities by carriers — assumption of obligations or liabilities — authorization by Commission.**] “(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed ‘securities’) or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose. [41 Stat. L. 494.]

([**Scope of Commission’s authority as to securities or obligations of carriers.**] “(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2). [41 Stat. L. 495.]

[**Application to Commission for authority — form and contents — certificate of notification.**] “(4) Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application, as also every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier. [41 Stat. L. 495.]

[Subsequent disposition of securities described in application of authority or certificate of notification.] “(5) Whenever any securities set forth and described in any application for authority or certificate of notification as pledged or held unencumbered in the treasury of the carrier shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of by the carrier, such carrier shall, within ten days after such sale, pledge, repledge, or other disposition, file with the Commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the Commission. [41 Stat. L. 495.]

[Notice of filing of application for authority — intervention by State officials — hearing on application.] “(6) Upon receipt of any such application for authority the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the Commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority. [41 Stat. L. 495.]

[Jurisdiction of Commission as exclusive and plenary.] “(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein. [41 Stat. L. 495.]

[Guaranty of securities by United States.] “(8) Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States. [41 Stat. L. 495.]

[Short term notes as affected by foregoing provisions — power of carriers to issue — par value — certificate of notification.] “(9) The foregoing provisions of this section shall not apply to notes to be issued by the carrier maturing not more than two years after the date thereof and aggregating (together with all other then outstanding notes of a maturity of two years or less) not more than 5 per centum of the par value of the securities of the carrier then outstanding. In the case of securities having no par value, the par value for the purposes of this paragraph shall be the fair market value as of the date of issue. Within ten days after the making of such notes the carrier issuing the same shall file with the Commission a certificate of notification, in such form as may from time to time be determined and prescribed by the Commission, setting forth as nearly as may be the same matters as those required in respect of applications for authority to issue other securities: *Provided*, That in any subsequent funding of such notes the provisions of this section respecting other securities shall apply. [41 Stat. L. 495.]

[Reports by carriers as to securities issued.] “(10) The Commission shall require periodical or special reports from each carrier hereafter issuing any

securities, including such notes, which shall show, in such detail as the Commission may require, the disposition made of such securities and the application of the proceeds thereof. [41 Stat. L. 496.]

[Securities issued or obligation or liability assumed without complying with requirements as to authorization — effect.] “(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the Commission's order or orders in the premises, or any application not authorized by the Commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$1,000 nor more than \$10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court. [41 Stat. L. 496.]

[Officers and directors of carriers — qualifications — participation in certain benefits or profits prohibited.] “(12) After December 31, 1921, it shall be unlawful for any person to hold the position of officer or director of more than one carrier, unless such holding shall have been authorized by order of the Commission, upon due showing, in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby. After this section takes effect it shall be unlawful for any officer or director of any carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any

of the proceeds thereof, or to participate in the making or paying of any dividends of an operating carrier from any funds properly included in capital account. Any violation of these provisions shall be a misdemeanor, and on conviction in any United States court having jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court." [41 Stat. L. 496.]

SEC. 440. [Membership of Commission — number — terms — qualifications — salaries — secretary.] Section 24 of the Interstate Commerce Act is hereby amended to read as follows:

"SEC. 24. That the Commission is hereby enlarged so as to consist of eleven members, with terms of seven years, and each shall receive \$12,000 compensation annually. The qualifications of the members and the manner of payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December 31, 1923, and one for a term expiring December 31, 1924. The terms of the present commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. Not more than six commissioners shall be appointed from the same political party. Hereafter the salary of the secretary of the Commission shall be \$7,500 a year." [41 Stat. L. 497.]

For section 24, amended by the text, see 4 Fed. Stat. Ann. (2d ed.) 544.

SEC. 441. [Sections 25, 26 and 27 added.] The Interstate Commerce Act is hereby further amended by adding at the end thereof three new sections, to read as follows:

[Common carriers by water in foreign commerce — filing schedules with Commission — contents.] "SEC. 25. (1) That every common carrier by water in foreign commerce, whose vessels are registered under the laws of the United States, shall file with the Commission, within thirty days after this section becomes effective and regularly thereafter as changes are made, a schedule or schedules showing for each of its steam vessels intended to load general cargo at ports in the United States for foreign destinations (a) the ports of loading, (b) the dates upon which such vessels will commence to receive freight and dates of sailing, (c) the route and itinerary such vessels will follow and the ports of call for which cargo will be carried. [41 Stat. L. 497.]

[Quotation of rates by carriers by water on request.] "(2) Upon application of any shipper a carrier by railroad shall make request for, and the carrier by water shall upon receipt of such request name, a specific rate applying for such sailing, and upon such commodity as shall be embraced in the inquiry, and shall name in connection with such rate, port charges, if any, which accrue

in addition to the vessel's rates and are not otherwise published by the railway as in addition to or absorbed in the railway rate. Vessel rates, if conditioned upon quantity of shipment, must be so stated and separate rates may be provided for carload and less than carload shipments. The carrier by water, upon advices from a carrier by railroad, stating that the quoted rate is firmly accepted as applying upon a specifically named quantity of any commodity, shall, subject to such conditions as the Commission by regulation may prescribe, make firm reservation from unsold space in such steam vessel as shall be required for its transportation and shall so advise the carrier by railroad, in which advices shall be included the latest available information as to prospective sailing date of such vessel. [41 Stat. L. 497.]

[Modification of schedules — publication of schedules — rules and regulations.] “(3) As the matters so required to be stated in such schedule or schedules are changed or modified from time to time, the carrier shall file with the Commission such changes or modifications as early as practicable after such modification is ascertained. The Commission is authorized to make and publish regulations not inconsistent herewith governing the manner and form in which such carriers are to comply with the foregoing provisions. The Commission shall cause to be published in compact form, for the information of shippers of commodities throughout the country, the substance of such schedules, and furnish such publications to all railway carriers subject to this Act, in such quantities that railway carriers may supply to each of their agents who receive commodities for shipment in such cities and towns as may be specified by the Commission, a copy of said publication; the intent being that each shipping community sufficiently important, from the standpoint of the export trade, to be so specified by the Commission shall have opportunity to know the sailings and routes, and to ascertain the transportation charges of such vessels engaged in foreign commerce. Each railway carrier to which such publication is furnished by the Commission is hereby required to distribute the same as aforesaid and to maintain such publication as it is issued from time to time, in the hands of its agents. The Commission is authorized to make such rules and regulations not inconsistent herewith respecting the distribution and maintenance of such publications in the several communities so specified as will further the intent of this section. [41 Stat. L. 498.]

[Bills of lading — issuance — form and contents.] “(4) When any consignor delivers a shipment of property to any of the places so specified by the Commission, to be delivered by a railway carrier to one of the vessels upon which space has been reserved at a specified rate previously ascertained, as provided herein, for the transportation by water from and for a port named in the aforesaid schedule, the railway carrier shall issue a through bill of lading to the point of destination. Such bill of lading shall name separately the charge to be paid for the railway transportation, water transportation, and port charges, if any, not included in the rail or water transportation charge; but the carrier by railroad shall not be liable to the consignor, consignee, or other person interested in the shipment after its delivery to the vessel. The Commission shall, in such manner as will preserve for the carrier by water the protection of limited liability provided by law, make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill

of lading. In all such cases it shall be the duty of the carrier by railroad to deliver such shipment to the vessel as a part of its undertaking as a common carrier. [41 Stat. L. 498.]

[Issuance of bill of lading as constituting "arrangement for continuous carriage."] "(5) The issuance of a through bill of lading covering shipments provided for herein shall not be held to constitute 'an arrangement for continuous carriage or shipment' within the meaning of this Act. [41 Stat. L. 498.]

[Safety devices on railroads — authority of Commission — failure to install — negligence.] "SEC. 26. That the Commission may, after investigation, order any carrier by railroad subject to this Act, within a time specified in the order, to install automatic train-stop or train-control devices or other safety devices, which comply with specifications and requirements prescribed by the Commission, upon the whole or any part of its railroad. such order to be issued and published at least two years before the date specified for its fulfillment: *Provided*, That a carrier shall not be held to be negligent because of its failure to install such devices upon a portion of its railroad not included in the order; and any action arising because of an accident happening upon such portion of its railroad shall be determined without consideration of the use of such devices upon another portion of its railroad. Any common carrier which refuses or neglects to comply with any order of the Commission made under the authority conferred by this section shall be liable to a penalty of \$100 for each day that such refusal or neglect continues, which shall accrue to the United States, and may be recovered in a civil action brought by the United States. [41 Stat. L. 498.]

[Name of Act — "Interstate Commerce Act."] "SEC. 27. That this Act may be cited as the 'Interstate Commerce Act.' " [41 Stat. L. 499.]

TITLE V.— MISCELLANEOUS PROVISIONS.

SEC. 500. [Inland waterway transportation — promotion and development — duty of Secretary of War.] It is hereby declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

It shall be the duty of the Secretary of War, with the object of promoting, encouraging, and developing inland waterway transportation facilities in connection with the commerce of the United States, to investigate the appropriate types of boats suitable for different classes of such waterways; to investigate the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, and also railroad spurs and switches connecting with such terminals, with a view to devising the types most appropriate for different locations, and for the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities, cities, and towns regarding the appropriate location of such terminals, and to cooperate with them in the preparation of plans for suitable terminal facilities; to investigate the existing status of water transportation upon the different inland waterways

of the country, with a view to determining whether such waterways are being utilized to the extent of their capacity, and to what extent they are meeting the demands of traffic, and whether the water carriers utilizing such waterways are interchanging traffic with the railroads; and to investigate any other matter that may tend to promote and encourage inland water transportation. It shall also be the province and duty of the Secretary of War to compile, publish, and distribute, from time to time, such useful statistics, data, and information concerning transportation on inland waterways as he may deem to be of value to the commercial interests of the country.

The words "inland waterway" as used in this section shall be construed to include the Great Lakes. [41 Stat. L. 499.]

SEC. 501. [Purchases, etc., by common carriers — competitive bidding.]

This section will be found under the title **TRADE COMBINATIONS AND TRUSTS**, *post*.

SEC. 502. [Invalidity of part of Act — effect on remainder.] That if any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid such judgment shall not affect, impair, or invalidate the remainder of the Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment has been rendered. [41 Stat. L. 499.]

* * * **[“Transportation Act” — Certification of amounts due carriers — Secs. 202 and 204 affected.]** The Interstate Commerce Commission, in certifying to the Secretary of the Treasury the amount payable to any carrier under paragraphs (f) and (g) of section 204 of the Transportation Act, 1920, also shall certify to the Secretary of the Treasury such sums, if any, as may be due from such carrier to the President (as operator of transportation systems under Federal control) on account of traffic balances or other indebtedness. The amount so certified to be due the President, upon his request, shall be deducted by the Secretary of the Treasury from the amount so certified to be due such carrier and thereupon shall be transferred from the appropriation made in paragraph (g) of the said section 204 and credited by him to the appropriation made in section 202 of the Transportation Act, 1920. Such deductions shall be considered as a payment pro tanto of such indebtedness to the Government. [41 Stat. L. 590.]

This is from the Deficiency Appropriation Act of May 8, 1920, ch. 172. For secs. 202 and 204 of the Transportation Act, mentioned in the text, see *supra*, this title, pp. 74, 76.

INTOXICATING LIQUORS

See **INDIANS**

IRRIGATION

See INDIANS; WATERS

JONES SHIPPING ACT

See SHIPPING AND NAVIGATION

JUDICIAL OFFICERS

Act of May 29, 1920, ch. 212, 127.

Moneys in Possession of Officers of United States Courts -- Conversion, 127.

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 128.

Sec. 1. District Attorney — Allowance in Lieu of Subsistence, 128.

Assistant District Attorneys — Salaries, 128.

United States District Courts — Clerks — Salaries — Office Expenses, 128.

Criers and Bailiffs — Attendance — Vacation, 128.

An Act To provide for the punishment of officers of United States courts wrongfully converting moneys coming into their possession, and for other purposes.

[*Act of May 29, 1920, ch. 212, 41 Stat. L. 630.*]

[**Moneys in possession of officers of United States courts — conversion.**]
That any United States marshal, clerk, receiver, referee, trustee, or other officer of a United States court, or any deputy, assistant, or employee of any such marshal, clerk, receiver, referee, trustee, or other officer who shall, after demand by the party entitled thereto, unlawfully retain or who shall convert to his own use or to the use of another any moneys received for or on account of costs or advance deposits to cover fees, expenses, or costs, deposits for fees or expenses in bankruptcy cases, composition funds or money of bankrupt estates, fees in naturalization matters, or any other money whatever which has come into his hands by virtue of his official relation or by the fact of his official position or employment shall be deemed guilty of embezzlement and shall, where the offense is not otherwise punishable by some statute of the United States, be fined not more than double the value of the money thus retained or converted or imprisoned not more than ten years, or both; and it shall not be a defense in such case that the accused person had an interest, contingent or otherwise, in some part of such moneys or of the fund from which they were retained or converted.
[*41 Stat. L. 630.*]

[SEC. 1.] * * * **[District attorneys — allowance in lieu of subsistence.]** That United States district attorneys and their regular assistants may be granted a per diem of not to exceed \$4 in lieu of subsistence, instead of, but under the conditions prescribed for, the present allowance for actual expenses of subsistence. [41 Stat. L. 923.]

This and the three paragraphs which follow are from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

* * * **[Assistant district attorneys — salaries.]** That except as otherwise prescribed by law the compensation of such of the assistant district attorneys authorized by section 8 of the Act approved May 28, 1896, as the Attorney General may deem necessary, may be fixed at not exceeding \$3,000 per annum. [41 Stat. L. 923.]

See note to first paragraph.

For the Act of May 28, 1896, sec. 8, mentioned in text, see 4 Fed. Stat. Ann. 622.

* * * **[United States district courts — clerks — salaries — office expenses.]** That the provisions of the Act entitled "An Act to fix the salaries of the clerks of the United States district courts and to provide for their office expenses, and for other purposes," approved February 26, 1919, shall be applicable on and after July 1, 1920, to the clerk of the Supreme Court of the District of Columbia, excepting that said clerk shall be appointed as heretofore by the Chief Justice of said Court. [41 Stat. L. 923.]

See note to first paragraph.

For the Act of Feb. 26, 1919, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 224.

* * * **[Criers and bailiffs — attendance — vacation.]** That all persons employed under section 715 of the Revised Statutes shall be deemed to be in actual attendance when they attend upon the order of the courts: *Provided further*, That no such person shall be employed during vacation. [41 Stat. L. 924.]

See note to first paragraph.

For R. S. sec. 715 (now Jud. Code sec. 5), mentioned in the text, see 4 Fed. Stat. Ann. (2d ed.) 819 note.

A provision identical with the above was contained in Sundry Civil Appropriation Act of July 19, 1919, ch. 24, and will be found in 1919 Supp. Fed. Stat. Ann. 227.

JUDICIARY

Act of Jan. 21, 1920, ch. 50, 129.

New York Judicial Districts — Jud. Code, sec. 97 Amended, 129.

Act of Jan. 29, 1920, ch. 57, 130.

Kentucky Judicial Districts — Jud. Code, sec. 83 Amended, 130.

Act of March 17, 1920, ch. 101, 131.

Sec. 1. North Carolina Judicial Districts — Jud. Code, sec. 98 Amended, 131.

2. Repeal of Law Providing for Additional Terms at Raleigh, 132.

Act of April 16, 1920, ch. 146, 132.

Removal of Causes from State Courts — Service of Process, 132.

Act of June 4, 1920, ch. 223 (Diplomatic and Consular Appropriation Act), 132.

United States Court for China — Commissioner — Appointment — Duties — Compensation, 132.

Expenses of Judge and District Attorney — Probate and Administration Proceedings — Inheritance Taxes, 133.

CROSS-REFERENCES

See also *COAST GUARD; JUDICIAL OFFICERS; JUSTICE DEPARTMENT*

An Act To amend section 97 of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911.

[*Act of Jan. 21, 1920, ch. 50, 41 Stat. L. 394.*]

[**New York judicial districts — Jud. Code, sec. 97 amended.**] That section 97 of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, be, and it is, amended so as to read as follows:

"SEC. 97. The State of New York is divided into four judicial districts, to be known as the northern, eastern, southern, and western districts of New York. The northern district shall include the territory embraced on the 1st day of July, 1910, in the counties of Albany, Broome, Cayuga, Chenango, Clinton, Cortland, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Jefferson, Lewis, Madison, Montgomery, Oneida, Onondaga, Oswego, Otsego, Rensselaer, Saint Lawrence, Saratoga, Schenectady, Schoharie, Tioga, Tompkins, Warren, and Washington, with the waters thereof. Terms of the district court for said district shall be held at Albany on the second Tuesday in February; at Utica on the first Tuesday in December; at Binghamton on the second Tuesday in June; at Auburn on the first Tuesday in October; at Syracuse on the first Tuesday in April; and, in the discretion of the judge of the court, one term annually at such time and place within the counties of Rensselaer, Saratoga, Onondaga, Saint Lawrence, Clinton, Jefferson, Oswego, and Franklin, as he may from time to time appoint. Such appointment shall be made by notice of at least twenty days published in a newspaper published at the place where said court is to be held. The eastern district shall include the territory embraced

on the 1st day of July, 1910, in the counties of Richmond, Kings, Queens, Nassau, and Suffolk, with the waters thereof. Terms of the district court for said district shall be held at Brooklyn on the first Wednesday in every month. The southern district shall include the territory embraced on the 1st day of July, 1910, in the counties of Columbia, Dutchess, Greene, New York, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester, with the waters thereof. Terms of the district court for said district shall be held at New York City on the first Tuesday in each month. The district courts of the southern and eastern districts shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters; all processes or orders issued within either of said courts or by any judge thereof shall run and be executed in any part of said waters. The western district shall include the territory embraced on the 1st day of July, 1910, in the counties of Allegany, Cattaraugus, Chautauqua, Chemung, Erie, Genesee, Livingston, Monroe, Niagara, Ontario, Orleans, Schuyler, Seneca, Steuben, Wayne, Wyoming, and Yates, with the waters thereof. Terms of the district court for said district shall be held at Elmira on the second Tuesday in January; at Buffalo on the second Tuesdays in March and November; at Rochester on the second Tuesday in May; at Jamestown on the second Tuesday in July; at Lockport on the second Tuesday in October; and at Canandaigua on the second Tuesday in September. The regular sessions of the district court for the western district for the hearing of motions, and for proceedings in bankruptcy and the trial of causes in admiralty, shall be held at Buffalo at least two weeks in each month of the year, except August, unless the business is sooner disposed of. The times for holding the same and such other special sessions as the court shall deem necessary shall be fixed by rules of the court. All process in admiralty causes and proceedings shall be made returnable at Buffalo. The judge of any district in the State of New York may perform the duties of the judge of any other district in such State upon the request of any resident judge entered in the minutes of his court; and in such cases such judge shall have the same powers as are vested in the resident judge." [41 Stat. L. 394.]

For Judicial Code, sec. 97, amended by this Act, see 5 Fed. Stat. Ann. (2d ed.) 578.

An Act To amend the Act establishing the eastern district of Kentucky.

[Act of Jan. 29, 1920, ch. 57, 41 Stat. L. 400.]

[Kentucky judicial districts — Jud. Code, sec. 83 amended.] That regular terms of the District Court of the United States for the Eastern District of Kentucky shall be held at the following times and places, namely:

At Jackson: Beginning on the first Monday in March and the third Monday in September in each year.

At Frankfort: Beginning on the second Monday in March and the fourth Monday in September in each year.

At Covington: Beginning on the first Monday in April and the third Monday in October in each year.

At Richmond: Beginning on the fourth Monday in April and the second Monday in November in each year.

At London: Beginning on the second Monday in May and the fourth Monday in November in each year.

At Catlettsburg: Beginning on the fourth Monday in May and the second Monday in December in each year.

At Lexington: Beginning on the second Monday in January and the second Monday in June in each year: *Provided*, That suitable rooms and accommodations for holding court at Lexington shall be furnished without expense to the United States.

And at such other times and places as may hereafter be provided by law.

The clerk of the court for the eastern district of Kentucky shall maintain an office in charge of himself, a deputy, or a clerical assistant, at each of the places of holding court within said district. [41 Stat. L. 400.]

The eastern district of Kentucky was established by Jud. Code, sec. 83, 5 Fed. Stat. Ann. (2d ed.) 566.

An Act To amend section 98 of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, as amended.

[Act of March 17, 1920, ch. 101, 41 Stat. L. 531.]

[SEC. 1.] [North Carolina judicial districts — Jud. Code, sec. 98 amended.] That section 98 of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, as amended, is hereby amended to read as follows:

"SEC. 98. The State of North Carolina is divided into two districts, to be known as the eastern and western districts of North Carolina. The eastern district shall include the territory embraced on the 1st day of July, 1910, in the counties of Beaufort, Bertie, Bladen, Brunswick, Camden, Chatham, Cumberland, Currituck, Craven, Columbus, Chowan, Carteret, Dare, Duplin, Durham, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Harnett, Hertford, Hyde, Johnston, Jones, Lenoir, Lee, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Robeson, Richmond, Sampson, Scotland, Tyrrell, Vance, Wake, Warren, Washington, Wayne, and Wilson. Terms of the district court for the eastern district shall be held at Laurinburg on the Monday before the last Mondays in March and September; at Wilson on the first Mondays in April and October; at Elizabeth City on the second Mondays in April and October; at Washington on the third Mondays in April and October; at Newbern on the fourth Mondays in April and October; at Wilmington on the second Monday after the fourth Mondays in April and October; and at Raleigh on the fourth Monday after the fourth Mondays in April and October and in addition for the trial of civil cases on the first Mondays in March and September: *Provided*, That the city of Washington, the city of Laurinburg, and the city of Wilson shall each provide and furnish at its own expense a suitable and convenient place for holding the district court at Washington, at Laurinburg, and at Wilson until a courthouse shall be constructed by the United States. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Raleigh, at Wilmington, at Newbern, at Elizabeth City, at Washington, at Laurinburg, and at Wilson, which shall be kept open at all times for the transaction of the business of the court.

"The western district shall include the territory embraced on the 1st day of July, 1910, in the counties of Alamance, Alexander, Ashe, Alleghany, Anson, Buncombe, Burke, Caswell, Cabarrus, Catawba, Cleveland, Caldwell, Clay, Cherokee, Davidson, Davie, Forsyth, Guilford, Gaston, Graham, Henderson, Haywood, Iredell, Jackson, Lincoln, Montgomery, Mecklenburg, Mitchell, McDowell, Madison, Macon, Orange, Polk, Randolph, Rockingham, Rowan, Rutherford, Stanly, Stokes, Surry, Swain, Transylvania, Union, Wilkes, Watauga, Yadkin, and Yancey. Terms of the district court for the western district shall be held in Greensboro on the first Mondays in June and December; at Statesville on the third Mondays in April and October; at Salisbury on the fourth Mondays in April and October; at Asheville on the first Mondays in May and November; at Charlotte on the first Mondays in April and October; and at Wilkesboro on the fourth Mondays in May and November. The clerk of the court for the western district shall maintain an office in charge of himself or a deputy at Greensboro, at Asheville, at Statesville, and at Wilkesboro, which shall be kept open at all times for the transaction of the business of the court." [41 Stat. L. 531.]

For Jud. Code, sec. 98, amended by this Act, see 5 Fed. Stat. Ann. (2d ed.) 580.

SEC. 2. [Repeal of law providing for additional terms at Raleigh.] That the Act entitled "An Act providing for the establishment of two additional terms of the district court for the eastern district of North Carolina at Raleigh, North Carolina," approved April 27, 1916, is hereby repealed. [41 Stat. L. 532.]

An Act Providing for service of process in causes removed from a State or other court to a United States court.

[Act of April 16, 1920, ch. 146, 41 Stat. L. 554.]

[Removal of causes from state courts — service of process.] That hereafter, in all cases removed from any State court to any United States court for trial in which any one or more of the defendants has not been served with process or in which the same has not been perfected prior to such removal, or in which the process served upon the defendant or defendants, or any of them, proves to be defective, such process may be completed by the United States court through its officers, or new process as to defendants upon whom process has not been completed may be issued out of such United States court, or service may be perfected in such court in the same manner as in cases which are originally filed in such United States court: *Provided*, Nothing in this Act shall be construed to deprive any defendant upon whom process is so served after removal, of his right to move to remand the cause to the State court, the same as if process had been served upon him prior to such removal. [41 Stat. L. 554.]

* * * [United States Court for China — commissioner — appointment — duties — compensation.] The judge of the United States court for China is authorized to appoint, as in the district courts of the United States and with similar powers and tenure of office, a United States commissioner who shall be an attorney regularly admitted to practice before the said United States court

for China and who, when appointed, shall be in addition ex officio judge of the consular court for the district of Shanghai, with all of the authority and jurisdiction now exercised by the vice consul acting by virtue of the Act of Congress of March 4, 1915 (Thirty-eighth United States Statutes at Large, part 1, third session, chapter 145, page 1122), which authority and jurisdiction are hereby transferred: *Provided*, That at the discretion of the judge of said court, he may appoint the clerk of the court to perform the duties of commissioner without additional compensation therefor. In the event that it is not practicable or desirable so to appoint the clerk to act as commissioner, the judge may, with approval of the Secretary of State, appoint some qualified attorney to act as commissioner who shall, if not an officer of the court, receive such compensation as may be fixed by the Secretary of State not exceeding \$5 for each day of service actually rendered. [41 Stat. L. 746.]

This and the paragraph which follows are from the Diplomatic and Consular Appropriation Act of June 4, 1920, ch. 223.

[Expenses of judge and district attorney — probate and administration proceedings — inheritance taxes.] The judge of the said court and the district attorney shall, when the sessions of the court are held at other cities than Shanghai, receive in addition to their salaries their necessary actual expenses during such sessions, not to exceed \$8 per day each, and so much as may be necessary for said purposes during the fiscal year ending June 30, 1921, is hereby appropriated: *Provided*, That in probate and administration proceedings, there shall be collected by said clerk, before entering the order of final distribution, to be paid into the Treasury of the United States, the same inheritance taxes from time to time collected under the laws enacted by the Congress of the United States from the estates of decedents residing within the territorial jurisdiction of the United States. [41 Stat. L. 746.]

See note to preceding paragraph.

JUSTICE DEPARTMENT

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 133.

Sec. 1. Purchases and Contracts for Services Rendered — Advertisements for Proposals — R. S. Sec. 3709 affected, 133.

[SEC. 1.] * * * [Purchases and contracts for services rendered — advertisements for proposals — R. S. sec. 3709 affected.] Hereafter section 3709 of the Revised Statutes of the United States shall not be construed to apply to any purchase or service rendered for the Department of Justice when the aggregate amount involved does not exceed the sum of \$25. [41 Stat. L. 677.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214.

For R. S. sec. 3709, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 336.

LABOR

Act of June 5, 1920, ch. 250 (" Merchant Marine Act, 1920 "), 134.

Sec. 16. United States Shipping Board Emergency Fleet Corporation — Housing Shipyard Employees — Provisions of Act of March 1, 1918, Terminated, 134.

CROSS-REFERENCES

See also *INTERSTATE COMMERCE; POSTAL SERVICE; PUBLIC OFFICERS AND EMPLOYEES; VOCATIONAL REHABILITATION*

SEC. 16. [United States Shipping Board Emergency Fleet Corporation — housing shipyard employees — provisions of Act of March 1, 1918, terminated.] That all authorization to purchase, build, requisition, lease, exchange, or otherwise acquire houses, buildings or land under the Act entitled "An Act to authorize and empower the United States Shipping Board Emergency Fleet Corporation to purchase, lease, requisition, or otherwise acquire, and to sell or otherwise dispose of improved or unimproved lands, houses, buildings, and for other purposes," approved March 1, 1918, is hereby terminated: *Provided, however,* That expenditures may be made under said Act for the repair of houses and buildings already constructed, and the completion of such houses or buildings as have heretofore been contracted for or are under construction, if considered advisable, and the board is authorized and directed to dispose of all such properties or the interest of the United States in all such properties at as early a date as practicable, consistent with good business and the best interests of the United States. [41 Stat. L. 994.]

This is from the "Merchant Marine Act, 1920" of June 5, 1920, ch. 250. The act will be found in the title SHIPPING AND NAVIGATION, *post*.

For Act of March 1, 1918, here terminated, see 1918 Supp. Fed. Stat. Ann. 440.

LABOR DEPARTMENT

Act of June 5, 1920, ch. 248, 134.

Sec. 1. Women's Bureau — Establishment, 134.

2. Director of Bureau — Appointment — Qualifications — Compensation — Duty of Bureau — Investigations and Reports, 135.

3. Assistant Director — Appointment — Compensation — Duties, 135.

4. Chief Clerk and Other Employees, 135.

5. Quarters for Work of Bureau, 135.

6. Act When in Effect, 135.

An Act To establish in the Department of Labor a bureau to be known as the Women's Bureau.

[Act of June 5, 1920, ch. 248, 41 Stat. L. 987.]

[SEC. 1.] [Women's Bureau — establishment.] That there shall be established in the Department of Labor a bureau to be known as the Women's Bureau. [41 Stat. L. 987.]

SEC. 2. [Director of bureau — appointment — qualifications — compensation — duty of bureau — investigations and reports.] That the said bureau shall be in charge of a director, a woman, to be appointed by the President, by and with the advice and consent of the Senate, who shall receive an annual compensation of \$5,000. It shall be the duty of said bureau to formulate standards and policies which shall promote the welfare of wage earning women, improve their working conditions, increase their efficiency, and advance their opportunities for profitable employment. The said bureau shall have authority to investigate and report to the said department upon all matters pertaining to the welfare of women in industry. The director of said bureau may from time to time publish the results of these investigations in such a manner and to such extent as the Secretary of Labor may prescribe. [41 Stat. L. 987.]

SEC. 3. [Assistant director — appointment — compensation — duties.] That there shall be in said bureau an assistant director, to be appointed by the Secretary of Labor, who shall receive an annual compensation of \$3,500 and shall perform such duties as shall be prescribed by the director and approved by the Secretary of Labor. [41 Stat. L. 987.]

SEC. 4. [Chief clerk and other employees.] That there is hereby authorized to be employed by said bureau a chief clerk and such special agents, assistants, clerks, and other employees at such rates of compensation and in such numbers as Congress may from time to time provide by appropriations. [41 Stat. L. 987.]

SEC. 5. [Quarters for work of bureau.] That the Secretary of Labor is hereby directed to furnish sufficient quarters, office furniture and equipment, for the work of this bureau. [41 Stat. L. 987.]

SEC. 6. [Act when in effect.] That this Act shall take effect and be in force from and after its passage. [41 Stat. L. 987.]

LIBEL

See SHIPPING AND NAVIGATION

LIBERTY BONDS

See CORPORATIONS; PUBLIC DEBT

LIFE SAVING

See COAST GUARD

LIGHTS AND BUOYS

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 136.

Sec. 1. Post Lantern Lights, etc.— Establishment on Yukon River, 136.

Act of June 5, 1920, ch. 264, 136.

Sec. 2. Bureau of Lighthouses — Salary of Superintendent of Naval Construction, 136.

CROSS-REFERENCE

See also *COAST GUARD*

[SEC. 1.] * * * [Post-lantern lights, etc.— establishment on Yukon river.] Hereafter post-lantern lights and other aids to navigation may be established and maintained, in the discretion of the Commissioner of Lighthouses, on the Yukon River and its tributaries, Alaska. The cost thereof shall be paid out of the annual appropriations for the Lighthouse Service. [41 Stat. L. 927.]

This is from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

An Act To authorize aids to navigation and for other works in the Lighthouse Service, and for other purposes.

[Act of June 5, 1920, ch. 264, 41 Stat. L. 1057.]

SEC. 2. [Bureau of Lighthouses — salary of Superintendent of Naval Construction.] That hereafter the salary of the Superintendent of Naval Construction in the Bureau of Lighthouses shall be \$4,000 per annum. [41 Stat. L. 1059.]

Section 1 of the above Act is omitted, as it is temporary.

MAILS

See *POSTAL SERVICE*; *SHIPPING AND NAVIGATION*

MARINE CORPS

See *NAVY*; *WAR DEPARTMENT AND MILITARY ESTABLISHMENT*

MARINE HOSPITALS

See *HOSPITALS AND ASYLUMS*

MARINE INSURANCE

See SHIPPING AND NAVIGATION

MARITIME LIENS

See SHIPPING AND NAVIGATION

MEDALS OF HONOR

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

MEDICAL CORPS

See NAVY

MERCHANT MARINE ACT

See SHIPPING AND NAVIGATION

MILITARY ACADEMY

Act of March 30, 1920, ch. 112, 137.

Surplus Tools and Material Belonging to War Department — Temporary Buildings, 137.

Course of Instruction, 138.

Appointees — Qualifications — R. S. sec. 1318 Amended, 138.

An Act Making appropriations for the support of the Military Academy for the fiscal year ending June 30, 1921, and for other purposes.

[Act of March 30, 1920, ch. 112, 41 Stat. L. 538.]

• • • [Surplus tools and material belonging to War Department — temporary buildings.] The Secretary of War is hereby directed to turn over to the United States Military Academy without expense all such surplus material as may be available and necessary for the construction of temporary buildings; also, surplus tools and matériel for use in the instruction of cadets at the academy: *Provided*, That to cover the cost of labor in the construction of such temporary buildings there is hereby appropriated the sum of \$10,000. [41 Stat. L. 547.]

* * * **Course of instruction:** The course of instruction at the United States Military Academy shall be four years: *Provided*, That any person heretofore nominated in accordance with regulations, for appointment to fill a vacancy which would have resulted from the graduation of a cadet during the present year, may be so appointed notwithstanding the retention of such cadet at the academy: *Provided further*, That any cadet now at the academy may at his option, exercised prior to June 11, 1920, continue at the academy one additional year and postpone thereby his prospective graduation, and cadets not electing so to prolong their course shall be graduated in the years assigned to their respective classes prior to the passage of this Act. [41 Stat. L. 548.]

* * * **[Appointees — qualifications — R. S. Sec. 1318 amended.]** That section 1318, Revised Statutes, be, and the same is hereby, amended to read as follows: "Appointees shall be admitted to the academy only between the ages of seventeen and twenty-two years, except in the following case: That during the calendar years 1919, 1920 and 1921 any appointee who has served honorably and faithfully not less than one year in the armed forces of the United States or allied armies in the late war with Germany, and who possesses the other qualifications required by law, may be admitted between the ages of seventeen and twenty-four years: *Provided*, That whenever any member of the graduating class shall fail to complete the course with his class by reason of sickness, or deficiency in his studies, or other cause, such failure shall not operate to delay the admission of his successor." [41 Stat. L. 548.]

For R. S. sec. 1318, before this amendment, see 6 Fed. Stat. Ann. (2d ed.) 407.

MILITIA

See NAVY; WAR DEPARTMENT AND MILITARY ESTABLISHMENT

MINERAL LANDS, MINES AND MINING

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 138.

Sec. 1. Bureau of Mines — Officers of Public Health Service — Detail — Compensation and Expenses, 138.

Headquarters of Mine Rescue Cars — Site of Experimental Mine — Plant for Studying Explosives, 139.

Employees — Detail — Expenses or Per Diem, 139.

Co-operative Work for Other Departments — Expenses — Transfer of Funds, 139.

CROSS-REFERENCES

See also INDIANS; PUBLIC LANDS

[SEC. 1.] * * * [Bureau of Mines — officers of Public Health Service — detail — compensation and expenses.] The Secretary of the Treasury may detail medical officers of the Public Health Service for cooperative health, safety,

or sanitation work with the Bureau of Mines, and the compensation and expenses of the officers so detailed may be paid from the applicable appropriations made herein for the Bureau of Mines. [41 Stat. L. 911.]

This and the three paragraphs which follow are from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

* * * [Headquarters of mine rescue cars — site of experimental mine — plant for studying explosives.] For the purchase or lease of necessary land, where and under such conditions as the Secretary of the Interior may direct, for headquarters of mine rescue cars and construction of necessary railway sidings and housing for the same, or as the site of an experimental mine and a plant for studying explosives, \$1,000: *Provided*, That the Secretary of the Interior is authorized to accept any suitable land or lands, buildings, or improvements that may be donated for said purpose and to enter into leases for periods not exceeding ten years, subject to annual appropriations by Congress. [41 Stat. L. 912.]

See note to first paragraph.

An identical provision appears in the Sundry Civil Appropriation Act of July 19, 1919, ch. 24, 1919 Supp. Fed. Stat. Ann. 253.

* * * [Employees — detail — expenses or per diem.] Persons employed during the fiscal year 1921 in field work outside of the District of Columbia under the Bureau of Mines may be detailed temporarily for service in the District of Columbia, for purposes of preparing results of their field work; all persons so detailed shall be paid in addition to their regular compensation only their actual traveling expenses or per diem in lieu of subsistence in going to and returning therefrom: *Provided*, That nothing herein shall prevent the payment to employees of the Bureau of Mines of their necessary expenses, or per diem in lieu of subsistence while on temporary detail in the District of Columbia, for purposes only of consultation or investigations on behalf of the United States. All details made hereunder and the purposes of each, during the preceding fiscal year shall be reported in the annual estimates of appropriations to Congress at the beginning of each regular session thereof. [41 Stat. L. 912.]

See note to first paragraph.

An identical provision appears in the Sundry Civil Appropriation Act of July 19, 1919, ch. 24, 1919 Supp. Fed. Stat. Ann. 253.

* * * [Co-operative work for other departments — expenses — transfer of funds.] During the fiscal year 1921, the head of any department or independent establishment of the Government having funds available for scientific investigations and requiring cooperative work by the Bureau of Mines on scientific investigations within the scope of the functions of that Bureau and which it is unable to perform within the limits of its appropriations, may, with the approval of the Secretary of the Interior, transfer to the Bureau of Mines such sums as may be necessary to carry on such investigations. The Secretary of the Treasury shall transfer on the books of the Treasury Department any sums which may be authorized hereunder and such amounts shall be placed to the credit of the Bureau of Mines for the performance of work for the department or establishment from which the transfer is made. [41 Stat. L. 913.]

See note to first paragraph.

MONOPOLIES

See SHIPPING AND NAVIGATION; TRADE COMBINATIONS AND TRUSTS

MORTGAGES

See INTERSTATE COMMERCE; SHIPPING AND NAVIGATION

NATIONAL BANKS

Act of Jan. 13, 1920, ch. 38, 140.

*Circulating Notes — Nature — For What Demands Receivable —
R. S. Sec. 5182 Amended, 140.*

Act of April 13, 1920, ch. 128, 141.

*Federal Reserve Bank — Establishment of Rates of Discount —
Federal Reserve Act, Sec. 14, Subsec. (d) Amended, 141.*

CROSS-REFERENCES

See also AGRICULTURE; TRADE COMBINATIONS AND TRUSTS

An Act To amend section 5182, Revised Statutes of the United States.

[Act of Jan. 13, 1920, ch. 38, 41 Stat. L. 387.]

[Circulating notes — nature — for what demands receivable — R. S. sec. 5182 amended.] That section 5182, Revised Statutes of the United States, be amended to read as follows:

“ SEC. 5182. Any association receiving circulating notes under this title may, if its promise to pay such notes on demand is expressed thereon attested by the written or engraved signatures of the president or vice president and the cashier thereof in such manner as to make them obligatory promissory notes payable on demand at its place of business, issue, and circulate the same as money. Such written or engraved signatures of the president or vice president and the cashier of such association may be attached to such notes either before or after the receipt of such notes by such association. And such notes shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency.”
[41 Stat. L. 387.]

For R. S. sec. 5182, before amendment, see 6 Fed. Stat. Ann. (2d ed.) 733.

An Act To amend the Act approved December 23, 1913, known as the Federal Reserve Act.

[*Act of April 13, 1920, ch. 128, 41 Stat. L. 550.*]

[Federal Reserve Bank—establishment of rates of discount—Federal Reserve Act, sec. 14, subsec. (d) amended.] That section 14 of the Federal Reserve Act as amended by the Acts approved September 7, 1916, and June 21, 1917, be further amended by striking out the semicolon after the word “business” at the end of subparagraph (d) and insert in lieu thereof the following: “and which, subject to the approval, review, and determination of the Federal Reserve Board, may be graduated or progressed on the basis of the amount of the advances and discount accommodations extended by the Federal reserve bank to the borrowing bank.” [41 Stat. L. 550.]

For sec. 14 of the Federal Reserve Act, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 832. For amendments see 1918 Supp. Fed. Stat. Ann. 471, 479.

NATIONAL BUREAU OF STANDARDS

See WEIGHTS AND MEASURES

NATIONAL GUARD

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

NATIONAL PARKS

See PUBLIC PARKS

NAVAL ACADEMY

Act of June 5, 1920, ch. 253 (Deficiency Appropriation Act), 141.

Midshipment deficient in Studies — Re-examination, 141.

CROSS-REFERENCES

See also **WAR DEPARTMENT AND MILITARY ESTABLISHMENT**

* * * [Midshipmen deficient in studies — re-examination.] That until otherwise provided by law no midshipman found deficient at the close of the last and succeeding academic terms shall be involuntarily discontinued at the Naval Academy or in the service unless he shall fail upon reexamination in the subjects in which found deficient at an examination to be held at the beginning of the next and succeeding academic terms, and the Secretary of the Navy shall provide for the special instruction of such midshipmen in the subjects in which found deficient during the period between academic terms. [41 Stat. L. 1028.]

This is from the Deficiency Appropriation Act of June 5, 1920, ch. 253.

NAVY

Act of June 4, 1920, ch. 228 (Naval Appropriation Act), 142.

Sec. 1. Properties Within Naval Petroleum Reserves — Appropriation for Government Use — Royalties, 142.

Naval Aircraft — Damages — Adjustment of Claims, 143.

Hydrographic Officers, 143.

Summer Schools for Boys — Use of Buildings at Training Stations — Rules — Uniforms, 143.

Naval Reserve Force and Naval Militia — Temporary Reorganization, 144.

Deaths in Navy, Marine Corps or Coast Guard — Six Months' Pay to Dependents, 144.

Commutation of Rations, 144.

Charter Hire of Government-Owned Vessels, 145.

Marine Corps — Enlisted Strength — Officers, 145.

2. Naval Reserve Force — Employment on Active Duty — Number — Line Officers — Aviation — Temporary Appointments — Retirement for Physical Disability of Reserve Force and Temporary Officers of Navy, 146.

3. Permanent Grades or Ranks — Appointments — Reserve Force — Flying Corps — Medical, Dental and Supply Corps — Coast Guard, 147.

4. Permanent Grades or Ranks — Additional Appointments, 147.

5. Age Limit for Officers Appointed — Promotions — Retirement — Reductions in Rank — Officers Holding Temporary Appointments, 148.

6. Re-enlistment in Navy or Marine Corps — Bonus — Travel Pay, 148.

7. Enlistments in Navy and Marine Corps — Term — Grades and Ratings, 149.

8. Protection of Uniform, 149.

9. Naval Reserve Force — Retainer Pay — Withholding — Use, 149.

10. Age Limits for Promotion, 149.

Act of June 5, 1920, ch. 261, 150.

Officers of Naval Service — Acceptance of Offices from South American Republics, 150.

CROSS-REFERENCES

See also *COAST AND GEODETIC SURVEY; COAST GUARD; LIGHTS AND BUOYS; NAVAL ACADEMY; PENSIONS; TELEGRAPHS, TELEPHONES AND CABLES; WAR DEPARTMENT AND MILITARY ESTABLISHMENT.*

An Act Making appropriations for the naval service for the fiscal year ending June 30, 1921, and for other purposes.

[Act of June 4, 1920, ch. 228, 41 Stat. L. 812.]

[SEC. 1.] * * * [Properties within naval petroleum reserves — appropriation for government use — royalties.] That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves

as are or may become subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled "An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," or pending applications for United States patent under any law; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States: *And provided further*, That the rights of any claimant under said Act of February 25, 1920, are not affected adversely thereby: *And provided further*, That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed \$500,000, are hereby made available for this purpose until July 1, 1922: *Provided further*, That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil as the Secretary of the Navy may direct. [41 Stat. L. 813.]

For Act of Feb. 25, 1920, mentioned in the text, see *post*, p. 187.

* * * [Naval aircraft — damages — adjustment of claims.] That the Secretary of the Navy is hereby authorized to consider, ascertain, adjust, determine, and pay out of this appropriation the amounts due on claims for damages which have occurred or may occur to private property growing out of the operations of naval aircraft, where such claim does not exceed the sum of \$500: *Provided further*, That all claims adjusted under this authority during any fiscal year shall be reported in detail to the Congress by the Secretary of the Navy. [41 Stat. L. 814.]

* * * [Hydrographic Office — detail of naval officers.] That the Secretary of the Navy is authorized to detail such naval officers as may be necessary to the Hydrographic Office. [41 Stat. L. 816.]

A similar provision appears in the Act of April 25, 1917, 1918 Supp. Fed. Stat. Ann. 523.

* * * [Summer schools for boys — use of buildings at training stations — rules — uniforms.] The Secretary of the Navy is hereby authorized, in his discretion, to establish at two of the permanent naval training stations experimental summer schools for boys between the ages of sixteen and twenty years. For this purpose he is authorized to use such buildings, or other accommodations, at such training stations; to loan any naval equipment necessary for such purposes, and to give instructions which will fit them for service in the Navy of the United States. He is empowered to establish and enforce such rules within the camp as may be necessary and to detail such members of the naval personnel as may be required in order to encourage and execute the spirit of this Act. The Secretary of the Navy is further authorized to loan the necessary naval uniforms during the period of training and to furnish subsistence, medical attendance and other necessary incidental expenses for those attending these schools: *Provided*, That those under instruction, with the consent of their parents or their guardians, shall enroll in the Naval Reserve Force for not less than three months, and no person not so enrolled shall be admitted to said training schools. For carrying out the provisions of this paragraph the sum of \$200,000 is appropriated. [41 Stat. L. 817.]

* * * **[Naval Reserve Force and Naval Militia — temporary reorganization.]** That, until June 30, 1922, of the Organized Militia as provided by law, such part as may be duly prescribed in any State, Territory, or the District of Columbia shall constitute a Naval Militia; and, until June 30, 1922, such of the Naval Militia as now is in existence, and as now organized and prescribed by the Secretary of the Navy under authority of the Act of Congress approved February 16, 1914, shall be a part of the Naval Reserve Force, and the Secretary of the Navy is authorized to maintain and provide for said Naval Militia as provided in said Act: *Provided further*, That upon their enrollment in the Naval Reserve Force, and not otherwise, until June 30, 1922, the members of said Naval Militia shall have all the benefits, gratuities, privileges, and emoluments provided by law for other members of the Naval Reserve Force; and that, with the approval of the Secretary of the Navy, duty performed in the Naval Militia may be counted as active service for the maintenance of efficiency required by law for members of the Naval Reserve Force: *And provided further*, That all moneys appropriated for the Naval Reserve Force or for the Naval Militia shall constitute one fund and hereby are made available, under the direction of the Secretary of the Navy, for both. [41 Stat. L. 817.]

* * * **[Deaths in Navy, Marine Corps or Coast Guard — six months' pay to dependents.]** That hereafter, immediately upon official notification of the death from wounds or disease, not the result of his or her own misconduct, of any officer, enlisted man, or nurse on the active list of the Regular Navy or Regular Marine Corps, or on the retired list when on active duty, the Paymaster General of the Navy shall cause to be paid to the widow, and if there be no widow to the child or children, and if there be no widow or child, to any other dependent relative of such officer, enlisted man, or nurse previously designated by him or her, an amount equal to six months' pay at the rate received by such officer, enlisted man, or nurse at the date of his or her death. The Secretary of the Navy shall establish regulations requiring each officer and enlisted man or nurse having no wife or child to designate the proper dependent relative to whom this amount shall be paid in case of his or her death. Said amount shall be paid from funds appropriated for the pay of the Navy and pay of the Marine Corps, respectively: *Provided*, That nothing in this section or in other existing legislation shall be construed as making the provisions of this section applicable to officers, enlisted men, or nurses of any forces of the Navy of the United States other than those of the regular Navy and Marine Corps, and nothing in this section shall be construed to apply in commissioned grades to any officers except those holding permanent or probationary appointments in the Regular Navy or Marine Corps: *Provided*, That the provisions of this section shall apply to the officers and enlisted men of the Coast Guard, and the Secretary of the Treasury will cause payment to be made accordingly. [41 Stat. L. 824.]

A similar provision appeared in the Naval Appropriation Act of Aug. 22, 1912, ch. 335. see 6 Fed. Stat. Ann. (2d ed.) 1210.

* * * **[Commutation of rations.]** For provisions and commuted rations for the seamen and marines, which commuted rations may be paid to caterers of messes, in case of death or desertion, upon orders of the commanding officers, commuted rations for officers on sea duty (other than commissioned officers of the

line, Medical and Supply Corps, chaplains, chief boatswains, chief gunners, chief carpenters, chief machinists, chief pay clerks, and chief sailmakers) at 68 cents per diem, and midshipmen at \$1.08 per diem, and commuted rations stopped on account of sick in hospital and credited at the rate of 68 cents per ration to the naval hospital fund; subsistence of officers and men unavoidably detained or absent from vessels to which attached under orders (during which subsistence rations to be stopped on board ship and no credit for commutation therefor to be given); subsistence of men on detached duty; subsistence of officers and men of the naval auxiliary service; subsistence of members of the Naval Reserve Force during period of active service; expenses in handling provisions and for subsistence of female nurses and Navy and Marine Corps general courts-martial prisoners undergoing imprisonment with sentences of dishonorable discharge from the service at the expiration of such confinement: *Provided*, That the Secretary of the Navy is authorized to commute rations for such general courts-martial prisoners in such amounts as seem to him proper, which may vary in accordance with the location of the naval prison, but which shall in no case exceed 30 cents per diem for each ration so commuted; and for the purchase of United States Army emergency rations as required; in all. \$26,000,000, to be available until the close of the fiscal year ending June 30, 1922. [41 Stat. L. 825.]

* * * [Charter hire of government-owned vessels.] That the United States Shipping Board shall not require payment from the Navy Department for the charter hire of vessels furnished or to be furnished from July 1, 1918, to June 30, 1921, inclusive, for the use of that department when such vessels are owned by the United States Government. [41 Stat. L. 826.]

* * * [Marine Corps — enlisted strength — officers.] The authorized enlisted strength of the active list of the Marine Corps is hereby permanently established at twenty-seven thousand four hundred, distribution in the various grades to be made in the same proportion as provided under existing law: *Provided*, That all officers serving temporarily in the grades of captain and below upon the date of the passage of this Act shall be eligible to fill existing vacancies and those hereby created in the permanent authorized strength in said grades by transfer to or reappointment in the permanent Marine Corps in the grades not above that of captain. Transfers so made shall be without regard to age, and if found not qualified for transfer to the same grade as that held by them on the date of transfer then to lower grades after qualification. All officers so transferred shall establish to the satisfaction of the Secretary of the Navy, under such rules as he may prescribe, their mental, moral, professional, and physical qualifications to perform the duties of the grade to which transferred or reappointed and shall take precedence with each other and with other officers of the Marine Corps in such order as may be recommended by a board of marine officers and approved by the Secretary of the Navy: *Provided*, That all persons who served honorably as officers in the Marine Corps or Marine Corps Reserve on active duty at any time between April 6, 1917, and the date of the passage of this Act and who have been honorably discharged or assigned to inactive duty shall be eligible for permanent appointment in the same or a lower rank than that held on discharge or assignment to inactive duty, but not above the rank of captain, to fill vacancies existing or hereby created in the

permanent authorized strength of the Marine Corps under the same conditions as those above prescribed for officers now in the service: *Provided further*, That officers now holding temporary commissions in the Marine Corps and who have had more than ten years' service therein, if not found qualified for permanent commissions, and who are recommended by the board herein provided for, may be appointed warrant officers in the Marine Corps; and the authorized number of warrant officers is hereby increased by a number not to exceed fifty to provide for the appointment of the aforesaid officers: *Provided further*, That all transfers and appointments made in accordance with the provisions of this section shall be accomplished by June 30, 1921: *Provided further*, That the officers now holding temporary appointments as commissioned officers in the Marine Corps may retain their temporary commissions until the permanent appointments provided for in the foregoing section shall have been made. [41 Stat. L. 830.]

SEC. 2. [Naval Reserve Force—employment on active duty—number—line officers—aviation—temporary appointments—retirement for physical disability of Reserve Force and temporary officers of Navy.] That the Secretary of the Navy is hereby authorized to employ on active duty, with their own consent, members of the Naval Reserve Force in enlisted ratings, the number so employed not to exceed during any fiscal year the average of twenty thousand men: *Provided*, That the number of naval reservists, so employed on active duty, together with the total number of enlisted men in the Regular Navy, shall not exceed the total enlisted strength of the Navy as authorized by law: *Provided further*, That such members of the Naval Reserve Force so employed shall serve on active duty for not less than twelve nor more than eighteen months unless sooner released: *Provided further*, That hereafter no person shall be enrolled in the Naval Reserve Force except for general service: *And provided further*, That the number of commissioned officers of the line, permanent, temporary, and reserve on active duty shall not exceed 4 per centum of the total authorized enlisted strength of the Regular Navy, and the number of staff officers on active duty of whatever kind shall be in the same proportions as authorized by existing law: *Provided further*, That five hundred reserve officers are also authorized to be employed in the aviation and auxiliary service: *And provided further*, That, until December 31, 1921, temporary appointments now existing may be continued in force in any grade or rank, not to exceed the number allowed in any grade or rank based upon the total permanent authorized commissioned strength of the line or of any staff corps; and, within the limitations herein prescribed, officers of the Naval Reserve Force may, with their own consent, be continued on active duty ashore or afloat, including three on shore duty in the Historical Section of the Office of Naval Intelligence, who may be retained on active duty beyond the age of disenrollment but not beyond June 30, 1922: *And provided further*, That nothing herein shall be construed as reducing the permanent commissioned or enlisted strength of the Regular Navy as authorized by existing law.

That all officers of the Naval Reserve Force and temporary officers of the Navy who have heretofore incurred or may hereafter incur physical disability in line of duty shall be eligible for retirement under the same conditions as now provided by law for officers of the Regular Navy who have incurred physical disability in line of duty. [41 Stat. L. 834.]

SEC. 3. [Permanent grades or ranks — appointments — Reserve Force — Flying Corps — Medical, Dental and Supply Corps — Coast Guard.] That officers holding temporary commissioned and warrant ranks in the Navy and members of the Naval Reserve Force of commissioned and warrant ranks shall be eligible for transfer to an appointment in the permanent grades or ranks in the Navy for which they may be found qualified not above that held by them on the date of transfer, but not to exceed a total of one thousand two hundred commissioned officers in the line, of which number five hundred may be appointed from class five, Naval Reserve Flying Corps, with proportionate number in all Staff Corps as now authorized by law, except that the Medical, Dental, and Supply Corps shall be entitled to such additional numbers as are necessary to make up the full quota of officers in those corps, as now authorized by law: *Provided*, That officers so appointed to the line of the Navy shall take rank in accordance with their precedence while holding temporary rank, and members of the Naval Reserve Force of commissioned and warrant ranks found qualified for a given rank shall be arranged according to their precedence among themselves and commissioned in the permanent service next after the lowest temporary officer who qualifies for the same rank and is appointed in accordance with the provisions of this Act.

Provided further, That included in the number of transfers and appointments hereinbefore allowed, commissioned officers of the Coast Guard, who have served creditably under the Navy Department in the War with the German Government, upon suitable application approved by the Secretary of the Navy and the Secretary of the Treasury, may be appointed to a permanent rank or grade in the Navy for which found qualified by a board of naval officers under the provisions of existing law, but not above the rank of lieutenant commander, and shall take such precedence therein as the Secretary of the Navy may determine: *Provided further*, That for the purposes of computing longevity pay and retirement privileges of officers and enlisted men of the Navy, all creditable service in the Coast Guard and former Revenue-Cutter Service shall be counted. [41 Stat. L. 834.]

SEC. 4. [Permanent grades or ranks — additional appointments.] That in addition to the number of transfers and appointments hereinbefore allowed, commissioned warrant officers of more than fifteen years' service since date of warrant or date of first appointment as paymaster's clerk, pharmacist or mate, who have creditably served in the war with the German Government in temporary commissioned ranks or grades in the regular Navy, shall be appointed to a permanent rank or grade for which they may be qualified as established and shown by their records of service during their term of service not above the temporary rank or grade held by them at the time of transfer: *Provided*, That officers so transferred to the line of the Navy shall take rank therein in accordance with their precedence while holding temporary rank: *Provided further*, That all officers so transferred in accordance with sections 3 and 4 of this Act to the staff corps of the Navy shall take precedence with each other and with other officers in the Navy in such order as may be recommended by a board of naval officers and approved by the Secretary of the Navy: *Provided further*, That no transfers or appointments made in accordance with sections 3 and 4 of this Act shall be to a higher grade or rank than lieutenant in the Navy: *And provided further*, That officers appointed to the permanent Navy in accord-

ance with the foregoing sections who now hold permanent warrant or permanent commissioned warrant rank in the United States Navy shall, if they thereafter fail professionally on examination for promotion, revert to such permanent warrant or permanent commissioned warrant status. [41 Stat. L. 835.]

SEC. 5. [Age limit for officers appointed — promotions — retirement — reductions in rank — officers holding temporary appointments.] That officers appointed under any of the foregoing provisions shall be not more than thirty-five years of age when so appointed to the line of the Navy, Construction Corps, or Supply Corps, and not more than forty-three years of age when so appointed to the Corps of Chaplains, or to the Medical, Dental, or Civil Engineering Corps: *Provided*, That said age limits shall be increased in the cases of officers who have rendered prior service as paymaster's clerks, or as mates, or as warrant or commissioned officers in the naval service to the extent of all prior naval service: *Provided further*, That officers originally appointed to the Dental Corps above the said age limits shall be eligible for appointment and promotion under this Act irrespective of age: *And provided further*, That officers of the line of the Navy who are appointed thereto pursuant to this Act from sources other than the Naval Academy shall not be ineligible for promotion by reason of age as prescribed by the Act of August 29, 1916 (Thirty-ninth Statutes, page 579), until they have rendered ten years' service in the grade of lieutenant commander, six years' service in the grade of commander, or eight years' service in the grade of captain, respectively, upon the completion of which service such officers, if then ineligible for promotion by reason of age, shall be retired in accordance with said Act: *And provided further*, That until June 30, 1923, promotions to lieutenant (junior grade) and lieutenant may be made without regard to length of service: *And provided further*, That until June 30, 1923, officers of the permanent Navy who have served satisfactorily during the war with the German Government in a temporary grade or rank shall be eligible under the provisions of existing law for selection for promotion or for promotion to the same permanent grade or rank without regard to statutory requirements other than age and professional and physical examination: *And provided further*, That in making reductions in rank as may be required by this Act, officers holding temporary appointments may be given temporary appointments in lower grades, and officers so appointed shall take precedence from the dates of their original appointments in such lower grades. [41 Stat. L. 835.]

For Act of Aug. 29, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 514.

SEC. 6. [Reenlistment in Navy or Marine Corps — bonus — travel pay.] That in case any enlisted man or enrolled man who, since the 11th day of November, 1918, has been or hereafter shall be discharged from any branch or class of the naval service for the purpose of reenlisting in the Navy or Marine Corps or heretofore has extended or hereafter shall extend his enlistment therein, he shall be entitled to the payment of the \$60 bonus provided in section 1406 of the Act entitled "An Act to provide revenue, and for other purposes," approved February 24, 1919, and to travel pay as authorized in section 3 of the Act entitled "An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment and to wear the same under certain conditions,"

approved February 28, 1919: *Provided*, That only one bonus shall be paid to the same person. [41 Stat. L. 836.]

For Act of Feb. 24, 1919, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 368.

For Act of Feb. 28, 1919, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 371.

SEC. 7. [Enlistments in Navy and Marine Corps—term—grades and ratings.] That hereafter enlistments in the Navy and in the Marine Corps may be for terms of two, three, or four years, and all laws now applicable to four-year enlistments shall apply, under such regulations as may be prescribed by the Secretary of the Navy, to enlistments for a shorter period with proportionate benefits upon discharge and reenlistment: *Provided*, That hereafter the Secretary of the Navy is authorized, in his discretion, to establish such grades and ratings as may be necessary for the proper administration of the enlisted personnel of the Navy and Marine Corps. [41 Stat. L. 836.]

SEC. 8. [Protection of uniform.] That section 125 of the Act entitled "An Act for making further and more effectual provisions for the national defense, and for other purposes," approved June 3, 1916, shall hereafter be in full force and effect as originally enacted, notwithstanding anything contained in the Act entitled "An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment and to wear the same under certain conditions," approved February 28, 1918 [1919?]: *Provided*, That the words "or the Secretary of the Navy" shall be inserted immediately after the words "the Secretary of War" wherever those words appear in section 125 of the Act approved June 3, 1916, hereinbefore referred to. [41 Stat. L. 836.]

For Act of June 3, 1916, § 125, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1075.

For Act of Feb. 28, 1919, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 370.

SEC. 9. [Naval Reserve Force—retainer pay—withholding—use.] That hereafter the Secretary of the Navy may, in his discretion, withhold any part or all of the retainer pay which may be due a member of the Naval Reserve Force where such members fail to perform such duty as may be prescribed by law for the maintenance of the efficiency of the Naval Reserve Force: *Provided*, That any money so withheld shall be credited to the appropriation for organizing and administering the Naval Reserve Force to be used for any purpose that the Secretary of the Navy may consider proper to increase the efficiency of the Naval Reserve Force: *Provided further*, That hereafter the minimum amount of active service required for the maintenance of the efficiency of the Fleet Naval Reserve shall be the same as for the Naval Reserve. [41 Stat. L. 837.]

SEC. 10. [Age limits for promotion.] That the age limits for promotion by selection, which, under existing law, will become effective on June 30, 1920, are hereby deferred until June 30, 1921, in the cases only of those officers who may request such deferment. [41 Stat. L. 837.]

An Act To authorize officers of the naval service to accept offices with compensation and emoluments from Governments of the Republics of South America.

[*Act of June 5, 1920, ch. 261, 41 Stat. L. 1056.*]

[**Officers of naval service—acceptance of offices from South American Republics.**] That the President of the United States be, and he is hereby, authorized, upon application from the foreign Governments concerned, and whenever in his discretion the public interests require, to detail officers of the United States naval service to assist the Governments of the Republics of South America in naval matters: *Provided*, That the officers so detailed be, and they are hereby, authorized to accept offices from the Government to which detailed with such compensation and emoluments therefor as may be first approved by the Secretary of the Navy: *Provided further*, That while so detailed such officers shall receive, in addition to the compensation and emoluments allowed them by such Governments, the pay and allowances of their rank in the United States naval service, and they shall be entitled to the same credit while so detailed for longevity, retirement, and for all other purposes that they would receive if they were serving with the United States naval service. [41 Stat. L. 1056.]

OIL

See PUBLIC LANDS

PANAMA CANAL

See RIVERS, HARBORS AND CANALS

PARKS

See PUBLIC PARKS

PASSPORTS

Act of June 4, 1920, ch. 223 (Diplomatic and Consular Appropriation Act), 151.

Sec. 1. Fees for Passports — Persons Excepted, 151.

2. Visé of Passport — Fee for Executing Application of Alien for Visé, 151.

3. Validity of Passport or Visé — Limitation of Time, 151.

4. Refusal of Appropriate Officer to Visé Passport — Refund of Fee, 152.

CROSS-REFERENCE

See also *CITIZENSHIP*

* * * **SECTION 1. [Fees for passports — persons excepted.]** From and after the 1st day of July, 1920, there shall be collected and paid into the Treasury of the United States quarterly a fee of \$1 for executing each application for a passport and \$9 for each passport issued to a citizen or person owing allegiance to or entitled to the protection of the United States: *Provided*, That nothing herein contained shall be construed to limit the right of the Secretary of State by regulation to authorize the retention by State officials of the fee of \$1 for executing an application for a passport: *And provided further*, That no fee shall be collected for passports issued to officers or employees of the United States proceeding abroad in the discharge of their official duties, or to members of their immediate families, or to seamen, or to widows, children, parents, brothers, and sisters of American soldiers, sailors, or marines, buried abroad whose journey is undertaken for the purpose and with the intent of visiting the graves of such soldiers, sailors, or marines, which facts shall be made a part of the application for the passport. [41 Stat. L. 750.]

This section and secs. 2, 3 and 4 following are from the Diplomatic and Consular Appropriation Act of June 4, 1920, ch. 223. Sec. 5 of the same Act will be found under the title *CITIZENSHIP*, p. 16, *ante*.

SEC. 2. [Visé of passport — fee for executing application of alien for visé.] From and after the 1st day of July, 1920, there shall be collected and paid into the Treasury of the United States quarterly a fee of \$1 for executing each application of an alien for a visé and \$9 for each visé of the passport of an alien: *Provided*, That no fee shall be collected from any officer of any foreign Government, or members of his immediate family, its armed forces, or of any State, district, or municipality thereof, traveling to or through the United States, or of any soldiers coming within the terms of the public resolution approved October 19, 1918 (Fortieth Statutes at Large, part 1, page 1014). [41 Stat. L. 750.]

See note to preceding section.

For Res. of Oct. 19, 1918, see 1918 Supp. Fed. Stat. Ann. 73.

SEC. 3. [Validity of passport or visé — limitation of time.] The validity of a passport or visé shall be limited to two years, unless the Secretary of State shall by regulation limit the validity of such passport or visé to a shorter period. [41 Stat. L. 751.]

See note to preceding sec. 1.

SEC. 4. [Refusal of appropriate officer to visé passport — refund of fee.] Whenever the appropriate officer within the United States of any foreign country refuses to visé a passport issued by the United States, the Department of State is hereby authorized upon request in writing and the return of the unused passport within six months from the date of issue to refund to the person to whom the passport was issued the fees which have been paid to Federal officials, and the money for that purpose is hereby appropriated and directed to be paid upon the order of the Secretary of State. [41 Stat. L. 751.]

See note to preceding Sec. 1.

PATENTS

Act of March 6, 1920, ch. 94 (Deficiency Appropriation Act), 152.

Sec. 1. Fees — Disposition — Moneys Paid by Mistake or in Excess of Fee Required by Law, 152.

CROSS-REFERENCES

See also *INDIANS; PUBLIC LANDS*

[SEC. 1.] * * * [Fees — disposition — moneys paid by mistake or in excess of fee required by law.] Hereafter all patent fees shall be paid to the Commissioner of Patents, who shall deposit the same in the Treasury of the United States in such manner as the Secretary of the Treasury shall direct, and said commissioner is authorized to pay back any sum or sums of money paid to him by any person by mistake or in excess of the fee required by law. [41 Stat. L. 512.]

This is from the Deficiency Appropriation Act of March 6, 1920, ch. 94.

PENAL LAWS

Act of May 25, 1920, ch. 196, 152.

Poisons and Explosives Nonmailable — Sec. 217 Amended, 152.

Act of June 5, 1920, ch. 268, 153.

Importation and Transportation of Obscene, etc., Books, etc. — Sec. 245 Amended, 153.

An Act To amend section 217 of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March 4, 1909.

[Act of May 25, 1920, ch. 196, 41 Stat. L. 620.]

[Poisons and explosives nonmailable — sec. 217 amended.] That section 217 of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March 4, 1909 (Thirty-fifth Statutes at Large, page 1131), is hereby amended to read as follows:

"SEC. 217. That all kinds of poison, and all articles and compositions containing poison, and all poisonous animals, insects, and reptiles, and explosives

of all kinds, and inflammable materials, and infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, and all disease germs or scabs, and all other natural or artificial articles, compositions, or materials, of whatever kind, which may kill or in anywise hurt, harm, or injure another or damage, deface, or otherwise injure the mails or other property, whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any letter carrier; but the Postmaster General may permit the transmission in the mails, from the manufacturer thereof or dealer therein to licensed physicians, surgeons, dentists, pharmacists, druggists, and veterinarians, under such rules and regulations as he shall prescribe, of any articles hereinbefore described which are not outwardly or of their own force dangerous or injurious to life, health, or property: *Provided*, That all spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind are hereby declared to be nonmailable, and shall not be deposited in or carried through the mails. Whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail, according to the direction thereon or at any place at which it is directed to be delivered by the person to whom it is addressed, anything declared by this section to be nonmailable, unless in accordance with the rules and regulations hereby authorized to be prescribed by the Postmaster General, shall be fined not more than \$1,000 or imprisoned not more than two years, or both; and whoever shall knowingly deposit or cause to be deposited for mailing or delivery, or shall knowingly cause to be delivered by mail, according to the direction thereon or at any place to which it is directed to be delivered by the person to whom it is addressed, anything declared by this section to be nonmailable, whether transmitted in accordance with the rules and regulations authorized to be prescribed by the Postmaster General or not, with the design, intent, or purpose to kill or in anywise hurt, harm, or injure another, or damage, deface, or otherwise injure the mails or other property, shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both." [41 Stat. L. 620.]

For sec. 217 of the Penal Laws, here amended, see 7 Fed. Stat. Ann. (2d ed.) 846.

An Act To amend the penal laws of the United States.

[Act of June 5, 1920, ch. 268, 41 Stat. L. 1060.]

[Importation and transportation of obscene, etc., books, etc.—sec. 245 amended.] That section 245 of the Act entitled "An Act to codify, revise, and amend the penal laws of the United States," approved March 4, 1909, is hereby amended to read as follows:

"SEC. 245. Whoever shall bring or cause to be brought into the United States, or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one State, Territory, or District of the United States or place noncontiguous to but subject to the jurisdiction thereof, to any other State, Territory, or District of the

United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States, through a foreign country, to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore mentioned articles, matters, or things may be obtained or made; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than \$5,000 or imprisoned not more than five years, or both." [41 Stat. L. 1060.]

PENSIONS

Act of May 1, 1920, ch. 165, 155.

- Sec. 1. Veterans of Civil and Mexican Wars — Revision of Pension Rates, 155.*
- 2. Blind or Helpless Veterans — Rate of Pensions, 155.*
- 3. Civil War Veterans — Pensions — Rates for Disabilities, 155.*
- 4. Widows of Civil War Veterans — Rate of Pensions — Remarriage — Veterans' Children — Widows of Veterans of Mexican War, 156.*
- 5. Civil War Army Nurses — Dependent Parents of Civil War Veterans — Rate of Pensions, 156.*
- 6. Commencement of Increased Pensions — Date — Veterans' Widows, 156.*
- 7. Army and Navy Medal of Honor Roll — Diminution of Additional Pensions, 157.*
- 8. Attorneys, etc. — Limitation of Fees — Penalty for Violation, 157.*

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 157.

- Sec. 1. Artificial Limbs — Purchase by Surgeon General, 157.*

Act of June 5, 1920, ch. 245, 158.

- Sec. 1. Veterans of Spanish and Later Wars — Rate of Pensions — Age of Pensioners — Pending Claims — Rank in Service, 158.*
- 2. Attorneys, etc. — Limitation of Fees — Penalty for Violation, 158.*
- 3. Disabilities — Rate of Pensions, 159.*

Act of June 5, 1920, ch. 253 (Deficiency Appropriation Act), 159.

- Bureau of Pensions — Employees — Additional Compensation, 159.*

CROSS-REFERENCE

See also *CIVIL SERVICE*

An Act To revise and equalize rates of pension to certain soldiers, sailors, and marines of the Civil War and the War with Mexico, to certain widows, including widows of the War of 1812, former widows, dependent parents, and children of such soldiers, sailors, and marines, and to certain Army nurses, and granting pensions and increase of pensions in certain cases.

[*Act of May 1, 1920, ch. 165, 41 Stat. L. 585.*]

[SEC. 1.] **[Veterans of Civil and Mexican Wars—revision of pension rates.]** That every person who served ninety days or more in the Army, Navy, or Marine Corps of the United States during the Civil War, and who has been honorably discharged therefrom, or who, having so served less than ninety days, was discharged for a disability incurred in the service and in the line of duty, or is now upon the pension rolls as a Civil War veteran, and every person who served sixty days or more in the War with Mexico, or on the coasts or frontier thereof, or enroute thereto, during the war with that nation, and was honorably discharged therefrom, and who is now in receipt of, or entitled to receive under existing law, a pension of less than \$50 per month, shall, from and after the passage of this Act, be entitled to and shall be paid a pension at the rate of \$50 per month. [*41 Stat. L. 585.*]

SEC. 2. **[Blind or helpless veterans—rate of pensions.]** That every person who served ninety days or more in the Army, Navy, or Marine Corps of the United States during the Civil War, and who has been honorably discharged therefrom, or who, having so served less than ninety days, was discharged for a disability incurred in the service and in the line of duty, or is now upon the pension rolls as a Civil War veteran, and every person who served sixty days or more in the War with Mexico, or on the coasts or frontier thereof, or en route thereto, during the war with that nation, and was honorably discharged therefrom, and who is now, or hereafter may become, by reason of age and physical or mental disabilities, helpless or blind, or so nearly helpless or blind as to require the regular personal aid and attendance of another person, shall be entitled to and shall be paid a pension at the rate of \$72 per month. [*41 Stat. L. 586.*]

SEC. 3. **[Civil War veterans—pensions—rates for disabilities.]** That from and after the approval of this Act all persons whose names are on the pension roll, and who, while in the service of the United States in the Army, Navy, or Marine Corps during the Civil War, and in the line of duty, shall have lost one hand or one foot or been totally disabled in the same, shall receive a pension at the rate of \$60 per month; that all persons who, in such service and in like manner, shall have lost an arm at or above the elbow, or a leg at or above the knee, or been totally disabled in the same, shall receive a pension at the rate of \$65 per month; that all persons who, in such service and in like manner, shall have lost an arm at the shoulder joint or a leg at the hip joint, or so near the shoulder or hip joint, or where the same is in such condition as to prevent the use of an artificial limb, shall receive a pension at the rate of \$72 per month; and that all persons who, in such service and in like manner, shall have lost one hand and one foot, or been totally disabled in the same, shall receive a pension at the rate of \$90 per month. [*41 Stat. L. 586.*]

SEC. 4. [Widows of Civil War veterans — rate of pensions — remarriage — veterans' children — widows of veterans of Mexican War.] That the widow of any person who served in the Army, Navy, or Marine Corps of the United States during the Civil War for ninety days or more, and was honorably discharged from such service, or regardless of the length of service was discharged for or died in service of a disability incurred in the service and in the line of duty, such widow having been married to such soldier, sailor, or marine prior to the 27th day of June, anno Domini 1905, shall be entitled to and shall be paid a pension at the rate of \$30 per month. And this section shall apply to a former widow of any person who served for ninety days or more in the Army, Navy, or Marine Corps of the United States during the Civil War and was honorably discharged from such service, or who, having so served for less than ninety days was discharged for or died in service of a disability incurred in the service and in the line of duty, such widow having remarried, either once or more than once after the death of the soldier, sailor, or marine, if it be shown that such subsequent or successive marriage has, or have been dissolved, either by the death of the husband or husbands, or by divorce without fault on the part of the wife; and any such former widow shall be entitled to and be paid a pension at the rate of \$30 per month; and any widow as mentioned in this section, shall also be paid \$6 per month for each child of such officer or enlisted man under the age of sixteen years, and in case of the death or remarriage of the widow leaving a child or children of such officer or enlisted man under the age of sixteen years, such pension shall be paid such child or children until the age of sixteen years: *Provided*, That in case a minor child is insane, idiotic, or otherwise mentally or physically helpless, the pension shall continue during the life of such child, or during the period of such disability, and this proviso shall apply to all pensions heretofore granted or hereafter to be granted under this or any former statute: *And provided further*, That in case of any widow whose name has been dropped from the pension roll because of her remarriage, if the pension has been granted to an insane, idiotic, or otherwise helpless child, or to a child or children under the age of sixteen years, she shall not be entitled to renewal of pension under this Act until that pension to such child or children terminates, unless such child or children be a member or members of her family and cared for by her, and upon the renewal of pension to such widow, payment of pension to such child or children shall cease: *And provided further*, That the rate of pension for the widow of any person who served in the Army, Navy, or Marine Corps of the United States in the War of 1812, or for sixty days or more in the War with Mexico, on the coasts or frontier thereof, or en route thereto during the war with that nation, and was honorably discharged therefrom, shall be \$30 per month. [41 Stat. L. 586.]

SEC. 5. [Civil War army nurses — dependent parents of Civil War veterans — rate of pensions.] That all Army nurses of the Civil War and all dependent parents of any officer or enlisted man who served in the Civil War whose names are now on the pension roll, or who are now entitled to pension under any existing law, shall be entitled to and shall be paid a pension at the rate of \$30 per month. [41 Stat. L. 587.]

SEC. 6. [Commencement of increased pensions — date — veterans' widows.] That the pension or increase of pension herein provided for, as to all persons whose names are now on the pension roll, or who are now in receipt of a pension under existing law, shall commence at the rates herein provided, from the date

of the approval of this Act, or under section 2 hereof, when the requisite condition is shown to exist after the approval of this Act; and as to persons whose names are not now on the pension roll, or who are not now in receipt of a pension under existing law, but who may be entitled to pension under the provisions of this Act, such pensions shall commence from the date of filing application therefor in the Bureau of Pensions in such form as may be prescribed by the Secretary of the Interior: *Provided*, That as to any former widow as mentioned in section 4 hereof, who since the death of her soldier, sailor, or marine husband has remarried either once or more than once, and such subsequent or successive marriage has been dissolved, either by the death of the husband or husbands, or by divorce without fault on the part of the wife, and who filed her application for pension under the Act of September 8, 1916, her pension shall commence from the date when her original application was filed under that Act in the Bureau of Pensions, and shall be at the rate in that Act provided, with increase at the rate or rates subsequently provided for the widows of Civil War soldiers, sailors, and marines, and by this Act from the date or dates when any such subsequent Act or Acts took effect or may hereafter take effect, it being the intent and purpose to give to any such widow the same status as other widows of Civil War soldiers, sailors, and marines who have not remarried, and from the date of said Act of September 8, 1916. [41 Stat. L. 587.]

SEC. 7. [Army and Navy Medal of Honor Roll — diminution of additional pensions.] That nothing in this Act contained shall be held to affect or diminish the additional pension to those on the roll designated as "The Army and Navy Medal of Honor Roll," as provided in the Act of April 27, 1916, but any increase herein provided for shall be in addition thereto; and no pension heretofore granted under any Act, public or private, shall be reduced by anything contained in this Act. [41 Stat. L. 587.]

For Act of April 27, 1916, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1071.

SEC. 8. [Attorneys, etc.—limitation of fees — penalty for violation.] That no claim agent or attorney or other person shall be recognized in the adjustment of claims under this Act, except in claims for original pension, and in such cases no more than the sum of \$10 shall be allowed for services in preparing, presenting, or prosecuting any such claim, which sum shall be payable only on the order of the Commissioner of Pensions; and any person who shall violate any of the provisions of this section, or shall wrongfully withhold from the pensioner or claimant the whole or any part of a pension allowed or due to such pensioner or claimant under this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every offense, be fined not exceeding \$500 or be imprisoned not exceeding one year, or both, in the discretion of the court. [41 Stat. L. 588.]

[SEC. 1.] * * * **[Artificial limbs — purchase by Surgeon General.]** That the Surgeon General of the Army is authorized to pay not exceeding \$125 for each artificial limb or apparatus for resection furnished in kind hereafter under the provisions of section 4787, Revised Statutes, as amended. [41 Stat. L. 901.]

This is from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

For R. S. sec. 4787, mentioned in the text, see 7 Fed. Stat. Ann. (2d ed.) p. 1116.

An Act To pension soldiers and sailors of the War with Spain, the Philippine insurrection, and the China relief expedition.

[Act of June 5, 1920, ch. 245, 41 Stat. L. 982.]

[SEC. 1.] **[Veterans of Spanish and later wars — rate of pensions — age of pensioners — pending claims — rank in service.]** That all persons who served ninety days or more in the military or naval service of the United States during the War with Spain, the Philippine insurrection, and the China relief expedition, and who have been honorably discharged therefrom, and who are now or who may hereafter be suffering from any mental or physical disability or disabilities of a permanent character, not the result of their own vicious habits, which so incapacitates them from the performance of manual labor as to render them unable to earn a support, shall, upon making due proof of the fact, according to such rules and regulations as the Secretary of the Interior may provide, be placed upon the list of invalid pensioners of the United States, and be entitled to receive a pension not exceeding \$30 per month and not less than \$12 per month, proportioned to the degree of inability to earn a support; and in determining such inability each and every infirmity shall be duly considered, and the aggregate of the disabilities shown be rated, and such pension shall commence from the date of the filing of the application in the Bureau of Pensions, after the passage of this Act, upon proof that the disability or disabilities then existed, and shall continue during the existence of the same: *Provided*, That any such person who has reached the age of 62 years shall, upon making proof of such fact, be placed upon the pension roll and entitled to receive a pension of \$12 per month. In case such person has reached the age of 68 years, \$18 per month; in case such person has reached the age of 72 years, \$24 per month; and in case such person has reached the age of 75 years, \$30 per month: *Provided further*, That persons who are now receiving pensions under existing laws, or whose claims are pending in the Bureau of Pensions, may, by application to the Commissioner of Pensions, in such form as he may prescribe, showing themselves entitled thereto, receive the benefits of this Act; and nothing herein contained shall be so construed as to prevent any pensioner thereunder from prosecuting his claim and receiving his pension under any other general or special Act: *Provided, however*, That no person shall receive more than one pension for the same period: *And provided further*, That rank in the service shall not be considered in applications filed under this Act. [41 Stat. L. 982.]

SEC. 2. **[Attorneys, etc.—limitation of fees — penalty for violation.]** That no agent, attorney, or other person engaged in preparing, presenting, or prosecuting any claim under the provisions of this Act, shall, directly or indirectly, contract for, demand, receive, or retain for such services in preparing, presenting, or prosecuting such claim a sum greater than \$20, which sum shall be payable only upon the order of the Commissioner of Pensions under such rules and regulations as he may deem proper to make, and any person who shall violate any of the provisions of this section, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of a pension or claim allowed or due such pensioner or claimant under this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offense, be fined not exceeding \$500, or be imprisoned at hard labor not exceeding two years, or both, in the discretion of the court. [41 Stat. L. 982.]

SEC. 3. [Disabilities — rate of pensions.] That from and after the approval of this Act all persons whose names are on the pension roll, and who, while in the service of the United States in the Army, Navy, or Marine Corps and in the line of duty, shall have lost one hand or one foot or been totally disabled in the same, shall receive a pension at the rate of \$60 per month; that all persons who, in such service and in like manner, shall have lost an arm at or above the elbow, or a leg at or above the knee, or been totally disabled in the same, shall receive a pension at the rate of \$65 per month; that all persons who, in such service and in like manner, shall have lost an arm at the shoulder joint or a leg at the hip joint, or so near the shoulder or hip joint, or where the same is in such condition as to prevent the use of an artificial limb, shall receive a pension at the rate of \$72 per month; and that all persons who, in such service and in like manner, shall have lost one hand and one foot, or been totally disabled in the same, shall receive a pension at the rate of \$90 per month; and that all persons who, in such service and in like manner, shall have lost both eyes, or been totally disabled in the same or who, in such service and in like manner, sustained injuries that proved the direct cause of the subsequent total loss of the sight of both eyes, shall receive a pension at the rate of \$100 per month. [41 Stat. L. 982.]

* * * [Bureau of Pensions — employees — additional compensation.] To provide additional compensation for employees of the Bureau of Pensions designated to carry out the Act entitled "An Act for the retirement of employees in the classified civil service, and for other purposes," approved May 22, 1920, \$2,000, to continue available until June 30, 1921: *Provided*, That no person so employed shall receive compensation at a rate exceeding \$1,740 per annum except one at \$3,000, one at \$2,400, one at \$2,000, and two at \$1,800 each. [41 Stat. L. 1030.]

This is from the Deficiency Appropriation Act of June 5, 1920, ch. 253.
For Act of May 22, 1920, mentioned in the text, see *ante*, p. 17.

PHOSPHATES

See PUBLIC LANDS

PLANTS

See AGRICULTURE

PLYMOUTH TERCENTENARY COMMISSION

Res. of May 13, 1920, ch. 186, 160.

Sec. 1. United States Pilgrim Tercentenary Commission — Organization, 160.

2. Appropriation — Expenditure, 160.

3. Appropriation by Massachusetts — Liability of United States for Expenditures by Commission — Allowance of Expenditures, 161.

4. Postage Stamps — Issuance of Commemorative Series, 161.

5. Expiration of Provisions of Resolution, 161.

Joint Resolution Authorizing an appropriation for the participation of the United States in the observance of the three hundredth anniversary of the landing of the Pilgrims at Provincetown and Plymouth, Massachusetts.

[Res. of May 13, 1920, No. 42, ch. 186, 41 Stat. L. 598.]

[SEC. 1.] **[United States Pilgrim Tercentenary Commission — organization.]** That there is hereby established a commission to be known as the United States Pilgrim Tercentenary Commission (hereinafter referred to as the commission) and to be composed of eleven commissioners as follows: Three persons to be appointed by the President of the United States; four Senators by the President of the Senate; and four Members of the House of Representatives by the Speaker of the House of Representatives. The commissioners shall serve without compensation and shall select a chairman from among their number. [41 Stat. L. 598.]

SEC. 2. [Appropriation — expenditure.] (a) That there is hereby authorized to be appropriated out of any money in the Treasury not otherwise appropriated the sum of \$400,000, to be expended by the commission in accordance with the provisions of this resolution.

(b) One hundred thousand dollars of such appropriation may be expended under the direction of the commission and in cooperation with the Provincetown Tercentenary Commission, the town of Provincetown, Massachusetts, and such other agencies, public or private, as the commission may determine, for the purpose of completing and improving the approaches to and the grounds of the Pilgrim Monument at Provincetown, Massachusetts; of erecting suitably inscribed tablets or markers in the towns of Provincetown, Truro, Wellfleet, and Eastham, and for other work in connection therewith, in accordance with plans adopted by the Provincetown Tercentenary Commission.

(c) Three hundred thousand dollars of such appropriation may be expended under the direction of the commission and in cooperation with the Pilgrim Tercentenary Commission, the town of Plymouth, Massachusetts, and such other agencies, public or private, as the commission may determine, for the purpose of restoring and improving Plymouth Rock and the shore line of the locality adjacent thereto, of protecting and improving the burial grounds upon Coles Hill and Burial Hill in Plymouth, Massachusetts; of erecting tablets or markers at appropriate places in the Old Colony, and for other work in connection therewith, in accordance with plans adopted by the Pilgrim Tercentenary Commission. [41 Stat. L. 598.]

SEC. 3. [**Appropriation by Massachusetts — liability of United States for expenditures by commission — allowance of expenditures.**] That no expenditure shall be made or authorized by the commission until the Commonwealth of Massachusetts has, as determined by the commission, expended or contracted to expend the sum of \$300,000 for the same purposes for which the commission may under the provisions of this resolution make expenditures. The United States shall not be held liable for any cost, expense, obligation, or indebtedness on account of the maintenance or upkeep of any property in respect to which any expenditure is made by the commission under the provisions of this resolution, nor for any obligation or indebtedness incurred by the Commonwealth of Massachusetts, the Provincetown Tercentenary Commission, the Pilgrim Tercentenary Commission, or any other agency or officer, employee, or agent thereof, for any purpose for which the commission may under the provisions of this resolution make expenditures. All expenditures of the commission shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman of the commission, but no expenditure shall be made or authorized by the commission except with the approval of a majority of the commissioners. [41 Stat. L. 599.]

SEC. 4. [**Postage stamps — issuance of commemorative series.**] That the Postmaster General is hereby authorized and directed to issue a special series of postage stamps, in such denominations and of such design as he may determine, commemorative of the three hundredth anniversary of the landing of the Pilgrims at Provincetown and Plymouth, Massachusetts. [41 Stat. L. 599.]

SEC. 5. [**Expiration of provisions of resolution.**] That the provisions of sections 1, 2, and 4 of this resolution shall expire December 31, 1921. [41 Stat. L. 599.]

POISONS

See PENAL LAWS

POSTAL SERVICE

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CROSS-REFERENCES

See also **CIVIL SERVICE; PENAL LAWS; SHIPPING AND NAVIGATION**

An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1921, and for other purposes.

[*Act of April 24, 1920, ch. 161, 41 Stat. L. 574.*]

[SEC. 1.] * * * [Inspectors — per diem allowance.] For per diem allowance of inspectors in the field while actually traveling on official business away from their homes, their official domiciles, and their headquarters, at a rate to be fixed by the Postmaster General, not to exceed \$4 per day: *Provided*, That the Postmaster General may, in his discretion, allow inspectors per diem while temporarily located at any place on business away from their homes or their designated domiciles for a period not exceeding twenty consecutive days at any one place, and make rules and regulations governing the foregoing provisions relating to per diem: *And provided further*, That no per diem shall be paid to inspectors receiving annual salaries of \$2,000 or more, except the thirty-two inspectors receiving \$2,100 each, \$363,500. [41 Stat. L. 574.]

The above provision has appeared in other appropriation acts.

* * * [Vacancy in office of postmaster — temporary designation by Postmaster General — appointment of regular postmaster.] That whenever the office of a postmaster becomes vacant through death, resignation, or removal, the Postmaster General shall designate some person to act as postmaster until a regular appointment can be made by the President, and the Postmaster General shall notify the Auditor for the Post Office Department of the change. The postmaster so appointed shall be responsible under his bond for the safekeeping of the public property of the post office and the performance of the duties thereof until a regular postmaster has been duly appointed and qualified and has taken possession of the office. Whenever a vacancy occurs from any cause, the appointment of a regular postmaster shall be made without unnecessary delay. [41 Stat. L. 575.]

* * * [First-class post offices — foremen — stenographers.] That there may also be employed at first-class post offices foremen and stenographers at a salary of \$1,300 or more per annum. [41 Stat. L. 577.]

This provision has appeared in other appropriation acts.

* * * [Fourth-class post offices — reclassification.] That wherever unusual conditions prevail, the Postmaster General, in his discretion, may advance any post office from the fourth class to the appropriate presidential class indicated by the receipts of the preceding quarter, notwithstanding section 16 of the Act approved May 18, 1916, as amended, which requires the compensation of fourth-class postmasters to reach \$1,000 for four consecutive quarters, exclusive of commissions on money order business, and that the receipts of such post office for the same period shall aggregate as much as \$1,900, before such advancement is made: *Provided further*, That in cases where the Postmaster General has exercised the authority herein granted, he shall, wherever the receipts are no longer sufficient to justify retaining such post office in the presidential class to which it has been advanced, reduce the grade of such office to the appropriate class indicated by its receipts for the last preceding quarter. [41 Stat. L. 578.]

For sec. 16 of Act of May 18, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 638.

* * * **[Leasing premises for use of post offices.]** For rent, light, and fuel for first, second, and third class post offices, \$8,000,000: *Provided*, That hereafter the Postmaster General may, in the disbursement of the appropriation for such purposes, apply a part thereof to the purpose of leasing premises for the use of post offices of the first, second, and third classes at a reasonable annual rental, to be paid quarterly for a term not exceeding twenty years. [41 Stat. L. 578.]

* * * **[Rent, fuel and light for third-class post office — repeal of provision in Act of July 2, 1918.]** That that part of the Act of July 2, 1918, providing that there shall not be allowed for the use of any third-class post office for rent a sum in excess of \$500, nor more than \$100 for fuel and light, in any one year, is hereby repealed. [41 Stat. L. 578.]

For the provision of the Act of July 2, 1918, repealed by the text, see 1918 Supp. Fed. Stat. Ann. 662.

* * * **[Special-delivery matter — receipt.]** That the Postmaster General may, under such rules and regulations as he shall prescribe, deliver special-delivery matter without obtaining a receipt therefor. [41 Stat. L. 579.]

* * * **[Aeroplane mail service — contracts by Postmaster General.]** That the Postmaster General may contract with any individual, firm, or corporation for an aeroplane mail service between such points as he may deem advisable and designate, in case such service is furnished at a cost not greater than the cost of the same service by rail, and shall pay therefor out of the appropriation for inland transportation by railroad routes. [41 Stat. L. 579.]

* * * **[Railway postal clerks — deadheading — full time.]** That hereafter railway postal clerks and substitute railway postal clerks, shall be credited with full time when deadheading under orders of the department. [41 Stat. L. 580.]

This provision has appeared in other appropriation acts.

* * * **[Transportation of mail by electric and cable cars — rate of compensation.]** For inland transportation of mail by electric and cable cars, \$545,000: *Provided*, That the rate of compensation to be paid per mile shall not exceed the rate now paid to companies performing such service, except that the Postmaster General, in cases where the quantity of mail is large and the number of exchange points numerous, may, in his discretion, authorize payment for closed-pouch service at a rate per mile not to exceed one-third above the rate per mile now paid for closed-pouch service; and for mail cars and apartments carrying the mails, not to exceed the rate of 1 cent per linear foot per car-mile of travel: *Provided further*, That the rates for electric car service on routes over twenty miles in length outside of cities shall not exceed the rates paid for service on steam railroads: *Provided further*, That not to exceed \$25,000 of the sum hereby appropriated may be expended in the discretion of the Postmaster General, where unusual conditions exist or where such service will be more expeditious and efficient and at no greater cost than otherwise. [41 Stat. L. 580.]

* * * **[Insured and collect-on-delivery mail — limited indemnity claims.]** That hereafter the Postmaster General may, under such rules and

regulations as he shall prescribe, authorize postmasters to pay limited indemnity claims on insured and collect-on-delivery mail. [41 Stat. L. 581.]

* * * [Post route maps and rural delivery maps or blue prints — sale — proceeds.] That the Postmaster General may authorize the sale to the public of post-route maps and rural delivery maps or blue prints at the cost of printing and 10 per centum thereof added, the proceeds of such sale to be used as a further appropriation for the preparation and publication of post-route maps and rural delivery maps or blue prints; of this amount \$1,500 may be expended in the purchase of atlases and geographical and technical works. [41 Stat. L. 582.]

* * * [Rural carriers — compensation.] That hereafter the pay of rural carriers and substitute rural carriers, which depends upon the length of the route, shall be determined in accordance with the records of the Post Office Department, which records shall be promptly corrected whenever the Postmaster General determines that such records are not correct. [41 Stat. L. 582.]

SEC. 2. [Increased compensation for post office employees — promotions, classifications and grades.] That the increased compensation for positions in the Postal Service of all classes and grades made and provided for in the Act entitled "An Act making appropriations for the Post Office Department for the fiscal year ending June 30, 1920," approved February 28, 1919, and House joint resolution of November 8, 1919, entitled "Joint resolution to provide for additional compensation for employees of the Postal Service and making appropriations therefor," and the provisions of such Act and resolution relating to promotions, classification, and grades specified in said Act and resolution shall continue in force during the fiscal year 1921, unless otherwise provided by law. [41 Stat. L. 583.]

For Act of Feb. 28, 1919, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 297.

Act of June 5, 1920, set out *infra*, p. 168, by virtue of an express provision therein (see p. 178), is not affected by this section.

SEC. 3. [Transportation of mails — motor vehicles and aeroplanes.] That the Secretary of War is authorized hereafter, in his discretion, to deliver and turn over to the Postmaster General, without charge therefor, from time to time, such motor vehicles, aeroplanes, and parts thereof, and machinery and tools to repair and maintain the same, as may be suitable for use in the Postal Service; and the Postmaster General is authorized to use the same in the transportation of the mails and to pay the necessary expenses thereof, including the replacement, maintenance, exchange, and repair of such equipment, out of any appropriation available for the service in which such vehicles or aeroplanes are used. [41 Stat. L. 583.]

SEC. 4. [Return of undelivered letters — R. S. sec. 3936 amended.] That section 3936, Revised Statutes of the United States, is hereby amended to read as follows:

"Sec. 3936. The Postmaster General may regulate the period during which undelivered letters shall remain in any post office and when they shall be returned to the dead-letter office; and he may make regulations for their return from the dead-letter office to the writers when they can not be delivered to the

parties addressed: *Provided*, That when letters are returned from the dead-letter office to the writers, a fee of 3 cents shall be collected at the time of delivery, under such rules and regulations as the Postmaster General may prescribe." [41 Stat. L. 583.]

For R. S. sec. 3936, before amendment, see 8 Fed. Stat. Ann. (2d ed.) 149.

SEC. 5. [Postage — first-class mail matter — affixing stamps.] That the Postmaster General, under such regulations as he may prescribe for the collection of such postage, is hereby authorized to accept for delivery and deliver, without postage stamps affixed thereto, mail matter of the first class on which the postage has been fully prepaid at the rate provided by law. [41 Stat. L. 583.]

SEC. 6. [Congressional commission — creation — investigation of mail transportation, etc.] (a) That a commission is hereby created to be composed of the chairman and four members of the Committee on Post Offices and Post Roads of the Senate, appointed by the President of the Senate, the chairman and four members of the Committee on the Post Office and Post Roads of the House of Representatives, appointed by the Speaker of the House, and a postal expert appointed by the Postmaster General. Such commission shall, by majority vote, appoint seven persons who are experienced in business or commercial transactions, or represent business or commercial organizations which make extensive use of the Postal Service, to act as an advisory council and to aid such commission in its work. Vacancies occurring in the commission or in such advisory council shall be filled in the same manner as the original appointments. No member of such advisory council shall receive any compensation for his services. The commission may employ and fix the compensation of such engineers, special experts, clerks, and other employees as it may deem necessary: *Provided*, That each executive department and independent establishment of the Government is hereby directed to furnish to the commission such engineers, special experts, clerks, and other employees as the commission may require, whenever, in the opinion of the head of such department or independent establishment, the public business thereof will not be materially affected thereby.

(b) The expenses of the commission and of the advisory council, including all necessary traveling expenses incurred by a member of the commission, a member of the advisory council, an engineer, special expert, clerk, or employee, under orders of the commission, in making any investigation or upon official business in other places than the place of his residence, shall be allowed and paid upon the presentation of itemized vouchers therefor, approved by the chairman of the commission, which approval shall be conclusive upon the accounting officers of the Treasury Department.

(c) The commission shall investigate all present and prospective methods and systems of handling, dispatching, transporting, and delivering the mails and the facilities therefor; and especially all methods and systems which relate to the handling, delivery and dispatching of the mails in the large cities of the United States.

On or before March 1, 1921, the commission shall make a report to Congress containing a summary of its findings and such recommendations for legislation as it may believe to be proper.

(d) For the purposes of this section, the commission shall have power to summon and compel the attendance of witnesses and the production of documentary evidence, and to administer oaths.

(e) The executive departments and independent establishments of the Government, when directed by the President, shall furnish the commission, on its request, all records, papers and information in their possession relating to any subject of investigation by the commission.

(f) The sum of \$10,000, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be available immediately and until July 1, 1920; and the unexpended balance on June 30, 1920, of any appropriation for the service of the Post Office Department for the fiscal year ending June 30, 1920, or so much thereof as may be necessary, is hereby appropriated, to be available after June 30, 1920, for the purposes of this section. [41 Stat. L. 583.]

* * * **[Airplanes and aviation material — sale by Postmaster General.]** The Postmaster General is authorized to sell under such rules and regulations as he may prescribe any airplanes, parts thereof, field equipment, tools and other aviation material which have become unsuitable in the postal service or which will deteriorate and become unsuitable before it can be used. The proceeds of such sales shall be covered into the Treasury as "Miscellaneous receipts." [41 Stat. L. 1031.]

This and the following paragraph are from the Deficiency Appropriation Act of June 5, 1920, ch. 253.

* * * **[Annual report of Postmaster General — cost of franked mail matter.]** Hereafter the Postmaster General shall in his annual report submit a detailed statement of the cost to the postal establishment of the matter mailed under frank by each department and independent establishment of the Government and the revenue which would be derived therefrom if carried at the ordinary rates of postage. [41 Stat. L. 1037.]

See note to preceding paragraph.

An Act To reclassify postmasters and employees of the Postal Service and readjust their salaries and compensation on an equitable basis.

[Act of June 5, 1920, ch. 254, 41 Stat. L. 1045.]

[Reclassification of postmasters.] That on and after July 1, 1920, postmasters and employees of the Postal Service shall be reclassified and their salaries and compensation readjusted, except as otherwise provided, as follows:

That postmasters shall be divided into four classes, as follows:

The first class shall embrace all those whose annual salaries are \$3,200 or more;

The second class shall embrace all those whose annual salaries are less than \$3,200, and not less than \$2,300;

The third class shall embrace all those whose annual salaries are less than \$2,300, but not less than \$1,000.

The fourth class shall embrace all postmasters whose annual compensation, exclusive of their commissions on the money-order business of their offices, amounts to less than \$1,000. [41 Stat. L. 1045.]

[Postmasters' salaries.] The respective compensation of postmasters of the first, second, and third classes shall be annual salaries, graded in even hundreds of dollars, and payable in semimonthly payments to be ascertained and fixed by the Postmaster General from their respective quarterly returns to the Auditor for the Post Office Department, or copies or duplicates thereof to the First Assistant Postmaster General, for the calendar year immediately preceding the adjustment, based on gross postal receipts at the following rates, namely:

Third class: \$1,500, but less than \$1,600, \$1,000; \$1,600, but less than \$1,700, \$1,100; \$1,700, but less than \$1,900, \$1,200; \$1,900, but less than \$2,100, \$1,300; \$2,100, but less than \$2,400, \$1,400; \$2,400, but less than \$2,700, \$1,500; \$2,700, but less than \$3,000, \$1,600; \$3,000, but less than \$3,500, \$1,700; \$3,500, but less than \$4,200, \$1,800; \$4,200, but less than \$5,000, \$1,900; \$5,000, but less than \$6,000, \$2,000; \$6,000, but less than \$7,000, \$2,100; \$7,000, but less than \$8,000, \$2,200.

Second class: \$8,000, but less than \$10,000, \$2,300; \$10,000, but less than \$12,000, \$2,400; \$12,000, but less than \$15,000, \$2,500; \$15,000, but less than \$18,000, \$2,600; \$18,000, but less than \$22,000, \$2,700; \$22,000, but less than \$27,000, \$2,800; \$27,000, but less than \$33,000, \$2,900; \$33,000, but less than \$40,000, \$3,000.

First class: \$40,000, but less than \$50,000, \$3,200; \$50,000, but less than \$60,000, \$3,300; \$60,000, but less than \$75,000, \$3,400; \$75,000, but less than \$90,000, \$3,500; \$90,000, but less than \$120,000, \$3,600; \$120,000, but less than \$150,000, \$3,700; \$150,000, but less than \$200,000, \$3,800; \$200,000, but less than \$250,000, \$3,900; \$250,000, but less than \$300,000, \$4,000; \$300,000, but less than \$400,000, \$4,200; \$400,000, but less than \$500,000, \$4,500; \$500,000, but less than \$600,000, \$5,000; \$600,000, but less than \$7,000,000, \$6,000; \$7,000,000 and upward, \$8,000. [41 Stat. L. 1045.]

[Postmasters of fourth class — salaries — basis of computation — advancement and reduction of post offices.] The compensation of postmasters of the fourth class shall be fixed upon the basis of the whole of the box rents collected at their offices and commissions upon the amount of canceled postage-due stamps and on postage stamps, stamped envelopes, and postal cards canceled on matter actually mailed at their offices, and on the amount of newspaper and periodical postage collected in money, and on the postage collected in money on identical pieces of third and fourth class matter mailed under the provisions of the Act of April 28, 1904, without postage stamps affixed and on postage collected in money on matter of the first class mailed under the provisions of the Act of April 24, 1920, without postage stamps affixed, and on amounts received from waste paper, dead newspapers, printed matter, and twine sold at the following rates, namely:

When the amount does not exceed \$75 for any one quarter the postmaster shall be allowed 145 per centum on the amount.

When the amount exceeds \$75 for any one quarter and does not exceed \$100, the postmaster shall be allowed 120 per centum on the amount.

When the amount exceeds \$100 for any one quarter, the postmaster shall be allowed — on the first \$100, 115 per centum; on the next \$100 or less 75 per centum; and on the balance 60 per centum, the same to be ascertained and allowed by the Auditor for the Post Office Department in the settlement of the

accounts of such postmasters upon their sworn quarterly returns: *Provided*, That when the total compensation of any postmaster at a post office of the fourth class for four consecutive quarters shall amount of [sic] \$1,000, exclusive of commissions on money orders issued, and the receipts of such post office for the same period shall aggregate as much as \$1,500, the office shall be assigned to its proper class and the salary of the postmaster fixed according to the receipts: *Provided further*, That in no case shall there be allowed any postmaster of this class a compensation greater than \$250 in any one of the first three quarters of the fiscal year, exclusive of money order commissions, and in the last quarter of each fiscal year there shall be allowed such further sum as he may be entitled to under the provisions of this Act, not exceeding for the whole fiscal year the sum of \$1,000, exclusive of money order commissions: *And provided further*, That whenever unusual conditions prevail, the Postmaster General, in his discretion, may advance any post office from the fourth class to the appropriate class indicated by the receipts of the preceding quarter, notwithstanding the proviso which requires the compensation of fourth-class postmasters to reach \$1,000 for four consecutive quarters, exclusive of commissions on money-order business, and that the receipts of such post office for the same period shall aggregate as much as \$1,500 before such advancement is made: *And provided further*, That when the Postmaster General has exercised the authority herein granted, he shall, whenever the receipts are no longer sufficient to justify retaining such post office in the class to which it has been advanced, reduce the grade of such office to the appropriate class indicated by its receipts for the last preceding quarter. [41 Stat. L. 1046.]

[Assistant postmasters at second-class offices — salaries — basis of computation.] The Postmaster General is authorized to fix the salaries of assistant postmasters at offices of the second class, based on gross postal receipts for the calendar year immediately preceding the adjustment at the following rates, namely:

Eight thousand dollars, but less than \$10,000, \$1,800; \$10,000, but less than \$12,000, \$1,850; \$12,000, but less than \$15,000, \$1,900; \$15,000, but less than \$18,000, \$1,950; \$18,000, but less than \$22,000, \$2,000; \$22,000, but less than \$27,000, \$2,050; \$27,000, but less than \$33,000, \$2,100; \$33,000, but less than \$40,000, \$2,150. [41 Stat. L. 1047.]

[Employees at first-class offices — salaries — basis of computation — offices designated as state depositories.] That at offices of the first class, the annual salaries of the employees, other than those in the automatic grades, shall be in even hundreds of dollars based upon the gross postal receipts for the preceding calendar year, as follows:

Receipts \$40,000, but less than \$50,000 — Assistant postmaster, \$2,200; superintendent of mails, \$2,100. Receipts \$50,000, but less than \$60,000 — Assistant postmaster, \$2,200; superintendent of mails, \$2,100. Receipts \$60,000, but less than \$75,000 — Assistant postmaster, \$2,200; superintendent of mails, \$2,100. Receipts \$75,000, but less than \$90,000 — Assistant postmaster, \$2,300; superintendent of mails, \$2,200. Receipts \$90,000, but less than \$120,000 — Assistant postmaster, \$2,400; superintendent of mails, \$2,300; foremen, \$2,000. Receipts \$120,000, but less than \$150,000 — Assistant postmaster, \$2,500; superintendent of mails, \$2,400; foremen, \$2,000. Receipts \$150,000, but less than \$20,000 — Assistant postmaster, \$2,600; superintendent of mails, \$2,500; foremen, \$2,000.

Receipts \$200,000, but less than \$250,000 — Assistant postmaster, \$2,700; superintendent of mails, \$2,600; foremen, \$2,000. Receipts \$250,000, but less than \$300,000 — Assistant postmaster, \$2,800; superintendent of mails, \$2,700; assistant superintendent of mails, \$2,200; foremen, \$2,000. Receipts \$300,000, but less than \$400,000 — Assistant postmaster, \$2,900; superintendent of mails, \$2,800; assistant superintendent of mails, \$2,200; foremen, \$2,000. Receipts \$400,000, but less than \$500,000 — Assistant postmaster, \$3,000; superintendents of mails, \$2,900; assistant superintendent of mails, \$2,200; foremen, \$2,000. Receipts \$500,000, but less than \$600,000 — Assistant postmaster, \$3,200; superintendent of mails, \$3,000; assistant superintendents of mails, \$2,300; foremen, \$2,000; postal cashier, \$2,600; money-order cashier, \$2,300. Receipts \$600,000, but less than \$1,000,000 — Assistant postmaster, \$3,400; superintendent of mails, \$3,200; assistant superintendents of mails, \$2,500; foremen, \$2,000 and \$2,100; postal cashier, \$2,800; money-order cashier, \$2,500. Receipts \$1,000,000, but less than \$2,000,000 — Assistant postmaster, \$3,600; superintendent of mails, \$3,400; assistant superintendents of mails, \$2,200, \$2,500 and \$2,800; foremen \$2,000 and \$2,200; postal cashier, \$3,000; assistant cashiers, \$2,300; money-order cashier, \$2,700; bookkeepers, \$2,000; station examiners, \$2,000. Receipts \$2,000,000, but less than \$3,000,000 — Assistant postmaster, \$3,700; superintendent of mails, \$3,500; assistant superintendents of mails, \$2,300, \$2,500, \$2,700, and \$3,000; foremen, \$2,000 and \$2,200; postal cashier, \$3,100; assistant cashiers, \$2,200 and \$2,400; money-order cashier, \$2,800; bookkeepers, \$2,000 and \$2,200; station examiners, \$2,300. Receipts \$3,000,000, but less than \$5,000,000 — Assistant postmaster, \$3,800; superintendent of mails, \$3,600; assistant superintendents of mails, \$2,300, \$2,500, \$2,800 and \$3,200; foremen, \$2,000 and \$2,200; postal cashier, \$3,300; assistant cashiers, \$2,200, \$2,400, and \$2,800; money-order cashier, \$3,000; bookkeepers, \$2,000 and \$2,200; station examiners, \$2,300 and \$2,500. Receipts \$5,000,000, but less than \$7,000,000 — Assistant postmaster, \$4,000; superintendent of mails, \$3,800; assistant superintendents of mails, \$2,300, \$2,500, \$2,800, \$3,000, and \$3,400; foremen, \$2,000 and \$2,200; postal cashier, \$3,500; assistant cashiers, \$2,200, \$2,600, and \$2,800; money-order cashier, \$3,200; bookkeepers, \$2,000, \$2,200, and \$2,300; station examiners, \$2,300 and \$2,500. Receipts \$7,000,000, but less than \$9,000,000 — Assistant postmaster, \$4,300; superintendent of mails, \$4,000; assistant superintendents of mails, \$2,300, \$2,500, \$2,800, \$3,200, and \$3,600; foremen, \$2,000 and \$2,200; postal cashier, \$3,700; assistant cashiers, \$2,300, \$2,500, \$2,800, and \$3,000; money-order cashier, \$3,300; bookkeepers, \$2,000, \$2,200, and \$2,300; station examiners, \$2,300 and \$2,500. Receipts \$9,000,000, but less than \$20,000,000 — Assistant postmaster, \$4,500; superintendent of mails, \$4,200; assistant superintendents of mails, \$2,400, \$2,500, \$2,800, \$3,200, \$3,400, and \$3,800; foremen, \$2,000, \$2,200, and \$2,300; postal cashier, \$3,800; assistant cashiers, \$2,300, \$2,500, \$2,800, and \$3,000; money-order cashier, \$3,400; bookkeepers, \$2,000, \$2,200, \$2,300, and \$2,500; station examiners, \$2,300 and \$2,500. Receipts \$20,000,000 and upward — Assistant postmaster, \$4,600; superintendent of mails, \$4,400; assistant superintendents of mails, \$2,400, \$2,600, \$2,800, \$3,200, \$3,600, and \$3,800; superintendent of delivery, \$4,400; assistant superintendents of delivery, \$2,400, \$2,600, \$2,800, \$3,200, \$3,600, and \$3,800; foremen, \$2,000, \$2,200, and \$2,300; superintendent of registry, \$4,000; assistant superintendents of registry, \$2,400, \$2,600, \$2,800, and \$3,200; superintendent of money order, \$4,000; assistant superintendent of money order, \$3,800; auditor, \$3,600;

postal cashier, \$4,000; assistant cashiers, \$2,300, \$2,500, \$2,800, \$3,000, and \$3,200; money-order cashier, \$3,600; bookkeepers, \$2,100, \$2,300, \$2,500, and \$3,000; station examiners, \$2,300 and \$2,500: *Provided*, That in fixing the salaries of supervisory employees in the post office at Washington, District of Columbia, the Postmaster General may in his discretion add not to exceed 50 per centum to the gross postal receipts of that office: *Provided further*, That not more than one assistant superintendent of mails, one assistant superintendent of delivery, one assistant superintendent of registry, and one assistant cashier shall be paid the maximum salary provided for these positions at any office, except where the receipts are \$9,000,000 and less than \$20,000,000, to which offices two assistant superintendents of mails shall be assigned at the maximum salary, one to be in charge of the city-delivery service: *And provided further*, That in post offices designated as State depositories for surplus postal funds and central accounting offices where the gross postal receipts are less than \$500,000 and no postal cashier is provided the employee directly in charge of the records and adjustments of such accounts shall be allowed an increase of \$200 per annum, and if the gross postal receipts of such offices are \$500,000 and less than \$5,000,000, the postal cashier shall be allowed an increase of \$200 per annum. [41 Stat. L. 1047.]

[Superintendents of classified stations — assistant superintendents — salaries — basis of computation.] The salary of superintendents of classified stations shall be based on the number of regular employees assigned thereto and the annual postal receipts: *Provided*, That no allowance shall be made for sales of stamps to patrons residing outside of the territory of the stations. At delivery stations each \$100,000 of postal receipts shall be considered equal to one additional employee. At nondelivery classified stations, known as finance stations, each \$25,000 of postal receipts shall be considered as equal to one additional employee.

At classified stations having less than four employees and where the receipts are less than \$100,000 the salary of the superintendent shall not be greater than that of a special clerk.

At classified stations having four employees or more the salary of the superintendent shall be as follows: Four and not exceeding six employees, \$2,100; seven and not exceeding eighteen employees, \$2,200; nineteen and not exceeding thirty-two employees, \$2,300; thirty-three and not exceeding forty-four employees, \$2,400; forty-five and not exceeding sixty-four employees, \$2,500; sixty-five and not exceeding ninety employees, \$2,600; ninety-one and not exceeding one hundred and twenty employees, \$2,700; one hundred and twenty-one and not exceeding one hundred and fifty employees, \$2,800; one hundred and fifty-one and not exceeding three hundred and fifty employees, \$3,000; three hundred and fifty-one employees and over, \$3,200.

At classified stations having sixty-five or more employees there may be an assistant superintendent of stations with salary as follows: Sixty-five and not exceeding ninety employees, \$2,200; ninety-one and not exceeding one hundred and twenty employees, \$2,300; one hundred and twenty-one and not exceeding one hundred and fifty employees, \$2,400; one hundred and fifty-one and not exceeding three hundred and fifty employees, \$2,600; three hundred and fifty-one employees and over, \$2,800. [41 Stat. L. 1049.]

[Clerks in first and second class offices — grades — readjustment — salaries — substitutes — promotion — printers, etc.] That clerks in first and second-class post offices and letter carriers in the City Delivery Service shall be divided into five grades as follows: First grade—salary, \$1,400; second grade—salary, \$1,500; third grade—salary, \$1,600; fourth grade—salary, \$1,700; fifth grade—salary, \$1,800: *Provided*, That in the readjustment of grades for clerks at first and second class post offices and letter carriers in the City Delivery Service to conform to the grades herein provided, grade 1 shall include present grade 1, grade 2 shall include present grade 2, grade 3 shall include present grade 3, grade 4 shall include present grade 4, and grade 5 shall include present grades 5 and 6: *Provided further*, That hereafter substitute clerks in first and second class post offices and substitute letter carriers in the City Delivery Service when appointed regular clerks or carriers shall have credit for actual time served on a basis of one year for each three hundred and six days of eight hours served as substitute, and appointed to the grade to which such clerk or carrier would have progressed had his original appointment as substitute been to grade one: *And provided further*, That clerks in first and second class post offices and letter carriers in the City Delivery Service shall be promoted successively after one year's satisfactory service in each grade to the next higher grade until they reach the fifth grade. All promotions shall be made at the beginning of the quarter following one year's satisfactory service in the grade: *And provided further*, That there shall be two grades of special clerks as follows: First grade—salary, \$1,900; second grade—salary, \$2,000: *And provided further*, That printers, mechanics, and skilled laborers shall, for the purpose of promotion and compensation, be deemed a part of the clerical force. [41 Stat. L. 1049.]

[Substitute, etc., clerks in first and second class offices — salaries.] That the pay of substitute, temporary, or auxiliary clerks at first and second class post offices and substitute letter carriers in the City Delivery Service shall be at the rate of 60 cents per hour. [41 Stat. L. 1050.]

[Watchmen, etc., in first and second class offices — grades — salaries — promotions.] That watchmen, messengers, and laborers in first and second class post offices shall be divided into two grades, as follows: First grade—salary, \$1,350; second grade—salary, \$1,450: *Provided*, That watchmen, messengers, and laborers shall be promoted to the second grade after one year's satisfactory service in the first grade. [41 Stat. L. 1050.]

[Railway postal clerks — laborers in Railway Mail Service — classes and grades — salaries.] That railway postal clerks shall be divided into two classes, Class A and Class B, and into six grades as follows: Grade one—salary, \$1,600; grade two—salary, \$1,700; grade three—salary, \$1,850; grade four—salary, \$2,000; grade five—salary, \$2,150; grade six—salary, \$2,300; and laborers in the Railway Mail Service shall be divided into two grades, as follows: Grade one—salary, \$1,350; grade two—salary, \$1,450.

For the purpose of organization and establishing maximum grades to which promotions may be made successively, as herein provided, runs now in Class A and all terminal railway post offices and transfer offices shall be placed in Class A, and the remainder in Class B. [41 Stat. L. 1050.]

[Road clerks — promotion.] Road clerks shall be promoted successively to grade three for clerks, and to grade four for clerks in charge of Class A, and to grade five for clerks and to grade six for clerks in charge of Class B. [41 Stat. L. 1050.]

[Terminal railway post office and transfer clerks — promotions.] Terminal railway post office and transfer clerks shall be promoted successively to grade three for clerks of whom general scheme distribution is not required, and to grade four for clerks of whom general scheme distribution is required, and for clerks in charge to grade five in terminals or tours or crews in terminals consisting of not more than nineteen clerks or in transfer offices or tours in transfer offices of not more than four clerks, and to grade six in terminals or tours or crews in terminals consisting of twenty or more clerks and in transfer offices or tours in transfer offices of five or more clerks. [41 Stat. L. 1050.]

[Clerk in charge — definition.] A clerk in charge is defined as a clerk in charge of a railway post office, terminal railway post office, or transfer office whether he performs service alone or has a crew of clerks under his supervision, or of a tour or a crew within a tour of a terminal railway post office or transfer office. [41 Stat. L. 1050.]

[Clerk in offices of division superintendents or chief clerks — promotion.] All clerks assigned to the office of division superintendents or chief clerks offices shall be promoted successively to grade three, and in the office of division superintendent four clerks may be promoted one grade per annum to grade four, four clerks to grade five, and four clerks to grade six, and in the office of chief clerks one clerk may be promoted one grade per annum to grade four, one clerk to grade five, and one clerk to grade six. [41 Stat. L. 1050.]

[Examiners and assistants — promotion.] Examiners shall be promoted successively to grade five and assistant examiners to grade four whether assigned to the office of division superintendents or chief clerks offices. [41 Stat. L. 1050.]

[Laborers — promotion.] Laborers shall be promoted to grade two after one year's satisfactory service in grade one. [41 Stat. L. 1050.]

[Promotions — when made.] Promotions shall be made successively at the beginning of the quarter following a year's satisfactory service in the next lower grade. [41 Stat. L. 1050.]

[Readjustment of service — grades.] In the readjustment of the service to conform to the grades herein provided, grade one shall include clerks in present grade one, grade two shall include clerks in present grades two and three, grade three shall include clerks in present grades four and five, grade four shall include clerks in present grades six and seven, grade five shall include clerks in present grades eight and nine, and grade six shall include clerks in present grade ten. [41 Stat. L. 1050.]

[Substitute railway postal clerks — salaries — promotion.] Substitute railway postal clerks shall be paid the salary of grade one for service actually performed during the first calendar year of service, which shall constitute his

probationary period, when, if his services are satisfactory, unless sooner appointed a regular clerk, he shall be promoted to grade two and paid the salary of that grade for service actually performed until appointed a regular clerk. [41 Stat. L. 1050.]

[Clerks — hours of service — overtime.] Service of clerks shall be based on an average of not exceeding eight hours daily for three hundred and six days per annum, including proper allowance for all service required on lay-off periods. Clerks required to perform service in excess of eight hours daily, as herein provided, shall be paid in cash at the annual rate of pay or granted compensatory time at their option for such overtime. [41 Stat. L. 1051.]

[Substitute railway postal clerks — time spent in traveling under orders — traveling expenses.] Substitute railway postal clerks shall be credited with full time while traveling under orders of the department to and from their designated headquarters to take up an assignment, together with actual and necessary travel expenses, not to exceed \$2 per day, while on duty away from such headquarters. When a substitute clerk performs service in a railway post office starting from his official headquarters he shall be allowed travel expenses under the law applying to clerks regularly assigned to the run. [41 Stat. L. 1051.]

[Division headquarters of post office inspectors — clerks — grades — salary — promotion.] That clerks at division headquarters of post-office inspectors shall be divided into six grades, as follows: Grade one — salary, \$1,600; grade two — salary, \$1,700; grade three — salary, \$1,850; grade four — salary, \$2,000; grade five — salary, \$2,150; grade six — salary, \$2,300; and there shall be one chief clerk at each division headquarters at a salary of \$2,600. That clerks at division headquarters shall be promoted successively to grade five at the beginning of the quarter following a year's satisfactory service in the next lower grade, and one clerk at each division headquarters may be promoted to grade six after one year's satisfactory service in grade five. [41 Stat. L. 1051.]

[Division headquarters of post office inspectors — clerks — absence from duty — substitutes.] Hereafter when any clerk in the office of division headquarters in the post-office inspection service is absent from duty from any cause other than leave with pay allowed by law, the Postmaster General, under such regulations as he may prescribe, may authorize the employment of a substitute for such work, and payment therefor from the lapsed salary of such absent clerk at a rate not to exceed the pay of the grade of work performed by such substitute. [41 Stat. L. 1051.]

[Rural letter carriers — grades — salaries — carriers assigned to horse-drawn vehicle routes — mileage.] That the compensation of each rural carrier for serving a rural route of twenty-four miles, six days in the week, shall be \$1,800; on routes twenty-two miles and less than twenty-four miles, \$1,728; on routes twenty miles and less than twenty-two miles, \$1,620; on routes eighteen miles and less than twenty miles, \$1,440; on routes sixteen miles and less than eighteen miles, \$1,260; on routes fourteen miles and less than sixteen miles, \$1,080; on routes twelve miles and less than fourteen miles, \$1,008; on routes ten miles and less than twelve miles, \$936; on routes eight miles and less than

ten miles, \$864; on routes six miles and less than eight miles, \$792; on routes four miles and less than six miles, \$720. A rural letter carrier serving one tri-weekly route shall be paid on the basis for a route one-half the length of the route served by him, and a carrier serving two triweekly routes shall be paid on the basis for a route one-half of the combined length of the two routes. Each rural carrier assigned to a horse-drawn vehicle route on which daily service is performed shall receive \$30 per mile per annum for each mile said route is in excess of twenty-four miles or major fraction thereof, based on actual mileage, and each rural carrier assigned to a horse-drawn vehicle route on which tri-weekly service is performed shall receive \$15 per mile for each mile said route is in excess of twenty-four miles or major fraction thereof, based on actual mileage. [41 Stat. L. 1051.]

[Rural letter carriers — deductions for failure to perform service.] Deductions for failure to perform service on a standard rural delivery route for twenty-four miles and less shall not exceed the rate of pay per mile for service for twenty-four miles and less; and deductions for failure to perform service on mileage in excess of twenty-four miles shall not exceed the rate of compensation allowed for such excess mileage. [41 Stat. L. 1051.]

[Rural letter carriers — maintenance of motor vehicles — salaries.] That the pay of a carrier who furnishes and maintains his own motor vehicle and who serves a route not less than fifty miles in length be at not exceeding \$2,600 per annum. [41 Stat. L. 1052.]

[Village letter carriers — salaries.] That the pay of carriers in the village delivery service, under such rules and regulations as the Postmaster General may prescribe, shall be from \$1,000 to \$1,200 per annum. [41 Stat. L. 1052.]

[Third-class offices — allowance for clerical services — employment of assistant postmasters.] That no allowance to third-class post offices to cover the cost of clerical services in excess of \$450 shall be made where the salary of the postmaster is \$1,000, to \$1,100, or \$1,200; nor in excess of \$600 where the salary of the postmaster is \$1,300, \$1,400, or \$1,500; nor in excess of \$700 where the salary of the postmaster is \$1,600, \$1,700, or \$1,800; nor in excess of \$900 where the salary of the postmaster is \$1,900 or \$2,000; nor in excess of \$1,200 where the salary of the postmaster is \$2,100 or \$2,200: *Provided*, That the Postmaster General may in the disbursement of the appropriation for this purpose and within its limitation provide for the employment at a maximum salary of \$900 per annum of assistant postmasters at post offices of the third class where the salary of the postmaster is \$2,100 or \$2,200 per annum. [41 Stat. L. 1052.]

[Inspectors — grades — salaries — promotion — per diem allowance.] That post-office inspectors shall be divided into seven grades, as follows: Grade one — salary, \$2,300; grade two — salary, \$2,500; grade three — salary, \$2,700; grade four — salary, \$2,900; grade five — salary, \$3,200; grade six — salary, \$3,500; grade seven — salary, \$3,700; and there shall be fifteen inspectors in charge at \$4,200. Inspectors shall be promoted successively to grade five at the beginning of the quarter following a year's satisfactory and efficient service in the next lower grade, and to grade six at the beginning of the quarter following the expiration of one year's meritorious service in grade five, and not to exceed 20 per centum of the force to grade seven for specially meritorious

service after not less than one year's service in grade six. The three grades of inspectors without per diem allowance and the three senior grades of field inspectors shall be considered on a parity in readjusting the inspectors to the grades provided. [41 Stat. L. 1052.]

[Inspectors — expenses.] Inspectors shall be paid their actual expenses not to exceed \$5 per day while engaged on official business away from their homes and official domiciles. The appropriation for per diem allowance authorized for the fiscal year beginning July 1, 1920, may be utilized for such expenses. [41 Stat. L. 1052.]

[Railway Mail Service — officials — grades — salaries.] That the annual salaries of officials of the Railway Mail Service shall be graded in even hundreds of dollars, as follows: Division superintendents at \$4,200; assistant division superintendents at \$3,200; assistant superintendents at \$3,100; assistant superintendent in charge of car construction at \$3,000; chief clerks at \$3,000; assistant chief clerks at \$2,500: *Provided*, That the clerks in charge of sections in the offices of the division superintendents shall be rated as assistant chief clerks at \$2,500 salary, and the chief clerk in charge of car construction shall be designated as an assistant superintendent at \$3,000 salary per annum. [41 Stat. L. 1052.]

[Requisition fillers and packers — grades — salaries.] That the salary of requisition fillers and packers in the division of equipment and supplies shall be as follows: One foreman, \$1,800 per annum; ten requisition fillers and nine packers, each, \$1,600 per annum. [41 Stat. L. 1052.]

[Postal service employees — leaves of absence — sick leaves — credit for leave.] Employees in the Postal Service shall be granted fifteen days' leave of absence with pay, exclusive of Sundays and holidays, each fiscal year, and sick leave with pay at the rate of ten days a year to be cumulative for a period of three years, but no sick leave with pay in excess of thirty days shall be granted during any three consecutive years. Sick leave shall be granted only upon satisfactory evidence of illness and if for more than two days the application therefor shall be accompanied by a physician's certificate.

The fifteen days' leave shall be credited at the rate of one and one-quarter days for each month of actual service. [41 Stat. L. 1052.]

[Demoted employees — restoration to former or intermediate grades.] Whenever an employee herein provided for shall have been reduced in salary for any cause, he may be restored to his former grade or advanced to an intermediate grade at the beginning of any quarter following the reduction, and a restoration to a former grade or advancement to an intermediate grade shall not be construed as a promotion within the meaning of the law prohibiting advancement of more than one grade within one year. [41 Stat. L. 1053.]

[Sunday or holiday service at first and second class offices — allowance of Compensatory time — Act of July 2, 1918, amended.] Hereafter when the needs of the service require the employment on Sundays or holidays of foremen, special clerks, clerks, carriers, watchmen, messengers, or laborers at first and second class post offices, or of railway postal clerks at terminal railway post offices and transfer offices, they shall be allowed compensatory time

within six days next succeeding the Sunday and within thirty days next succeeding the holiday on which service is performed, and that portion of the Act approved July 2, 1918, authorizing the payment for overtime in lieu of compensatory time is hereby repealed. [41 Stat. L. 1053.]

For the Act of July 2, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 662.

[Employees in automatic grades — promotion — time.] All employees herein provided for in automatic grades, who have not reached the maximum grades to which they are entitled to progress automatically, shall be promoted at the beginning of the quarter following the completion of one year's satisfactory service since their last promotion, regardless of any increases in salaries granted them by the provisions of this Act. [41 Stat. L. 1053.]

[Supervisory officials, etc.— limitation on promotion — exceptions.] On and after July 1, 1921, no supervisory official or employee in the Postal Service shall be promoted more than \$300 during any one year, except when appointed postmaster, inspector in charge, or Superintendent of the Railway Mail Service. [41 Stat. L. 1053.]

[Clerks and carriers — transfers — grade and salaries.] The Postmaster General may, when the interest of the service requires, transfer any clerk to the position of carrier or any carrier to the position of clerk, such transfer to be made to the corresponding grade and salary of the clerk or carrier transferred. [41 Stat. L. 1053.]

[Joint commission — continuance.] That the joint commission authorized under section 3 of the Act of February 28, 1919, making appropriations for the service of the Post Office Department, be continued until the next regular session of Congress to prepare a detailed report of the investigation. [41 Stat. L. 1053.]

For the Act of Feb. 28, 1919, sec. 3, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 298.

[Application of Act of April 24, 1920, sec. 2.] That section 2 of an Act entitled "An Act making appropriation for the service of the Post Office Department for the fiscal year ending June 30, 1921, and for other purposes," approved April 24, 1920, be, and the same is hereby, repealed, except in so far as it affects the pay of employees not covered by this Act. [41 Stat. L. 1053.]

Section 2, partially repealed by the text, is set out *supra*, p. 166.

[Act of April 24, 1920 — use of sums appropriated — further appropriations.] That the sums appropriated for salaries and compensation of postmasters and employees of the Postal Service in the Act approved April 24, 1920, shall be available for the payment of salaries and compensation of postmasters and postal employees at the rates of pay herein provided; and such additional sums as may be necessary are hereby appropriated to carry out the provisions of this Act. [41 Stat. L. 1053.]

POWER COMMISSION

See WATERS

PRESIDENT

See EXECUTIVE DEPARTMENTS; INTERSTATE COMMERCE; SHIPPING AND NAVIGATION

PRINTING

See CONGRESS; PUBLIC PRINTING

PUBLIC CONTRACTS

Act of March 6, 1920, ch. 94 (Deficiency Appropriation Act), 179.

Sec. 1. Work under Supervision of Treasury Department — Relief of Contractors, etc., 179.

Act of May 21, 1920, ch. 194 (Fortifications Appropriation Act), 179.

Sec. 6. Ordnance Contracts — Placing with Government Establishments — Obligations Assumed, 179.

CROSS-REFERENCE

See also WAR DEPARTMENT AND MILITARY ESTABLISHMENT

[SEC. 1.] * * * [Work under supervision of Treasury Department — relief of contractors, etc.] Toward the amount necessary for the payment of claims of contractors, and so forth, arising under the Act entitled "An Act for the relief of contractors and subcontractors for the post offices and other buildings and work under the supervision of the Treasury Department, and for other purposes," approved August 25, 1919, \$500,000: *Provided*, That the Secretary of the Treasury is authorized to make partial payments of any claim payable under said Act, and to make payment of any and all loss and expense (exclusive of profits) incurred by a contractor or subcontractor in fulfilling his contract or subcontract with the Treasury Department in excess of the amount which such contractor or subcontractor may receive under the terms of his contract or subcontract, if such loss and expense were, in the opinion of the Secretary of the Treasury, due to war conditions. [41 Stat. L. 507.]

This is from the Deficiency Appropriation Act of March 6, 1920, ch. 94.

For Act of Aug. 25, 1919, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 307.

SEC. 6. [Ordnance contracts — placing with government establishments — obligations assumed.] That all orders or contracts for manufacture of material pertaining to approved projects, which are placed with arsenals or other ordnance establishments and which are chargeable to armament of fortifications appropriations, shall be considered as obligations in all respects in the same manner as provided for similar orders placed with commercial manufacturers. [41 Stat. L. 613.]

This is from the Fortifications Appropriation Act of May 21, 1920, ch. 194.

PUBLIC DEBT

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 180.

Sec. 1. Expenses Incident to Loans Authorized by Liberty Bond Acts — Appropriations, 180.

CROSS-REFERENCE

See also *CORPORATIONS*

[SEC. 1.] * * * [**Expenses incident to loans authorized by Liberty Bond Acts — appropriations.**] The appropriations “ Expenses of Loans, Act of April 24, 1917,” and “ Expenses of Loans, Act of September 24, 1917, as amended,” shall not be available for obligation after June 30, 1921, and the unexpended balances of such appropriations which remain upon the books of the Treasury Department on June 30, 1922, shall be covered into the Treasury and carried to the surplus fund: *Provided*, That for the fiscal year 1922 and annually thereafter estimates of appropriations shall be submitted to Congress in the manner prescribed by law for expenses arising in connection with the loans authorized by the various Liberty Bond Acts and the Victory Liberty Loan Act. [41 Stat. L. 646.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214.

For Acts of April 24, 1917, and Sept. 24, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 672.

PUBLIC HEALTH

See **ANIMALS; HEALTH AND QUARANTINE; HOSPITALS AND ASYLUMS; MINERAL LANDS, MINES AND MINING; WAR DEPARTMENT AND MILITARY ESTABLISHMENT**

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CROSS-REFERENCES

See also *ALASKA; INDIANS; MINERAL LANDS, MINES AND MINING; WATERS*

An Act Authorizing local drainage districts to drain certain public lands in the State of Arkansas, counties of Mississippi and Poinsett, and subjecting said lands to taxation.

[*Act of Jan. 17, 1920, ch. 47, 41 Stat. L. 392.*]

[SEC. 1.] **[Public lands in Arkansas subject to state drainage laws.]** That all of those unentered, unreserved public lands, and all of those entered lands for which no final certificates have been issued, within the areas hereinafter described, are hereby made and declared to be subject to the laws of the State of Arkansas relating to the organization, government, and regulation of drainage districts to the same extent and in the same manner, except as hereinafter provided, in which lands held under private ownership are or may be subject to said laws: *Provided* That the United States and all persons legally holding unpatented lands under entries made under the public-land laws of the United States shall be accorded all the rights, privileges, and benefits given by said laws to persons holding lands in private ownership, said lands being those public lands in Mississippi County, Arkansas, in townships fourteen, fifteen, and sixteen north, range nine east, and townships fifteen and sixteen north, range ten east, fifth principal meridian, according to the official surveys thereof approved October 12, 1915, and all of those unentered public lands, and all of those entered lands for which no final certificates have been issued in Poinsett County, Arkansas, in townships eleven and twelve north, range six east, fifth principal meridian, according to the official surveys thereof approved July 30, 1913. [41 Stat. L. 392.]

SEC. 2. **[Apportionment of cost of drainage—certification of charges.]** That the construction and maintenance of canals, ditches, levees, and other drainage works upon and across the lands subject to the operation of this Act are hereby authorized, subject to the same conditions as are imposed by the laws of the State of Arkansas upon lands held in private ownership, and that the cost of construction and maintenance of canals, ditches, levees, and other drainage works incurred in connection with any drainage project under said laws shall be equitably apportioned among all lands held in private ownership, all unentered public lands, and all lands embraced in unpatented entries affected by such project. Officially certified lists showing the amount of charges assessed against each smallest legal subdivision of such lands shall be furnished to the register and receiver of the United States land office of the district in which the lands affected are situated as soon as said charges would become a lien if the lands were held in private ownership [41 Stat. L. 392.]

SEC. 3. **[Charges assessed against lands as lien—enforcement by sale.]** That all charges legally assessed pursuant to the drainage laws of the State of Arkansas by a drainage district against any unentered public lands, or against any lands embraced in unpatented entries, subject to the provisions of this Act, shall be a lien upon said lands, which may be enforced by sale in the same manner and subject to the same conditions, except as hereinafter set forth, under which said charges shall be enforced against lands held in private ownership, and whenever any of said lands shall be sold for nonpayment of such charges, inclusive of lands bid in for a drainage district, a statement showing the name of the purchaser, the price at which each legal subdivision was sold

the amount assessed against it, together with penalties and interest, if any, and the cost of the sale, and the amount of excess, if any, over and above all lawful assessment charges and the cost of sale, shall be officially certified to the register and receiver of the United States land office of the district in which the lands are situated immediately after the completion of such sale, but nothing in this Act shall be construed as creating any obligation on the United States to pay any of said charges. [41 Stat. L. 393.]

SEC. 4. [Sales of lands subject to Act—disposition of moneys received.] That all moneys received from the sale of entered or unentered lands subject to the operation of this Act which shall be in excess of assessments due thereon, together with penalties and interest and the costs of the sales, shall be paid by the proper county officer to the receiver of the United States land office of the district in which the lands are situated, and such excess moneys shall be covered into the United States Treasury as proceeds from the sales of public lands. [41 Stat. L. 393.]

SEC. 5. [Patents—purchasers—qualifications—limitation on amount of land sold to single purchaser—proceeds of sale.] That at any time within ninety days after the sale of unentered public lands and at any time within ninety days after the expiration of the period of redemption provided for in the drainage laws under which the lands are sold, no redemption having been made, after the sale of lands embraced within unpatented entries, the purchaser at such sale, a drainage district being herein expressly excepted from the operation of this provision, shall, upon the filing of an application therefor and an affidavit containing proof of necessary qualifications with the register and receiver of the United States land office, and upon payment to the receiver of the price of \$5 per acre, together with the usual fees and commissions charged in entry of lands under the homestead laws, be entitled to receive a patent: *Provided*. That such purchaser shall have the qualifications required in making entry of lands under the homestead laws, and any such purchase shall exhaust any further homestead right of the purchaser to the extent of the amount of lands thus purchased by him. Not more than one hundred and sixty acres of such lands shall be sold and patented to any one purchaser under the provisions of this Act. This limitation shall not apply to lands subject to the operation of this Act which may be bid in for a drainage district, but no patent shall be issued to a drainage district or to any one bidding in said lands for a drainage district. The proceeds derived by the Government shall be covered into the United States Treasury and applied as provided by law for the disposal of the proceeds from the sale of public lands. [41 Stat. L. 393.]

SEC. 6. [Failure of purchaser to complete sale—subrogation.] That unless the purchaser shall, within the time specified in section 5 of this Act, file with the register and receiver of the United States land office an application for a patent, together with the required affidavit, and make payment of the purchase price, fees, and commissions as provided in said section 5, any person having the qualifications of an entryman under the homestead laws may file an application for a patent, together with the required affidavit, and upon payment to the receiver of the purchase price of \$5 per acre, fees, and commissions, and in addition thereto an amount equal to the drainage charges, penalties, interest,

and costs for which the lands were sold, and if the lands were bid in for the drainage district, an additional amount equal to 6 per centum per annum on the sum for which the lands were sold from the date of such sale, said applicant shall become subrogated to the rights of such purchaser and shall be entitled to receive a patent for not more than one hundred and sixty acres of said lands. When payment is made to effect subrogation as herein provided the register and receiver of the United States land office shall serve notice upon the purchaser that an application for patent for the lands purchased by him has been filed, and that the amount of the drainage charges, penalties, interests, and costs of the sale will be paid to him upon submission of proof of purchase and payment by him of said sums. The receiver shall make such payment as soon as said requirement shall have been fulfilled. If the lands were bid in for a drainage district, the receiver will pay to the proper county officers the amount of the drainage charges, penalties, and interests and costs of sale, together with the additional sum of 6 per centum per annum, to which said drainage district is entitled. All remaining moneys to which the United States may be entitled shall be covered into the United States Treasury and applied as provided by law for the disposal of the proceeds from the sale of public lands. [41 Stat. L. 393.]

SEC. 7. [Notices — hearings — appeals.] That a copy of all notices required by the drainage laws of the State of Arkansas to be given to the owners and occupants of lands held in private ownership shall, as soon as such notice is issued, be delivered to the register and receiver of the United States land office of the district in which the lands are situated where any of the lands subject to the operation of this Act are affected, and the United States and the entryman claiming under the public land laws of the United States shall be accorded the same rights to be heard by petition, answer, remonstrance, appeal, or otherwise, as are given to persons holding lands in private ownership, and all entrymen shall be given the same rights of redemption as are given to the owners of land held in private ownership. [41 Stat. L. 394.]

SEC. 8. [Act when effective.] That this Act shall not be effective as to any lands involved in suits instituted on behalf of the United States with a view to quieting title in the Government to such lands until and unless such suits shall be finally determined in favor of the United States. [41 Stat. L. 394.]

An Act To authorize a preference right of entry by certain Carey Act entrymen, and for other purposes.

[Act of Feb. 14, 1920, ch. 74, 41 Stat. L. 407.]

[Carey Act entrymen — preference right of entry.] That the Secretary of the Interior, when restoring to the public domain lands that have been segregated to a State under section 4 of the Act of August 18, 1894, and the Acts and resolutions amendatory thereof and supplemental thereto, commonly called the Carey Act, is authorized, in his discretion and under such rules and regulations as he may establish to allow for not exceeding ninety days to any Carey Act entryman a preference right of entry under applicable land laws of any

of such lands which such person had entered under and pursuant to the State laws providing for the administration of the grant under the Carey Act and upon which such person had established actual bona fide residence or had made substantial and permanent improvements: *Provided*, That each entryman shall be entitled to a credit as residence upon his new homestead entry allowed hereunder of the time that he has actually lived upon the claim as a bona fide resident thereof. [41 Stat. L. 407.]

For the Carey Act, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 698.

Joint Resolution Giving to discharged soldiers, sailors, and marines a preferred right of homestead entry.

[Resolution of Feb. 14, 1920, No. 29, ch. 76, 41 Stat. L. 434.]

[SEC. 1.] [Discharged soldiers, sailors, and marines — preferred right of homestead entry.] That hereafter, for the period of two years following the passage of this Act, on the opening of public or Indian lands to entry, or the restoration to entry of public lands theretofore withdrawn from entry, such opening or restoration shall, in the order therefor, provide for a period of not less than sixty days before the general opening of such lands to disposal in which officers, soldiers, sailors, or marines who have served in the Army or Navy of the United States in the war with Germany and been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve shall have a preferred right of entry under the homestead or desert land laws, if qualified thereunder, except as against prior existing valid settlement rights and as against preference rights conferred by existing laws or equitable claims subject to allowance and confirmation: *Provided*, That the rights and benefits conferred by this Act shall not extend to any person who, having been drafted for service under the provisions of the Selective Service Act, shall have refused to render such service or to wear the uniform of such service of the United States. [41 Stat. L. 434.]

SEC. 2. [Regulations — authority to make.] That the Secretary of the Interior is hereby authorized to make any and all regulations necessary to carry into full force and effect the provisions hereof. [41 Stat. L. 435.]

An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain.

[Act of Feb. 25, 1920, ch. 85, 41 Stat. L. 437.]

[SEC. 1.] [Mineral deposits — leasing by government — lands affected — reservation to extract helium from gas.] That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as here-

inafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities: *Provided*, That the United States reserves the right to extract helium from all gas produced from lands permitted, leased, or otherwise granted under the provisions of this Act, under such rules and regulations as shall be prescribed by the Secretary of the Interior: *Provided further*, That in the extraction of helium from gas produced from such lands, it shall be so extracted as to cause no substantial delay in the delivery of gas produced from the well to the purchaser thereof: *And provided further*, That citizens of another country, the laws, customs, or regulations of which, deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act. [41 Stat. L. 437.]

For Act of March 1, 1911, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 597.

COAL.

SEC. 2. [Leasing coal lands — occupants and claimants — prospecting or exploratory work — notice of leasing — leasing by railroads.] That the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in the opinion of the Secretary of the Interior, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter the Secretary of the Interior shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant: *Provided*, That the Secretary is hereby authorized, in awarding leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants: *Provided further*, That where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this Act, prospecting permits for a term of two years, for not exceeding two thousand five hundred and sixty acres; and if within said period of two years thereafter, the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this Act for all or part of the land in his permit: *And provided further*, That no lease of coal under this Act shall be approved or issued until after notice of the proposed lease, or offering for lease, has been given for thirty days in a newspaper of general circulation in the county in which the lands or deposits are situated: *And provided further*, That no company or corporation operating a common carrier railroad shall be given or hold a permit or lease under the provisions of this Act for any coal deposits except for its own use for railroad purposes; and such limitations of use shall be expressed in all permits and leases issued to such companies or corporations,

and no such company or corporation shall receive or hold more than one permit or lease for each two hundred miles of its railroad line within the State in which said property is situated, exclusive of spurs or switches and exclusive of branch lines built to connect the leased coal with the railroad, and also exclusive of parts of the railroad operated mainly by power produced otherwise than by steam: *And provided further*, That nothing herein shall preclude such a railroad of less than two hundred miles in length from securing and holding one permit or lease hereunder. [41 Stat. L. 438.]

SEC. 3. [Modification of leases — contiguous coal deposits.] That any person, association, or corporation holding a lease of coal lands or coal deposits under this Act may, with the approval of the Secretary of the Interior, upon a finding by him that it will be for the advantage of the lessee and the United States, secure modifications of his or its original lease by including additional coal lands or coal deposits contiguous to those embraced in such lease, but in no event shall the total area embraced in such modified lease exceed in the aggregate two thousand five hundred and sixty acres. [41 Stat. L. 439.]

SEC. 4. [Exhaustion of coal deposits — leases of additional tracts.] That upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining in the existing lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same conditions as in case of an original lease. [41 Stat. L. 439.]

SEC. 5. [Consolidation of leases.] That if, in the judgment of the Secretary of the Interior, the public interest will be subserved thereby, lessees holding under lease areas not exceeding the maximum permitted under this Act may consolidate their leases through the surrender of the original leases and the inclusion of such areas in a new lease of not to exceed two thousand five hundred and sixty acres of contiguous lands. [41 Stat. L. 439.]

SEC. 6. [Single lease embracing noncontiguous tracts.] That where coal or phosphate lands aggregating two thousand five hundred and sixty acres and subject to lease hereunder do not exist as contiguous areas, the Secretary of the Interior is authorized, if, in his opinion the interests of the public and of the lessee will be thereby subserved, to embrace in a single lease noncontiguous tracts which can be operated as a single mine or unit. [41 Stat. L. 439.]

SEC. 7. [Royalties — period of lease — continuity of operation of mines.] That for the privilege of mining or extracting the coal in the lands covered by the lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall be fixed in advance of offering the same, and which shall not be less than 5 cents per ton of two thousand pounds, due and payable at the end of each third month succeeding that of the extraction of the coal from the mine, and an annual rental, payable at the date of such lease and annually thereafter, on the lands or coal deposits covered by such lease, at such rate as may be fixed by the Secretary of the Interior prior to offering the same, which shall not be less than 25 cents per acre for the first year thereafter, not

less than 50 cents per acre for the second, third, fourth, and fifth years, respectively, and not less than \$1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases shall be for indeterminate periods upon condition of diligent development and continued operation of the mine or mines, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods: *Provided*, That the Secretary of the Interior may, if in his judgment the public interest will be subserved thereby, in lieu of the provision herein contained requiring continuous operation of the mine or mines, provide in the lease for the payment of an annual advance royalty upon a minimum number of tons of coal, which in no case shall aggregate less than the amount of rentals herein provided for: *Provided further*, That the Secretary of the Interior may permit suspension of operation under such lease for not to exceed six months at any one time when market conditions are such that the lease can not be operated except at a loss. [41 Stat. L. 439.]

SEC. 8. [Supplying local domestic needs for fuel—limited licenses and permits—corporations—municipalities.] That in order to provide for the supply of strictly local domestic needs for fuel, the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue limited licenses or permits to individuals or associations of individuals to prospect for, mine, and take for their use but not for sale, coal from the public lands without payment of royalty for the coal mined or the land occupied, on such conditions not inconsistent with this Act as in his opinion will safeguard the public interests: *Provided*, That this privilege shall not extend to any corporations: *Provided further*, That in the case of municipal corporations the Secretary of the Interior may issue such limited license or permit, for not to exceed three hundred and twenty acres for a municipality of less than one hundred thousand population, and not to exceed one thousand two hundred and eighty acres for a municipality of not less than one hundred thousand and not more than one hundred and fifty thousand population; and not to exceed two thousand five hundred and sixty acres for a municipality of one hundred and fifty thousand population or more, the land to be selected within the State wherein the municipal applicant may be located, upon condition that such municipal corporations will mine the coal therein under proper conditions and dispose of the same without profit to residents of such municipality for household use: *And provided further*, That the acquisition or holding of a lease under the preceding sections of this Act shall be no bar to the holding of such tract or operation of such mine under said limited license. [41 Stat. L. 440.]

PHOSPHATES.

SEC. 9. [Leasing phosphate lands.] That the Secretary of the Interior is hereby authorized to lease to any applicant qualified under this Act any lands belonging to the United States containing deposits of phosphates, under such restrictions and upon such terms as are herein specified, through advertisement, competitive bidding, or such other methods as the Secretary of the Interior may by general regulation adopt. [41 Stat. L. 440.]

SEC. 10. [Acreage embraced in lease.] That each lease shall be for not to exceed two thousand five hundred and sixty acres of land to be described by the legal subdivisions of the public land surveys, if surveyed; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease, in accordance with rules and regulations prescribed by the Secretary of the Interior and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such survey; deposits made to cover expense of surveys shall be deemed appropriated for that purpose; and any excess deposits shall be repaid to the person, association, or corporation making such deposits or their legal representatives: *Provided*, That the land embraced in any one lease shall be in compact form, the length of which shall not exceed two and one half times its width. [41 Stat. L. 440.]

SEC. 11. [Royalties — period of lease — continuity of operation of mines.] That for the privilege of mining or extracting the phosphates or phosphate rock covered by the lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall be fixed by the Secretary of the Interior in advance of offering the same, which shall be not less than 2 per centum of the gross value of the output of phosphates or phosphate rock at the mine, due and payable at the end of each third month succeeding that of the sale or other disposition of the phosphates or phosphate rock, and an annual rental payable at the date of such lease and annually thereafter on the area covered by such lease at such rate as may be fixed by the Secretary of the Interior prior to offering the lease, which shall be not less than 25 cents per acre for the first year thereafter, 50 cents per acre for the second, third, fourth, and fifth years, respectively, and \$1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases shall be for indeterminate periods upon condition of a minimum annual production, except when operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions shall be made as the Secretary of the Interior shall determine unless otherwise provided by law at the time of the expiration of such periods: *Provided*, That the Secretary of the Interior may permit suspension of operation under such lease for not exceeding twelve months at any one time when market conditions are such that the lease can not be operated except at a loss. [41 Stat. L. 440.]

SEC. 12. [Surface of unappropriated and unentered lands — use.] That any qualified applicant to whom the Secretary of the Interior may grant a lease to develop and extract phosphates, or phosphate rock, under the provisions of this Act shall have the right to use so much of the surface of unappropriated and unentered lands, not exceeding forty acres, as may be determined by the Secretary of the Interior to be necessary for the proper prospecting for or development, extraction, treatment, and removal of such mineral deposits. [41 Stat. L. 441.]

OIL AND GAS.

SEC. 13. [Lands containing oil and gas — prospecting permits.] That the Secretary of the Interior is hereby authorized, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified

under this Act a prospecting permit, which shall give the exclusive right, for a period not exceeding two years, to prospect for oil or gas upon not to exceed two thousand five hundred and sixty acres of land wherein such deposits belong to the United States and are not within any known geological structure of a producing oil or gas field upon condition that the permittee shall begin drilling operations within six months from the date of the permit, and shall, within one year from and after the date of permit, drill one or more wells for oil or gas to a depth of not less than five hundred feet each, unless valuable deposits of oil or gas shall be sooner discovered, and shall, within two years from date of the permit, drill for oil or gas to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered. The Secretary of the Interior may, if he shall find that the permittee has been unable with the exercise of diligence to test the land in the time granted by the permit, extend any such permit for such time, not exceeding two years, and upon such conditions as he shall prescribe. Whether the lands sought in any such application and permit are surveyed or unsurveyed the applicant shall, prior to filing his application for permit, locate such lands in a reasonably compact form and according to the legal subdivisions of the public land surveys if the land be surveyed; and in an approximately square or rectangular tract if the land be an unsurveyed tract, the length of which shall not exceed two and one-half times its width, and if he shall cause to be erected upon the land for which a permit is sought a monument not less than four feet high, at some conspicuous place thereon, and shall post a notice in writing on or near said monument, stating that an application for permit will be made within thirty days after date of posting said notice, the name of the applicant, the date of the notice, and such a general description of the land to be covered by such permit by reference to courses and distances from such monument and such other natural objects and permanent monuments as will reasonably identify the land, stating the amount thereof in acres. he shall during the period of thirty days following such marking and posting, be entitled to a preference right over others to a permit for the land so identified. The applicant shall, within ninety days after receiving a permit, mark each of the corners of the tract described in the permit upon the ground with substantial monuments, so that the boundaries can be readily traced on the ground, and shall post in a conspicuous place upon the lands a notice that such permit has been granted and a description of the lands covered thereby: *Provided*, That in the Territory of Alaska prospecting permits not more than five in number may be granted to any qualified applicant for periods not exceeding four years, actual drilling operations shall begin within two years from date of permit, and oil and gas wells shall be drilled to a depth of not less than five hundred feet, unless valuable deposits of oil or gas shall be sooner discovered, within three years from date of the permit and to an aggregate depth of not less than two thousand feet unless valuable deposits of oil or gas shall be sooner discovered, within four years from date of permit: *Provided further*, That in said Territory the applicants shall have a preference right over others to a permit for land identified by temporary monuments and notice posted on or near the same for six months following such marking and posting, and upon receiving a permit he shall mark the corners of the tract described in the permit upon the ground with substantial monuments within one year after receiving such permit. [41 Stat. L. 441.]

SEC. 14. [Discovery of deposits of oil or gas by permittee—lease.] That upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil or gas have been discovered within the limits of the land embraced in any permit, the permittee shall be entitled to a lease for one-fourth of the land embraced in the prospecting permit: *Provided*, That the permittee shall be granted a lease for as much as one hundred and sixty acres of said lands, if there be that number of acres within the permit. The area to be selected by the permittee, shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public-land surveys: if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in accordance with rules and regulations to be prescribed by the Secretary of the Interior and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys; deposits made to cover expense of surveys shall be deemed appropriated for that purpose, and any excess deposits may be repaid to the person or persons making such deposit or their legal representatives. Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of \$1 per acre, the rental paid for any one year to be credited against the royalties as they accrue for that year, with the right of renewal as prescribed in section 17 hereof. The permittee shall also be entitled to a preference right to a lease for the remainder of the land in his prospecting permit at a royalty of not less than 12½ per centum in amount or value of the production, and under such other conditions as are fixed for oil or gas leases in this Act, the royalty to be determined by competitive bidding or fixed by such other method as the Secretary may by regulations prescribe: *Provided*, That the Secretary shall have the right to reject any or all bids. [41 Stat. L. 442.]

SEC. 15. [Disposal of oil and gas by permittee—payments to government.] That until the permittee shall apply for lease to the one quarter of the permit area heretofore provided for he shall pay to the United States 20 per centum of the gross value of all oil or gas secured by him from the lands embraced within his permit and sold or otherwise disposed of or held by him for sale or other disposition. [41 Stat. L. 442.]

SEC. 16. [Permits and leases—condition of issuance.] That all permits and leases of lands containing oil or gas, made or issued under the provisions of this Act, shall be subject to the condition that no wells shall be drilled within two hundred feet of any of the outer boundaries of the lands so permitted or leased, unless the adjoining lands have been patented or the title thereto otherwise vested in private owners, and to the further condition that the permittee or lessee will, in conducting his explorations and mining operations, use all reasonable precautions to prevent waste of oil or gas developed in the land, or the entrance of water through wells drilled by him to the oil sands or oil-bearing strata, to the destruction or injury of the oil deposits. Violations of the provisions of this section shall constitute grounds for the forfeiture of the permit, or lease, to be enforced through appropriate proceedings in courts of competent jurisdiction. [41 Stat. L. 443.]

SEC. 17. [Unappropriated deposits of oil and gas—leasing.] That all unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field and the unentered lands containing the same, not subject to preferential lease, may be leased by the Secretary of the Interior to the highest responsible bidder by competitive bidding under general regulations to qualified applicants in areas not exceeding six hundred and forty acres and in tracts which shall not exceed in length two and one-half times their width, such leases to be conditioned upon the payment by the lessee of such bonus as may be accepted and of such royalty as may be fixed in the lease, which shall not be less than 12½ per centum in amount or value of the production and the payment in advance of a rental of not less than \$1 per acre per annum thereafter during the continuance of the lease, the rental paid for any one year to be credited against the royalties as they accrue for that year. Leases shall be for a period of twenty years, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods. Whenever the average daily production of any oil well shall not exceed ten barrels per day, the Secretary of the Interior is authorized to reduce the royalty on future production when in his judgment the wells can not be successfully operated upon the royalty fixed in the lease. The provisions of this paragraph shall apply to all oil and gas leases made under this Act. [41 Stat. L. 443.]

SEC. 18. [Rights in oil or gas bearing land under preexisting mining law—relinquishment—lease to claimants—suits affecting lands.] That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this Act, of all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the preexisting placer mining law to any oil or gas bearing land upon which there has been drilled one or more oil or gas wells to discovery embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced except oil or gas used for production purposes on the claim, or unavoidably lost, from such land, the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than 12½ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: *Provided*, That not more than one-half of the area, but in no case to exceed three thousand two hundred acres, within the geologic oil or gas structure of a producing oil or gas field shall be leased to any one claimant under the provision of this section when the area of such geologic oil structure exceeds six hundred and forty acres. Any claimant or his successor, subject to this limitation, shall, however, have the right to select and receive the lease as in this section provided for that portion of his claim or claims equal to, but not in excess of, said one-half of the area of such geologic oil structure, but not more than three thousand two hundred acres.

All such leases shall be made and the amount of royalty to be paid for oil and gas produced, except oil or gas used for production purposes on the claim, or unavoidably lost, after the execution of such lease shall be fixed by the Secre-

tary of the Interior under appropriate rules and regulations: *Provided, however*, That as to all like claims situate within any naval petroleum reserve the producing wells thereon only shall be leased, together with an area of land sufficient for the operation thereof, upon the terms and payment of royalties for past and future production as herein provided for in the leasing of claims. No wells shall be drilled in the land subject to this provision within six hundred and sixty feet of any such leased well without the consent of the lessee: *Provided, however*, That the President may, in his discretion, lease the remainder or any part of any such claim upon which such wells have been drilled, and in the event of such leasing said claimant or his successor shall have a preference right to such lease: *And provided further*, That he may permit the drilling of additional wells by the claimant or his successor within the limited area of six hundred and sixty feet theretofore provided for upon such terms and conditions as he may prescribe.

No claimant for a lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

Upon the delivery and acceptance of the lease, as in this section provided, all suits brought by the Government affecting such lands may be settled and adjusted in accordance herewith and all moneys impounded in such suits or under the Act entitled "An Act to amend an Act entitled 'An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest,' approved March 2, 1911," approved August 25, 1914 (Thirty-eighth Statutes at Large, page 708), shall be paid over to the parties entitled thereto. In case of conflicting claimants for leases under this section, the Secretary of the Interior is authorized to grant leases to one or more of them as shall be deemed just. All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear, subject, however, to the same limitation as to area and acreage as is provided for claimant in this section: *Provided*, That no claimant acquiring any interest in such lands since September 1, 1919, from a claimant on or since said date claiming or holding more than the maximum allowed claimant under this section shall secure a lease thereon or any interest therein, but the inhibition of this proviso shall not apply to an exchange of any interest in such lands made prior to the 1st day of January, 1920, which did not increase or reduce the area or acreage held or claimed in excess of said maximum by either party to the exchange: *Provided further*, That no lease or leases under this section shall be granted, nor shall any interest therein, inure to any person, association, or corporation for a greater aggregate area or acreage than the maximum in this section provided for. [41 Stat. L. 443.]

For Act of Aug. 25, 1914, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 610.

SEC. 18a. [Gas or petroleum placer claims — settlement.] That whenever the validity of any gas or petroleum placer claim under preexisting law to land embraced in the Executive order of withdrawal issued September 27, 1909, has been or may hereafter be drawn in question on behalf of the United States in any departmental or judicial proceedings, the President is hereby authorized at any time within twelve months after the approval of this Act to direct the compromise and settlement of any such controversy upon such terms and conditions as may be agreed upon, to be carried out by an exchange or division of land or division of the proceeds of operation. [41 Stat. L. 444.]

SEC. 19. [Claimants of oil or gas lands subsequently withdrawn from entry — prospecting permits.] That any person who on October 1, 1919, was a bona fide occupant or claimant of oil or gas lands under a claim initiated while such lands were not withdrawn from oil or gas location and entry, and who had previously performed all acts under then existing laws necessary to valid locations thereof except to make discovery, and upon which discovery had not been made prior to the passage of this Act, and who has performed work or expended on or for the benefit of such locations an amount equal in the aggregate of \$250 for each location if application therefor shall be made within six months from the passage of this Act shall be entitled to prospecting permits thereon upon the same terms and conditions, and limitations as to acreage, as other permits provided for in this Act, or where any such person has heretofore made such discovery, he shall be entitled to a lease thereon under such terms as the Secretary of the Interior may prescribe unless otherwise provided for in section 18 hereof: *Provided*, That where such prospecting permit is granted upon land within any known geologic structure of a producing oil or gas field, the royalty to be fixed in any lease thereafter granted thereon or any portion thereof shall be not less than 12½ per centum of all the oil or gas produced except oil or gas used for production purposes on the claim, or unavoidably lost: *Provided, however*, That the provisions of this section shall not apply to lands reserved for the use of the Navy: *Provided, however*, That no claimant for a permit or lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section.

All permits or leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear. [41 Stat. L. 445.]

SEC. 20. [Entry on agricultural lands containing minerals.] In the case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under any railroad grant, the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; and within an area not greater than a township such entryman and patentees, or assigns holding restricted patents may combine their holdings, not to exceed two thousand five hundred and sixty acres for the purpose of making joint application. Leases executed under this section and embracing only lands so entered shall provide for the payment of a royalty of not less than 12½ per centum as to such areas within the permit as may not be included within the discovery lease to which the permittee is entitled under section 14 hereof. [41 Stat. L. 445.]

OIL SHALE.

SEC. 21. [Leasing oil shale deposits.] That the Secretary of the Interior is hereby authorized to lease to any person or corporation qualified under this Act any deposits of oil shale belonging to the United States and the surface of so much of the public lands containing such deposits, or land adjacent thereto, as may be required for the extraction and reduction of the leased minerals, under such rules and regulations, not inconsistent with this Act, as he may prescribe;

that no lease hereunder shall exceed five thousand one hundred and twenty acres of land, to be described by the legal subdivisions of the public-land surveys, or if unsurveyed, to be surveyed by the United States, at the expense of the applicant, in accordance with regulations to be prescribed by the Secretary of the Interior. Leases may be for indeterminate periods, upon such conditions as may be imposed by the Secretary of the Interior, including covenants relative to methods of mining, prevention of waste, and productive development. For the privilege of mining, extracting, and disposing of the oil or other minerals covered by a lease under this section the lessee shall pay to the United States such royalties as shall be specified in the lease and an annual rental; payable at the beginning of each year, at the rate of 50 cents per acre per annum, for the lands included in the lease, the rental paid for any one year to be credited against the royalties accruing for that year; such royalties to be subject to readjustment at the end of each twenty-year period by the Secretary of the Interior: *Provided*, That for the purpose of encouraging the production of petroleum products from shales the Secretary may, in his discretion, waive the payment of any royalty and rental during the first five years of any lease: *Provided*, That any person having a valid claim to such minerals under existing laws on January 1, 1919, shall, upon the relinquishment of such claim, be entitled to a lease under the provisions of this section for such area of the land relinquished as shall not exceed the maximum area authorized by this section to be leased to an individual or corporation: *Provided, however*, That no claimant for a lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section: *Provided further*, That not more than one lease shall be granted under this section to any one person, association, or corporation. [41 Stat. L. 445.]

ALASKA OIL PROVISIO.

SEC. 22. [Oil or gas bearing lands in Alaska — occupants and claimants — permits and leases.] That any bona fide occupant or claimant of oil or gas bearing lands in the Territory of Alaska, who, or whose predecessors in interest, prior to withdrawal had complied otherwise with the requirements of the mining laws, but had made no discovery of oil or gas in wells and who prior to withdrawal had made substantial improvements for the discovery of oil or gas on or for each location or had prior to the passage of this Act expended not less than \$250 in improvements on or for each location shall be entitled, upon relinquishment or surrender to the United States within one year from the date of this Act, or within six months after final denial or withdrawal of application for patent, to a prospecting permit or permits, lease or leases, under this Act covering such lands, not exceeding five permits or leases in number and not exceeding an aggregate of one thousand two hundred and eighty acres in each: *Provided*, That leases in Alaska under this Act whether as a result of prospecting permits or otherwise shall be upon such rental and royalties as shall be fixed by the Secretary of the Interior and specified in the lease, and be subject to readjustment at the end of each twenty-year period of the lease: *Provided further*, That for the purpose of encouraging the production of petroleum products in Alaska the Secretary may, in his discretion, waive the payment of any rental or royalty not exceeding the first five years of any lease.

No claimant for a lease who has been guilty of any fraud or who had knowledge or reasonable grounds to know of any fraud, or who has not acted honestly and in good faith, shall be entitled to any of the benefits of this section. [41 Stat. L. 446.]

SODIUM.

SEC. 23. [Prospecting permits for sodium.] That the Secretary of the Interior is hereby authorized and directed, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium dissolved in and soluble in water, and accumulated by concentration, in lands belonging to the United States for a period of not exceeding two years: *Provided*, That the area to be included in such a permit shall be not exceeding two thousand five hundred and sixty acres of land in reasonably compact form: *Provided further*, That the provisions of this section shall not apply to lands in San Bernardino County, California. [41 Stat. L. 447.]

SEC. 24. [Leases of lands containing sodium deposits.] That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof has been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor the permittee shall be entitled to a lease for one-half of the land embraced in the prospecting permit, at a royalty of not less than one-eighth of the amount or value of the production, to be taken and described by legal subdivisions of the public-land surveys, or if the land be not surveyed by survey executed at the cost of the permittee in accordance with the rules and regulations to be prescribed by the Secretary of the Interior. The permittee shall also have the preference right to lease the remainder of the lands embraced within the limits of his permit at a royalty of not less than one-eighth of the amount or value of the production to be fixed by the Secretary of the Interior. Lands known to contain such valuable deposits as are enumerated in section 23 hereof and not covered by permits or leases, except such lands as are situated in said county of San Bernardino, shall be held subject to lease, and may be leased by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres; all leases to be conditioned upon the payment by the lessee of such royalty of not less than one-eighth of the amount or value of the production as may be fixed in the lease, and the payment in advance of a rental of 50 cents per acre for the first calendar year or fraction thereof and \$1 per acre per annum thereafter during the continuance of the lease, the rental paid for any one year to be credited on the royalty for that year. Leases may be for determinate periods, subject to readjustment at the end of each twenty-year period, upon such conditions not inconsistent herewith as may be incorporated in each lease or prescribed in general regulation theretofore issued by the Secretary of the Interior, including covenants relative to mining methods, waste, period of preliminary, development and minimum production, and a lessee under this section may be lessee of the remaining lands in his permit. [41 Stat. L. 447.]

SEC. 25. [Nonmineral lands for camp sites, refining works, etc.] That in addition to areas of such mineral land which may be included in any such prospecting permits or leases, the Secretary of the Interior, in his discretion, may grant to a permittee or lessee of lands containing sodium deposits, and subject to the payment of an annual rental of not less than 25 cents per acre, the exclusive right to use, during the life of the permit or lease, a tract of unoccupied nonmineral public land, not exceeding forty acres in area, for camp sites, refining works, and other purposes connected with and necessary to the proper development and use of the deposits covered by the permit or lease. [41 Stat. L. 447.]

GENERAL PROVISIONS APPLICABLE TO COAL, PHOSPHATE, SODIUM, OIL, OIL SHALE,
AND GAS LEASES.

SEC. 26. [Cancellation of prospecting permits.] That the Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit, and shall insert in every such permit issued under the provisions of this Act appropriate provisions for its cancellation by him. [41 Stat. L. 448.]

SEC. 27. [Number of leases obtainable by one person, etc.] That no person, association, or corporation, except as herein provided, shall take or hold more than one coal, phosphate, or sodium lease during the life of such lease in any one State; no person, association, or corporation shall take or hold, at one time, more than three oil or gas leases granted hereunder in any one State, and not more than one lease within the geologic structure of the same producing oil or gas field; no corporation shall hold any interest as a stockholder of another corporation in more than such number of leases; and no person or corporation shall take or hold any interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, which, together with the area embraced in any direct holding of a lease under this Act, or which, together with any other interest or interests as a member of an association or associations or as a stockholder of a corporation or corporations holding a lease under the provisions hereof, for any kind of mineral leased hereunder, exceeds in the aggregate an amount equivalent to the maximum number of acres of the respective kinds of minerals allowed to any one lessee under this Act. Any interests held in violation of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property, or some part thereof, is located, except that any ownership or interest forbidden in this Act which may be acquired by descent, will, judgment, or decree may be held for two years and not longer after its acquisition: *Provided*, That nothing herein contained shall be construed to limit sections 18, 18a, 19, and 22 or to prevent any number of lessees under the provisions of this Act from combining their several interests so far as may be necessary for the purposes of constructing and carrying on the business of a refinery, or of establishing and constructing as a common carrier a pipe line or lines of railroads to be operated and used by them jointly in the transportation of oil from their several wells, or from the wells of other lessees under this Act, or the transportation of coal: *Provided*

further, That any combination for such purpose or purposes shall be subject to the approval of the Secretary of the Interior on application to him for permission to form the same: *And provided further*, That if any of the lands or deposits leased under the provisions of this Act shall be subleased, trusted, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of, or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, phosphate, oil, oil shale, gas, or sodium entered into by the lessee, or any agreement or understanding, written, verbal, or otherwise to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof or of any holding of such lands by any individual, partnership, association, corporation, or control, in excess of the amounts of lands provided in this Act, the lease thereof shall be forfeited by appropriate court proceedings. [41 Stat. L. 448.]

SEC. 28. [Rights of way — public lands and forest reserves — pipe lines for oil and natural gas.] That rights of way through the public lands, including the forest reserves, of the United States are hereby granted for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 1 of this Act, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: *Provided*, That the Government shall in express terms reserve and shall provide in every lease of oil lands hereunder that the lessee, assignee, or beneficiary, if owner, or operator or owner of a controlling interest in any pipe line or of any company operating the same which may be operated accessible to the oil derived from lands under such lease, shall at reasonable rates and without discrimination accept and convey the oil of the Government or of any citizen or company not the owner of any pipe line, operating a lease or purchasing gas or oil under the provisions of this Act: *Provided further*, That no right of way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding. [41 Stat. L. 449.]

SEC. 29. [Easements and rights of way reservations — surface of leased lands.] That any permit, lease, occupation, or use permitted under this Act shall reserve to the Secretary of the Interior the right to permit upon such terms as he may determine to be just, for joint or several use, such easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied, or used as may be necessary or appropriate to the working of the same, or of other lands containing the deposits described in this Act, and the treatment and shipment of the products thereof by or under authority

of the Government, its lessees, or permittees, and for other public purposes: *Provided*, That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further*, That if such reservation is made it shall be so determined before the offering of such lease: *And provided further*, That the said Secretary, during the life of the lease, is authorized to issue such permits for easements herein provided to be reserved. [41 Stat. L. 449.]

SEC. 30. [Provisions in leases — assigning and subleasing — relinquishment of rights — care in operation of property — labor — wages — weighing coal — safeguarding public welfare.] That no lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior. The lessee may, in the discretion of the Secretary of the Interior, be permitted at any time to make written relinquishment of all rights under such a lease, and upon acceptance thereof be thereby relieved of all future obligations under said lease, and may with like consent surrender any legal subdivision of the area included within the lease. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property; a provision that such rules for the safety and welfare of the miners and for the prevention of undue waste as may be prescribed by said Secretary shall be observed, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions prohibiting the employment of any boy under the age of sixteen or the employment of any girl or woman, without regard to age, in any mine below the surface; provisions securing the workmen complete freedom of purchase; provision requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to insure the fair and just weighing or measurement of the coal mined by each miner, and such other provisions as he may deem necessary to insure the sale of the production of such leased lands to the United States and to the public at reasonable prices, for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare: *Provided*, That none of such provisions shall be in conflict with the laws of the State in which the leased property is situated. [41 Stat. L. 449.]

SEC. 31. [Provisions for forfeiture and cancellation — settlement of disputes — breaches of specified conditions.] That any lease issued under the provisions of this Act may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this Act, of the lease, or of the general regulations promulgated under this Act and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof. [41 Stat. L. 450.]

SEC. 32. [Rules and regulations by Secretary of Interior — protection of rights of states.] That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things neces-

sary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act: *Provided*, That nothing in this Act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States. [41 Stat. L. 450.]

SEC. 33. [Statements, representations, and reports — form — oath.] That all statements, representations, or reports required by the Secretary of the Interior under this Act shall be upon oath, unless otherwise specified by him, and in such form and upon such blanks as the Secretary of the Interior may require. [41 Stat. L. 450.]

SEC. 34. [Deposits of minerals reserved by United States in lands disposed of — application of Act.] That the provisions of this Act shall also apply to all deposits of coal, phosphate, sodium, oil, oil shale, or gas in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits, with the right to prospect for, mine, and remove the same, subject to such conditions as are or may hereafter be provided by such laws reserving such deposits. [41 Stat. L. 450.]

SEC. 35. [Moneys accruing to United States under Act — disposition.] That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this Act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct: *Provided*, That all moneys which may accrue to the United States under the provisions of this Act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts." [41 Stat. L. 450.]

For Act of June 17, 1902, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1363.

SEC. 36. [Royalties accruing under oil or gas leases — payment in kind.] That all royalty accruing to the United States under any oil or gas lease or permit under this Act on demand of the Secretary of the Interior shall be paid in oil or gas.

Upon granting any oil or gas lease under this Act, and from time to time thereafter during said lease, the Secretary of the Interior shall, except whenever in his judgment it is desirable to retain the same for the use of the United

States, offer for sale for such period as he may determine, upon notice and advertisement on sealed bids or at public auction, all royalty oil and gas accruing or reserved to the United States under such lease. Such advertisement and sale shall reserve to the Secretary of the Interior the right to reject all bids whenever within his judgment the interest of the United States demands; and in cases where no satisfactory bid is received or where the accepted bidder fails to complete the purchase, or where the Secretary of the Interior shall determine that it is unwise in the public interest to accept the offer of the highest bidder, the Secretary of the Interior, within his discretion, may readvertise such royalty for sale, or sell at private sale at not less than the market price for such period, or accept the value thereof from the lessee: *Provided, however,* That pending the making of a permanent contract for the sale of any royalty, oil or gas as herein provided, the Secretary of the Interior may sell the current product at private sale, at not less than the market price: *And provided further,* That any royalty, oil, or gas may be sold at not less than the market price at private sale to any department or agency of the United States. [41 Stat. L. 451.]

SEC. 37. [Disposition of deposits of minerals in certain specified lands.] That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery. [41 Stat. L. 451.]

SEC. 38. [Fees and commissions — registers and receivers.] That, until otherwise provided, the Secretary of the Interior shall be authorized to prescribe fees and commissions to be paid registers and receivers of United States land offices on account of business transacted under the provisions of this Act. [41 Stat. L. 451.]

An Act To provide for the disposition of public lands withdrawn and improved under the provisions of the reclamation laws, and which are no longer needed in connection with said laws.

[Act of May 20, 1920, ch. 192, 41 Stat. L. 605.]

[SEC. 1.] [Lands withdrawn and improved under reclamation laws — sale when no longer needed.] That whenever in the opinion of the Secretary of the Interior any public lands which have been withdrawn for or in connection with construction or operation of reclamation projects under the provisions of the Act of June 17, 1902, known as the Reclamation Act and Acts amendatory thereof and supplemental thereto, which are not otherwise reserved and which have

been improved by and at the expense of the reclamation fund for administration or other like purposes, are no longer needed for the purposes for which they were withdrawn and improved, the Secretary of the Interior may cause said lands, together with the improvements thereon, to be appraised by three disinterested persons to be appointed by him and thereafter sell the same, for not less than the appraised value, at public auction to the highest bidder, after giving public notice of the time and place of sale by posting upon the land and by publication for not less than thirty days in a newspaper of general circulation in the vicinity of the land, not less than one-fifth the purchase price shall be paid at the time of sale, and the remainder in not more than four annual payments with interest at 6 per centum per annum, payable annually, on deferred payments. [41 Stat. L. 605.]

For Act of June 17, 1902, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1363.

SEC. 2. [Terms of sale.] That upon payment of the purchase price the Secretary of the Interior is authorized, by appropriate patent, to convey all the right, title, and interest of the United States in and to said lands to the purchaser at said sale, subject, however, to such reservations, limitations, or conditions as said Secretary may deem proper: *Provided*, That not over one hundred and sixty acres shall be sold to any one person, and if said lands are irrigable under the project in which located they shall be sold subject to compliance by the purchaser with all terms, conditions, and limitations of the Reclamation Act applicable to lands of that character: *Provided*, That the accepted bidder must, prior to issuance of patent, furnish satisfactory evidence that he or she is a citizen of the United States. [41 Stat. L. 606.]

SEC. 3. [Moneys received from sale — disposition.] That the moneys derived from the sale of such lands shall be covered into the reclamation fund and be placed to the credit of the project for which such lands had been withdrawn. [41 Stat. L. 606.]

An Act Authorizing certain railroad companies, or their successors in interest, to convey for public-road purposes certain parts of their rights of way.

[Act of May 25, 1920, ch. 197, 41 Stat. L. 621.]

[Railroad — rights of way over public lands — conveyance for public-road purposes.] That all railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are hereby authorized to convey to any State, county, or municipality any portion of such right of way to be used as a public highway or street: *Provided*, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than fifty feet on each side of the center of the main track of the railroad as now established and maintained. [41 Stat. L. 621.]

An Act To restore to the public domain certain lands heretofore reserved for a bird reservation in Siskiyou and Modoc Counties, California, and Klamath County, Oregon, and for other purposes.

[*Act of May 27, 1920, ch. 209, 41 Stat. L. 627.*]

[SEC. 1.] [**Klamath project, California-Oregon — determination of lands to be opened for agricultural development — homestead entries — rights reserved to United States — patents.**] That the Secretary of the Interior be, and he hereby is, authorized and directed to determine and make public announcement of what lands in and around Little or Lower Klamath Lake, in Siskiyou County, California, and in Klamath County, Oregon, ceded to the United States by the State of California by the Act entitled "An Act authorizing the United States Government to lower the water levels of any or all of the following lakes: Lower or Little Klamath Lake, Tule or Rhett Lake, Goose Lake, and Clear Lake, situated in Siskiyou and Modoc Counties, and to use any part or all of the beds of said lakes for the storage of water in connection with the irrigation and reclamation operations conducted by the Reclamation Service of the United States; also ceding to the United States all right, title, interest, or claim of the State of California to any lands uncovered by the lowering of the water levels of any or all of said lakes not already disposed of by the State," and ceded to the United States by the State of Oregon by an Act entitled "An Act to authorize the utilization of Upper Klamath Lake, Lower or Little Klamath Lake, and Tule or Rhett Lake, situate in Klamath County, Oregon, and Goose Lake, situate in Lake County, Oregon, in connection with the irrigation and reclamation operations of the Reclamation Service of the United States, and to cede to the United States all the right, title, interest, and claim of the State of Oregon to any and all lands recovered by the lowering of the water levels or by the drainage of any or all of said lakes," will eventually be uncovered and opened to agricultural development by the lowering of the water level of said lake. Title to all said lands can be acquired by homestead entry under the general homestead laws and the provisions of this Act and not otherwise: *Provided*, That all said lands shall forever be and remain subject to the right of the United States (a) to overflow the same or any part thereof for the purposes of irrigation by such systems of reservoirs and drainage and diking as now actually exist or may be hereafter constructed in Siskiyou County, California, and Klamath County, Oregon, and (b) to drain the water therefrom. All patents issued for the said lands shall expressly reserve to the United States such right of overflow and drainage, and the title and ownership of all minerals and mineral interests in such lands, including oil, are expressly reserved to the United States. [*41 Stat. L. 627.*]

SEC. 2. [**Assessment of land for expenditures.**] That the Secretary of the Interior shall also determine and make public announcement of the proportionate part of the sum of \$283,225, heretofore expended from the reclamation fund in connection with the Klamath project, Oregon-California, that in the opinion of the Secretary of the Interior each acre of the said land should be assessed, and the proportionate part that each acre of privately owned land, similarly situated to the said lands hereby affected, should be assessed, to return to said reclamation fund in all the said sum of \$283,225. [*41 Stat. L. 628.*]

SEC. 3. [Survey—opening for entry—payment of assessments.] That the Secretary of the Interior be, and he is hereby, authorized and directed to cause said lands to be surveyed and opened to entry under the general homestead laws and the provisions of this Act: *Provided*, That none of said lands shall be opened to entry until the Secretary of the Interior shall have first made arrangement with the owners of lands in private ownership, similarly situated to the lands hereby affected, for the payment into the reclamation fund of the proportionate part of the sum of \$283,225, determined and apportioned by the Secretary of the Interior against said privately owned lands as provided in section 2. [41 Stat. L. 628.]

SEC. 4. [Assessments—payment in installments—cancellation of entries—interest on assessments.] That in addition to all payments required by the general homestead laws there shall be paid by homestead entrymen the amount per acre assessed as provided in section 2 of this Act. Said payment shall be made in annual installments of \$1 per acre, except the last installment, which may be a fraction of a dollar: *Provided*, That the whole or any part of the amount so assessed may be paid by the entryman in a shorter period if he so elects. The first installment shall be paid at the time homestead application is filed and subsequent installments shall be due and payable on December 1 of each calendar year thereafter until the entire sum so assessed and apportioned against the lands is paid, and patent shall not issue for any of said lands until the sum so apportioned against said lands shall have been fully paid. Failure to pay any installment when due shall render the entry subject to cancellation, with a forfeiture of all moneys paid. All assessments shall draw interest at the rate of 6 per centum per annum from their due date until paid. All moneys paid on account of such assessments shall, without diminution of any kind whatsoever, be covered into the reclamation fund. [41 Stat. L. 628.]

SEC. 5. [Honorably discharged war veterans—preference as to entries—draftees who refused to render service.] That those who served in the military or naval forces of the United States during the war between the United States and Germany and have been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve shall have preference and prior right to file upon and enter said lands under the homestead laws and the provisions of this Act for a period of six months following the time said lands are opened to entry. That in opening said lands for homestead entry the Secretary of the Interior shall provide for the disposition thereof to the said soldiers, sailors, and marines, by drawing, under general rules and regulations to be promulgated by him: *Provided*, That the rights and benefits conferred by this Act shall not extend to any person who, having been drafted for service under the provisions of the selective service Act, shall have refused to render such service or to wear the uniform of such service of the United States. [41 Stat. L. 628.]

SEC. 6. [Squatters—right to entry—penalty.] That no rights to make entry shall attach by reason of settlement or squatting upon any of the lands hereby restored before the hour on which such lands shall be subject to homestead entry at the land office, and until said lands are opened for settlement and entry as herein provided no person shall enter upon and occupy the same, and any person violating this provision shall never be permitted to enter any of said lands. [41 Stat. L. 629.]

SEC. 7. [**Klamath Lake Bird Reserve — lands chiefly valuable for agricultural purposes — reservation of shore line.**] That the Secretary of the Interior shall determine which of the lands now within the boundaries of the Klamath Lake Bird Reserve are chiefly valuable for agricultural purposes and which for the purpose of said reservation, and shall open to homestead entry those lands which are chiefly valuable for agricultural purposes: *Provided*, That the shore line of the lake, including the smallest legal subdivision of land adjoining the flow line, shall remain in the possession of the United States, but access may be provided to the lake for such canals as may be necessary for irrigation, drainage, and domestic water supply. [41 Stat. L. 629.]

SEC. 8. [**Rules and regulations.**] That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect. [41 Stat. L. 629.]

[SEC. 1.] * * * [**Office of surveyor general — detail of clerks — traveling expenses — report.**] The Secretary of the Interior is authorized to detail temporarily clerks from the office of one surveyor general to another as the necessities of the service may require and to pay their actual necessary traveling expenses in going to and returning from such office out of the appropriation for surveying the public lands. A detailed statement of traveling expenses incurred hereunder shall be made to Congress at the beginning of each regular session thereof. [41 Stat. L. 673.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214. Identical provisions have appeared in other appropriation acts.

An Act Regulating the disposition of lands formerly embraced in the grants to the Oregon and California Railroad Company and Coos Bay Wagon Road Company.

[Act of June 4, 1920, ch. 226, 41 Stat. L. 758.]

[SEC. 1.] [**Lands granted to Oregon and California Railroad Co. and state of Oregon — reconveyance to United States — sale of timber and power-site lands — preferred rights to homestead entries.**] That in the administration of the Act approved June 9, 1916 (Thirty-ninth Statutes at Large, page 218), revesting title in the United States to the lands formerly granted to the Oregon and California Railroad Company remaining unsold July 1, 1913, and the Act approved February 26, 1919 (Fortieth Statutes at Large, page 1179), authorizing the United States to accept from the Southern Oregon Company a reconveyance of the lands granted to the State of Oregon by the Act approved March 3, 1869, the Secretary of the Interior is hereby authorized, in his discretion, to sell the timber on lands classified and withdrawn as power-site lands, in such manner and at such times as he is now authorized to sell the timber from lands classified as timberlands: *Provided*, That if a valid claim for a preferred right of home-

stead entry, in accordance with the terms of section 5 of said Act of June 9, 1916, or a preference right of purchase or entry under section 3 of said Act of February 26, 1919, is shown to exist for lands thus classified and withdrawn, it may be exercised therefor, as provided in section 2 hereof. [41 Stat. L. 758.]

SEC. 2. [Lands subject to homestead entries — disposition as water-power sites — damages.] That the lands embraced in homestead entries or sales authorized by the proviso to section 1 hereof shall be subject to disposition as water-power sites upon the compensation of the owner of the land for actual damages sustained by the loss of his improvements thereon, through the use of the land for water-power purposes, such damages to be ascertained and awarded under the direction of the Secretary of the Interior; and the rights reserved under this section shall be expressly stated in the patent. [41 Stat. L. 758.]

SEC. 3. [Exchange of privately owned lands — application of Act of May 31, 1918, as amended.] That the provisions of the Act of Congress approved May 31, 1918 (Fortieth Statutes at Large, page 593), "To authorize the Secretary of the Interior to exchange for lands in private ownership lands formerly embraced in the grant to the Oregon and California Railroad Company," as amended in section 4 of this Act, shall be extended to the lands reconveyed to the United States under the terms of said Act of February 26, 1919, and authorize the exchange of lands embraced therein, in like manner and for the same purpose. [41 Stat. L. 758.]

SEC. 4. [Exchange of privately owned lands — filing fees.] That said Act of May 31, 1918, is hereby so amended as to require the applicant for exchange to pay a filing fee of \$1 each to the register and receiver for each one hundred and sixty acres or fraction thereof of the public lands embraced in proposed selections, whether now pending or hereafter tendered. [41 Stat. L. 758.]

SEC. 5. [Rules and regulations.] That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect. [41 Stat. L. 758.]

[SEC. 1.] * * * [Hearings in land entries — depositions — fees of officer taking.] That where depositions are taken for use in such hearings the fees of the officer taking them shall be 20 cents per folio for taking and certifying same and 10 cents per folio for each copy furnished to a party on request. [41 Stat. L. 908.]

This and the paragraph which follows are from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235. An identical provision appeared in the Sundry Civil Appropriation Act of July 19, 1919, ch. 24, 1919 Supp. Fed. Stat. Ann. 319.

*** * * [Township plats — photolithographic copies.]** That hereafter photolithographic copies of township plats shall be sold to the public at 50 cents each. [41 Stat. L. 908.]

See note to preceding paragraph.

An Act Providing for the extension of time for the reclamation of certain lands in the State of Oregon under the Carey Act.

[Act of June 5, 1920, ch. 249, 41 Stat. L. 987.]

[Reclamation of lands — extension of time — Oregon — Carey Act.] That the Secretary of the Interior is hereby authorized within his discretion to continue to not beyond October 21, 1930, the segregation of the lands embraced in approved Oregon segregation list numbered eleven, under the Carey Act. [41 Stat. L. 987.]

For the provisions of the Carey Act, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 698.

PUBLIC MONEYS

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 209.

Sec. 1. Assistant Treasurers and Subtreasuries — Offices Abolished — Transfer of Duties and Employees — R. S. Sec. 3595 Repealed, 209.

[SEC. 1.] * * * [Assistant treasurers and subtreasuries — offices abolished — transfer of duties and employees — R. S. sec. 3595 repealed.] Section 3595 of the Revised Statutes of the United States, as amended, providing for the appointment of an Assistant Treasurer of the United States at Boston, New York, Philadelphia, Baltimore, New Orleans, Saint Louis, San Francisco, Cincinnati, and Chicago, and all laws or parts of laws so far as they authorize the establishment or maintenance of offices of such Assistant Treasurers or of Subtreasuries of the United States are hereby repealed from and after July 1, 1921; and the Secretary of the Treasury is authorized and directed to discontinue from and after such date or at such earlier date or dates as he may deem advisable, such subtreasuries and the exercise of all duties and functions by such assistant treasurers or their offices. The office of each assistant treasurer specified above and the services of any officers or other employees assigned to duty at his office shall terminate upon the discontinuance of the functions of that office by the Secretary of the Treasury.

The Secretary of the Treasury is hereby authorized, in his discretion, to transfer any or all of the duties and functions performed or authorized to be performed by the assistant treasurers above enumerated, or their offices, to the Treasurer of the United States or the mints or assay offices of the United States, under such rules and regulations as he may prescribe, or to utilize any of the Federal reserve banks acting as depositaries or fiscal agents of the United States, for the purpose of performing any or all of such duties and functions, notwithstanding the limitations of section 15 of the Federal reserve Act, as amended, or any other provisions of law: *Provided*, That if any moneys or bullion, constituting part of the trust funds or other special funds heretofore required by law to be kept in Treasury offices, shall be deposited with any Federal reserve bank, then such moneys or bullion shall by such bank be kept separate and distinct from the assets, funds, and securities of the Federal reserve bank and be held in the joint custody of the Federal reserve agent and the Federal reserve

bank: *Provided further*, That nothing in this section shall be construed to deny the right of the Secretary of the Treasury to use member banks as depositaries as heretofore authorized by law.

The Secretary of the Treasury is hereby authorized to assign any or all the rooms, vaults, equipment, and safes or space in the buildings used by the sub-treasuries to any Federal reserve bank acting as fiscal agent of the United States.

All employees in the subtreasuries in the classified civil service of the United States, who may so desire, shall be eligible for transfer to classified civil service positions under the control of the Treasury Department, or if their services are not required in such department they may be transferred to fill vacancies in any other executive department with the consent of such department. To the extent that such employees possess required qualifications, they shall be given preference over new appointments in the classified civil service under the control of the Treasury Department in the cities in which they are now employed. [41 Stat. L. 654.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214.

PUBLIC OFFICERS AND EMPLOYEES

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 210.

Sec. 2. Government Employees — Pay — Telephone Operators — Assistant Messengers — Firemen — Watchmen — Laborers — Charwomen, 210.

6. Government Employees — Additional Compensation, 210.

CROSS-REFERENCES

See also *CIVIL SERVICE; EXECUTIVE DEPARTMENTS; POSTAL SERVICE*

SEC. 2. [Government employees — pay — telephone operators — assistant messengers — firemen — watchmen — laborers — charwomen.] That the pay of telephone switchboard operators, assistant messengers, firemen, watchmen, laborers, and charwomen provided for in this Act, except those employed in mints and assay offices, unless otherwise specially stated, shall be as follows: For telephone-switchboard operators, assistant messengers, firemen, and watchmen, at the rate of \$720 per annum each; for laborers, at the rate of \$660 per annum each; assistant telephone-switchboard operators, at the rate of \$600 each, and for charwomen, at the rate of \$240 per annum each. [41 Stat. L. 688.]

This section and section 6 which follows are from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214. They have appeared in other appropriation acts and are set out in 1919 Supp. Fed. Stat. Ann. 323, 324.

SEC. 6. [Government employees — additional compensation.] That all civilian employees of the Governments of the United States and the District of Columbia who receive a total of compensation at the rate of \$2,500 per annum or less, except as otherwise provided in this section, shall receive, during the fiscal year ending June 30, 1921, additional compensation at the rate of \$240

per annum: *Provided*, That such employees as receive a total of annual compensation at a rate more than \$2,500 and less than \$2,740 shall receive additional compensation at such a rate per annum as may be necessary to make their salaries, plus their additional compensation, at the rate of \$2,740 per annum, and no employee shall receive additional compensation under this section at a rate which is more than 60 per centum of the rate of the total annual compensation received by such employee: *Provided further*, That the increased compensation at the rate of \$240 per annum for the fiscal year ending June 30, 1920, shall not be computed as salary in construing this section: *Provided further*, That where an employee in the service on June 30, 1919, has received during the fiscal year 1920, or shall receive during the fiscal year 1921 an increase of salary at a rate in excess of \$200 per annum, or where an employee, whether previously in the service or not, has entered the service since June 30, 1919, whether such employee has received an increase in salary or not, such employees shall be granted the increased compensation provided herein only when and upon the certification of the person in the legislative branch or the head of the department or establishment employing such persons of the ability and qualifications personal to such employees as would justify such increased compensation: *Provided further*, That the increased compensation provided in this section to employees whose pay is adjusted from time to time through wage boards or similar authority shall be taken into consideration by such wage boards or similar authority in adjusting the pay of such employees.

The provisions of this section shall not apply to the following: Employees paid from the postal revenues and sums which may be advanced from the Treasury to meet deficiencies in the postal revenues; employees of the Panama Canal on the Canal Zone; employees of the Alaskan Engineering Commission in Alaska; officers and members of the Metropolitan police of the District of Columbia and the United States Park police who receive the compensation fixed by the Act approved December 5, 1919; officers and members of the Fire Department of the District of Columbia who receive the compensation fixed by the Act approved January 24, 1920; employees paid from lump-sum appropriations in bureaus, divisions, commissions, or any other governmental agencies or employments created by law since January 1, 1916, except employees of the United States Tariff Commission who shall be included and except that employees of the Bureau of War Risk Insurance shall receive increased compensation at one-half the rate allowed by this section for other employees: *Provided*, That employees of said bureau who are compensated at rates below \$400 per annum shall receive additional compensation only as the rate of 60 per centum of the annual rates of compensation received by such employees. The provisions of this section shall not apply to employees whose duties require only a portion of their time, except charwomen, who shall be included; employees whose services are utilized for brief periods at intervals; persons employed by or through corporations, firms, or individuals acting for or on behalf of or as agents of the United States or any department or independent establishment of the Government of the United States in connection with construction work or the operation of plants; employees who receive a part of their pay from any outside sources under cooperative arrangements with the Government of the United States or the District of Columbia; employees who serve voluntarily or receive only a nominal compensation, and employees who may be provided with special allowances because of their service in foreign countries. The provisions of this section shall not apply to employees of the railroads, express companies, telegraph, telephone,

marine cable, or radio system or systems taken over by the United States, and nothing contained herein shall be deemed a recognition of the employees of such railroads, express companies, telegraph, telephone, marine cable, or radio system or systems as employees of the United States.

Section 6 of the Legislative, Executive, and Judicial Appropriation Act approved May 10, 1916, as amended by the Naval Appropriation Act approved August 29, 1916, shall not operate to prevent anyone from receiving the additional compensation provided in this section who otherwise is entitled to receive the same.

Such employees as are engaged on piecework, by the hour, or at per diem rates, if otherwise entitled to receive the additional compensation, shall receive the same at the rate to which they are entitled in this section when their fixed rate of pay for the regular working hours and on the basis of three hundred and thirteen days in the said fiscal year would amount to \$2,500 or less: *Provided*, That this method of computation shall not apply to any per diem employees regularly paid a per diem for every day in the year.

So much as may be necessary to pay the additional compensation provided in this section to employees of the Government of the United States is appropriated out of any money in the Treasury not otherwise appropriated.

So much as may be necessary to pay the increased compensation provided in this section to employees of the government of the District of Columbia is appropriated, one-half out of any money in the Treasury not otherwise appropriated and one-half out of the revenues of the District of Columbia, except to employees of the Washington Aqueduct and the water department, which shall be paid entirely from the revenues of the water department, and to employees of the minimum wage board and the playgrounds department, which shall be paid wholly out of the revenues of the District of Columbia.

So much as may be necessary to pay the increased compensation provided in this section to persons employed under trust funds who may be construed to be employees of the Government of the United States or of the District of Columbia is authorized to be paid, respectively, from such trust funds.

Reports shall be submitted to Congress on the first day of the next regular session showing for the first four months of the fiscal year the average number of employees in each department, bureau, office, or establishment receiving the increased compensation at the rate of \$240 per annum and the average number by grades receiving the same at each other rate. [41 Stat. L. 689.]

See note to preceding section 2.

For section 6 of Act of May 10, 1916, as amended by Act of Aug. 29, 1916, both of which are mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 719.

PUBLIC PARKS

Act of Feb. 27, 1920, ch. 89, 214.

- Sec. 1. Hawaii National Park — Acquisition of Land within Boundaries, 214.*
2. Acquisition of Land by Exchange, 214.

Act of June 2, 1920, ch. 218, 214.

- Sec. 1. Yosemite, Sequoia and General Grant National Parks — Cession of Territory to United States — Rights Reserved to California — Applicability of Federal Laws — Fugitives from Justice, 214.*
2. Yosemite National Park — Federal District — offenses Committed Therein, 215.
3. Sequoia and General Grant National Parks — Federal District — Offenses Committed Therein, 215.
4. Offenses Not Punishable under Federal Law, 215.
5. Hunting and Fishing — Rules for Management and Care — Possession of Dead Bodies of Wild Birds or Animals — Violation of Rules — Penalty — Authority of Secretary of Interior to Sell Timber, etc. — Act of Aug. 25, 1916, Amended, 215.
6. Forfeiture of Guns, etc., Used in Killing Wild Birds or Animals, 216.
7. Commissioner for Yosemite National Park — Appointment — Jurisdiction — Powers — Appeals from Convictions, 217.
8. Commissioner for Sequoia and General Grant National Parks — Appointment — Jurisdiction — Powers — Appeals from Convictions, 217.
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14. Governor of California — Notification of Passage and Approval of Act, 218.

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 219.

- Sec. 1. National Park Service — Acceptance of Lands, etc., Donated, 219.*
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- Sec. 1. Custer State Park Game Sanctuary — Creation, 219.*
2. Hunting, etc., Game Animals and Birds — Regulations — Penalty for Violation, 219.
3. Purpose of Act, 219.
4. Fences — Erection and Maintenance by South Dakota — Gates — Additional Inclosures, 220.
5. Conveyance of Lands in Park to South Dakota — Conveyance of Forest Lands to United States in Exchange, 220.

An Act To authorize the governor of the Territory of Hawaii to acquire privately owned lands and rights of way within the boundaries of the Hawaii National Park.

[*Act of Feb. 27, 1920, ch. 89, 41 Stat. L. 452.*]

[SEC. 1.] [**Hawaii National Park — acquisition of land within boundaries.**] That the governor of the Territory of Hawaii is hereby authorized to acquire, at the expense of the Territory of Hawaii, by exchange or otherwise, all privately owned lands lying within the boundaries of the Hawaii National Park as defined by "An Act to establish a national park in the Territory of Hawaii," approved August 1, 1916, and all necessary perpetual easements and rights of way, or roadways, in fee simple, over or to said land or any part thereof. [41 Stat. L. 452.]

For Act of Aug. 1, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 732.

SEC. 2. [**Acquisition of land by exchange.**] That the provisions of section 73 of an Act entitled "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900, as amended by an Act approved May 27, 1910, relating to exchanges of public lands, shall not apply in the acquisition, by exchange, of the privately owned lands herein referred to. [41 Stat. L. 453.]

For Act of April 30, 1900, sec. 73, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 511.

An Act To accept the cession by the State of California of exclusive jurisdiction of the lands embraced within the Yosemite National Park, Sequoia National Park, and General Grant National Park, respectively, and for other purposes.

[*Act of June 2, 1920, ch. 218, 41 Stat. L. 731.*]

[SEC. 1.] [**Yosemite, Sequoia and General Grant National Parks — cession of territory to United States — rights reserved to California — applicability of federal laws — fugitives from justice.**] That the provisions of the act of the Legislature of the State of California (approved April 15, 1919) ceding to the United States exclusive jurisdiction over the territory embraced and included within the Yosemite National Park, Sequoia National Park, and General Grant National Park, respectively, are hereby accepted and sole and exclusive jurisdiction is hereby assumed by the United States over such territory, saving, however, to the said State of California the right to serve civil or criminal process within the limits of the aforesaid parks or either of them in suits or prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State outside of said parks; and saving further to the said State the right to tax persons and corporations, their franchises and property on the lands included in said parks, and the right to fix and collect license fees for fishing in said parks; and saving also to the persons residing in any of said parks now or hereafter the right to vote at all elections held within the county or counties in which said parks are situated. All the laws applicable to places under sole and exclusive jurisdiction of the United States shall have force and effect in said parks or either of them. All fugitives from justice taking refuge in said parks, or either of them, shall be subject to the same laws as refugees from justice found in the State of California. [41 Stat. L. 731.]

SEC. 2. [Yosemite National Park — federal district — offenses committed therein.] That said Yosemite National Park shall constitute a part of the United States judicial district for the northern district of California, and the district court of the United States in and for said northern district shall have jurisdiction of all offenses committed within said boundaries of the Yosemite National Park. [41 Stat. L. 731.]

SEC. 3. [Sequoia and General Grant National Parks — federal district — offenses committed therein.] That said Sequoia National Park and General Grant National Park shall constitute part of the United States judicial district for the southern district of California, and the district court of the United States in and for said southern district shall have jurisdiction of all offenses committed within the boundaries of said Sequoia National Park and General Grant National Park. [41 Stat. L. 731.]

SEC. 4. [Offenses not punishable under federal law.] That if any offense shall be committed in the Yosemite National Park, Sequoia National Park, General Grant National Park, or either of them, which offense is not prohibited or the punishment is not specifically provided for by any law of the United States, the offender shall be subject to the same punishment as the laws of the State of California in force at the time of the commission of the offense may provide for a like offense in said State; and no subsequent repeal of any such law of the State of California shall affect any prosecution for said offense committed within said parks, or either of them. [41 Stat. L. 731.]

SEC. 5. [Hunting and fishing — rules for management and care — possession of dead bodies of wild birds or animals — violation of rules — penalty — authority of Secretary of Interior to sell timber, etc.— Act of Aug. 25, 1916, amended.] That all hunting or the killing, wounding, or capturing at any time of any wild bird or animal, except dangerous animals, when it is necessary to prevent them from destroying human lives or inflicting personal injury, is prohibited within the limits of said parks; or shall any fish be taken out of any of the waters of the said parks, or either of them, in any other way than by hook and line, and then only at such seasons and such times and manner as may be directed by the Secretary of the Interior. That the Secretary of the Interior shall make and publish such general rules and regulations as he may deem necessary and proper for the management and care of the park and for the protection of the property therein, especially for the preservation from injury or spoliation of all timber, mineral deposits other than those legally located prior to the passage of the respective Acts creating and establishing said parks, natural curiosities or wonderful objects within said parks, and for the protection of the animals in the park from capture or destruction, and to prevent their being frightened or driven from the said parks; and he shall make rules and regulations governing the taking of fish from the streams or lakes in the said parks or either of them. Possession within said parks, or either of them, of the dead bodies or any part thereof of any wild bird or animal shall be prima facie evidence that person or persons having same are guilty of violating this Act. Any person or persons, or stage or express company, or railway company, who knows or has reason to believe that they were taken or killed contrary to the provisions of this Act, and who receives for transportation any of said ani-

mals, birds, or fish so killed, caught, or taken, or who shall violate any of the other provisions of this Act, or any rule or regulation that may be promulgated by the Secretary of the Interior, with reference to the management and care of the said parks, or either of them, or for the protection of the property therein for the preservation from injury or spoliation of timber, mineral deposits, other than those legally located prior to the passage of the respective Acts creating and establishing said parks, natural curiosities, or wonderful objects within said parks, or either of them, or for the protection of the animals, birds, or fish in the said parks, or either of them, or who shall within said parks commit any damage, injury, spoliation to or upon any building, fence, hedge, gate, guide post, tree, wood, underwood, timber, garden, crops, vegetables, plants, land, springs, mineral deposits other than those legally located prior to the passage of the respective Acts creating and establishing said parks, natural curiosities, or other matter or thing growing or being thereon, or situated therein, shall be subject to the penalty provided for the violation of rules and regulations of the Secretary of the Interior authorized by section 3 of the Act of Congress approved August 25, 1916 (Thirty-ninth Statutes, page 535), entitled "An Act to establish a National Park Service, and for other purposes," which section is hereby amended by striking therefrom the words " and any violations of any of the rules and regulations authorized by this Act shall be punished as provided for in section 50 of the Act entitled 'An Act to codify and amend the Penal Laws of the United States,' approved March 4, 1909, as amended by section 6 of the Act of June 25, 1910 (Thirty-sixth United States Statutes at Large, page 857)," and inserting in lieu thereof the words " and any violation of any of the rules and regulations authorized by this Act shall be punished by a fine of not more than \$500 or imprisonment for not exceeding six months, or both, and be adjudged to pay all cost of the proceedings ": *Provided*, That nothing herein shall be construed as repealing or in any way modifying the authority granted the Secretary of the Interior by said section 3 of the said Act approved August 25, 1916, to sell or dispose of timber in national parks in those cases where, in his judgment, the cutting of such timber is required in order to control the attacks of insects or discases or otherwise conserve the scenery of the natural or historic objects in such parks and to provide for the destruction of such animals and such plant life as may be detrimental to the use of any of said parks, or the authority granted to said Secretary by the Act approved April 9, 1912, entitled "An Act to authorize the Secretary of the Interior to secure for the United States title to patented lands in the Yosemite National Park, and for other purposes," as amended by the Act approved April 16, 1914. [41 Stat. L. 731.]

SEC. 6. [Forfeiture of guns, etc., used in killing wild birds or animals.] That all guns, traps, teams, horses, or means of transportation of every nature or description used by any person or persons within the limits of said parks, or either of them, when engaged in killing, trapping, ensnaring, or capturing such wild beasts, birds, or animals, shall be forfeited to the United States and may be seized by the officers in said parks, or either of them, and held pending prosecution of any person or persons arrested under the charge of violating the provisions of this Act, and upon conviction such forfeiture shall be adjudicated as a penalty in addition to the other punishment prescribed in this Act. Such forfeited property shall be disposed of and accounted for by and under the authority of the Secretary of the Interior. [41 Stat. L. 733.]

SEC. 7. [Commissioner for Yosemite National Park — appointment — jurisdiction — powers — appeals from convictions.] That the United States District Court for the Northern District of California shall appoint a commissioner for the Yosemite National Park, who shall reside in said park, and who shall have jurisdiction to hear and act upon all complaints made of any violations of law, or of the rules and regulations made by the Secretary of the Interior, for the government of said Yosemite National Park, and for the protection of the animals, birds, and fish, and objects of interest therein, and for other purposes authorized by this Act.

Such commissioner shall have power, upon sworn information, to issue process in the name of the United States for the arrest of any person charged with the commission of any misdemeanor, or charged with a violation of the rules and regulations, or with a violation of any of the provisions of this Act prescribed for the government of said Yosemite National Park, and for the protection of the animals, birds, and fish in said park, and try persons so charged, and if found guilty impose punishment and to adjudge forfeiture prescribed.

In all cases of conviction an appeal shall lie from the judgment of said commissioner to the United States Court for the Northern District of California, and the United States district court in said district shall prescribe rules and procedure and practice for said commissioner in the trial of cases and for appeals to said United States district court. [41 Stat. L. 733.]

SEC. 8. [Commissioner for Sequoia and General Grant National Parks — appointment — jurisdiction — powers — appeals from convictions.] That the United States District Court for the Southern District of California shall appoint a commissioner for the Sequoia National Park and the General Grant National Park, who shall reside in one of said parks, and who shall have jurisdiction to hear and act upon all complaints made of any violations of the law or of the rules and regulations made by the Secretary of the Interior, for the government of the Sequoia National Park and the General Grant National Park, and for the protection of the animals, birds, and fish, and objects of interest therein, and for other purposes authorized by this Act.

Such commissioner shall have power, upon sworn information, to issue process in the name of the United States for the arrest of any person charged with the commission of any misdemeanor, or charged with a violation of the rules and regulations, or with a violation of any of the provisions of this Act prescribed for the government of said Sequoia National Park and General Grant National Park or either of them, and for the protection of the animals, birds, and fish in said last-named parks, or either of them, and try persons so charged, and, if found guilty, impose punishment and to adjudge forfeiture prescribed.

In all cases of conviction an appeal shall lie from the judgment of said commissioner to the United States Court for the Southern District of California, and the United States district court in said district shall prescribe rules and procedure and practice for said commissioner in the trial of cases and for appeals to said United States district court. [41 Stat. L. 733.]

SEC. 9. [Criminal offenses not covered by Act — powers of commissioners — bail.] That any such commissioner within his jurisdiction shall also have the power to issue process as hereinbefore provided for the arrest of any person charged with commission within said boundaries of said parks, or either of them, as specified above in this Act, of any criminal offense not covered by the

provisions of section 5 of this Act, to hear the evidence introduced, and if he is of the opinion that probable cause is shown for holding the person so charged for trial, he shall cause such person to be safely conveyed to a secure place of confinement within the jurisdiction of the United States district court in and for the judicial district to which he belongs, and certify a transcript of the record of his proceedings and testimony in the case to the court, to which the park is attached as above specified in this Act, which court shall have jurisdiction of the case: *Provided*, That the said commissioner shall grant bail in all cases bailable under the laws of the United States or of said State. [41 Stat. L. 734.]

SEC. 10. [Issuance of process by commissioners — arrests within parks.] That all process issued by the commissioner of the Yosemite National Park shall be directed to the marshal of the United States for the northern district of California, and all process issued by the commissioner of the Sequoia National Park and the General Grant National Park shall be directed to the marshal of the United States for the southern district of California, but nothing herein contained shall be so construed to prevent the arrest by any officer or employee of the Government or any person employed by the United States, in the policing of such reservation within the boundaries of said parks, or either of them, without process of any person taken in the act of violating the law or this Act or the regulation prescribed by said Secretary as aforesaid. [41 Stat. L. 734.]

SEC. 11. [Commissioners' salaries — residence — disposition of fees, etc.] That the commissioner provided for in this Act for the Yosemite National Park and the commissioner provided for in this Act for the Sequoia National Park and the General Grant National Park each shall be paid an annual salary of \$1,500, payable monthly: *Provided*, That the said commissioner for the Yosemite National Park shall reside within the exterior boundaries of said Yosemite National Park, and the commissioner provided for the Sequoia National Park and the General Grant National Park shall reside within the exterior boundaries of one of the said last-named national parks and at a place to be designated by the court making such appointment: *And provided further*, That all fees, costs, and expenses collected by the commissioner shall be disposed of as provided in section 13 of this Act. [41 Stat. L. 734.]

SEC. 12. [Fees, etc., chargeable to United States.] That all fees, costs, and expenses arising in cases under this Act and properly chargeable to the United States shall be certified, approved, and paid as are like fees, costs, and expenses in the courts of the United States. [41 Stat. L. 734.]

SEC. 13. [Fines and costs — deposit.] That all fines and costs imposed and collected shall be deposited by said commissioners of the United States, or the marshal of the United States collecting the same, with the clerk of the United States district court to which said parks are attached, as provided in this Act. [41 Stat. L. 734.]

SEC. 14. [Governor of California — notification of passage and approval of Act.] That the Secretary of the Interior shall notify in writing the governor of the State of California of the passage and approval of this Act and of the fact that the United States assumes police jurisdiction over said parks, as specified in said Act. [41 Stat. L. 734.]

[SEC. 1.] * * * [National Park Service—acceptance of lands, etc., donated.] Hereafter the Secretary of the Interior in his administration of the National Park Service is authorized, in his discretion, to accept patented lands, rights of way over patented lands or other lands, buildings, or other property within the various national parks and national monuments, and moneys which may be donated for the purposes of the national park and monument system. [41 Stat. L. 917.]

This and the paragraph which follows are from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

* * * [Hot Springs Reservation—physicians, etc.—charges.] The Secretary of the Interior is hereby authorized to assess and collect from physicians, who desire to prescribe the hot waters from the Hot Springs Reservation, reasonable charges for the exercise of such privilege, including fees for examination and registration; and he is also authorized to assess and collect from bath attendants and masseurs operating in all bathhouses receiving hot water from the reservation, reasonable charges for the exercise of such privileges. The moneys received from the exercise of this authority shall be used in the protection and improvement of the said reservation. [41 Stat. L. 918.]

See note to preceding paragraph.

An Act For the creation of the Custer State Park Game Sanctuary, in the State of South Dakota, and for other purposes.

[Act of June 5, 1920, ch. 247, 41 Stat. L. 986.]

[SEC. 1.] [Custer State Park Game Sanctuary—creation.] That the President of the United States is hereby authorized to designate as the Custer State Park Game Sanctuary such areas, not exceeding thirty thousand acres, of the Harney National Forest, and adjoining or in the vicinity of the Custer State Park, in the State of South Dakota, as should, in his opinion, be set aside for the protection of game animals and birds and be recognized as a breeding place therefor. [41 Stat. L. 986.]

SEC. 2. [Hunting, etc., game animals and birds—regulations—penalty for violation.] That when such areas have been designated as provided for in section 1 of this Act, hunting, trapping, killing, or capturing of game animals and birds upon the lands of the United States within the limits of said areas shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture; and any person violating such regulations or the provisions of this Act shall be deemed guilty of a misdemeanor, and shall, upon conviction in any United States court of competent jurisdiction, be fined in a sum not exceeding \$1,000, or be imprisoned for a period not exceeding one year, or shall suffer both fine and imprisonment, in the discretion of the court. [41 Stat. L. 986.]

SEC. 3. [Purpose of Act.] That it is the purpose of this Act to protect from trespass the public lands of the United States and the game animals and birds which may be thereon, and not to interfere with the operation of the local game law as affecting private or State lands. [41 Stat. L. 986.]

SEC. 4. [Fences — erection and maintenance by South Dakota — gates — additional inclosures.] That the State of South Dakota is hereby authorized and permitted to erect and maintain a good substantial fence, inclosing in whole or in part such areas as may be designated and set aside by the President under the authority of section 1. The state shall erect and maintain such gates in this fence as may be required by the authorized agents of the Federal Government in administering this game sanctuary and the adjoining national forest lands, and may erect and maintain such additional inclosures as may be agreed upon with the Secretary of Agriculture. The right of the State to maintain this fence shall continue so long as the area designated by the President as a game sanctuary is also given similar protection by the laws of the State of South Dakota. [41 Stat. L. 986.]

SEC. 5. [Conveyance of lands in park to South Dakota — conveyance of forest lands to United States in exchange.] That upon recommendation of the Secretary of Agriculture, the Secretary of the Interior may patent to the State of South Dakota not to exceed one thousand six hundred acres of nonmineral national forest lands not otherwise appropriated or withdrawn within the areas set aside by the President under the authority of section 1: *Provided*, That the State of South Dakota conveys to the Government good and sufficient title to other lands of equal value owned by the State and lying within the exterior boundaries of a national forest in the State of South Dakota and approved by the Secretary of Agriculture as equally desirable for national forest purposes, the lands thus conveyed to the Government to become a part of the national forest: *Provided, however*, That this authority shall not operate to restrict any selection rights which the State may have or may be hereafter granted, excepting as to the specific lands conveyed to the Government under authority of this Act. [41 Stat. L. 986.]

PUBLIC PRINTING

Act of May 31, 1920, ch. 217 (Agricultural Appropriation Act), 220.

Weather Bureau — Printing, 220.

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 221.

Sec. 1. Bureau of Engraving and Printing — Proceeds from Work — Credit on Appropriation, 221.

Congressional Memorial Addresses — Illustrations, 221.

* * * **[Weather Bureau — printing.]** That no printing shall be done by the Weather Bureau that, in the judgment of the Secretary of Agriculture, can be done at the Government Printing Office without impairing the service of said bureau. [41 Stat. L. 696.]

This is from the Agricultural Appropriation Act of May 31, 1920, ch. 217.

[SEC. 1.] * * * [Bureau of Engraving and Printing — proceeds from work — credit on appropriation.] During the fiscal year 1921 all proceeds derived from work performed by the Bureau of Engraving and Printing, by direction of the Secretary of the Treasury, not covered and embraced in the appropriation for said bureau for the said fiscal year, instead of being covered into the Treasury as miscellaneous receipts, as provided by the Act of August 4, 1886 (Twenty-fourth Statutes, page 227), shall be credited when received to the appropriation for said bureau for the fiscal year 1921. [41 Stat. L. 881.]

This and the following paragraph are from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

* * * [Congressional memorial addresses — illustrations.] The illustrations to accompany bound copies of memorial addresses delivered in Congress shall be made at the Bureau of Engraving and Printing and paid for out of the appropriation for that Bureau, or, in the discretion of the Joint Committee on Printing, shall hereafter be obtained elsewhere by the Public Printer and charged to the allotment for printing and binding for Congress. [41 Stat. L. 943.]

See note to preceding paragraph.

PUBLIC PROPERTY, BUILDINGS AND GROUNDS

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 221.

Sec. 7. Rented Buildings, District of Columbia — Contents of Statement Submitted to Congress, 221.

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act, 222.

Sec. 1. Public Buildings — Furniture, 222.

Purchase of Fuel — Contracts, 222.

3. Government-owned Buildings — District of Columbia — Reports to Congress Concerning, 222.

SEC. 7. [Rented buildings, District of Columbia — contents of statement submitted to Congress.] That hereafter the statement of buildings rented within the District of Columbia for the use of the Government, required by the Act of July 16, 1892, shall indicate, in addition to the data required by section 3 of the Act of May 1, 1913, the cost of the care, maintenance, and operation of each building per square foot of floor space of the building or portion of building rented. [41 Stat. L. 691.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 29, 1920, ch. 214.

The Acts of July 16, 1892, and May 1, 1913, § 3, mentioned in the text will be found in 8 Fed. Stat. Ann. (2d. ed.) 1081.

[SEC. 1.] * * * **[Public buildings — furniture.]** That all furniture now owned by the United States in other public buildings or in buildings rented by the United States shall be used, so far as practicable, whether it corresponds with the present regulation plan for furniture or not. [41 Stat. L. 878.]

This and the paragraph which follows, also section 3 following, are from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235. A provision identical with the above appears in the Sundry Civil Appropriation Act of July 1, 1916, ch. 209, 1918 Supp. Fed. Stat. Ann. 751.

* * * **[Purchase of fuel — contracts.]** That the Secretary of the Treasury is authorized to contract for the purchase of fuel for public buildings under the control of the Treasury Department in advance of the availability of the appropriation for the payment thereof. Such contracts, however, shall not exceed the necessities of the current fiscal year [41 Stat. L. 879.]

See note to preceding paragraph.

SEC. 3. **[Government-owned buildings — District of Columbia — reports to Congress concerning.]** That hereafter it shall be the duty of the head of each department and independent establishment of the Government to submit to Congress, annually in the Book of Estimates, a statement giving for each of the Government-owned buildings in the District of Columbia under their respective jurisdiction the following information for the preceding fiscal year: The location and valuation of each building, the purpose or purposes for which used, and the cost of care, maintenance, upkeep, and operation thereof per square foot of floor space. [41 Stat. L. 945.]

See note to first paragraph of sec. 1.

QUARANTINE

See AGRICULTURE; ANIMALS; HEALTH AND QUARANTINE

RADIO COMMUNICATION

See TELEGRAPH, TELEPHONES AND CABLES

RAILROADS

See CORPORATIONS; INTERSTATE COMMERCE; POSTAL SERVICE; PUBLIC LANDS

RECLAMATION

See PUBLIC LANDS; WATERS

RED CROSS

See CHARITIES

REMOVAL OF CAUSES

See JUDICIARY

RIVERS, HARBORS AND CANALS

Act of June 5, 1920, ch. 235 (Sundry Civil Appropriation Act), 223.

Sec. 1. Panama Canal — Employees — Number — Rate of Compensation, 223.

Act of June 5, 1920, ch. 252 (Rivers and Harbors Appropriation Act), 224.

Sec. 3. New Projects — Undertaking as Dependent on Cost of Completion, 224.

5. Contracts Uncompleted Prior to April 6, 1917 — Readjustment of Compensation — Limitation of Time for Applying for Relief, 224.

7. Appropriations for River and Harbor Improvements — Maintenance and Repair — Diversion, 224.

9. Damages Resulting from Prosecution of River and Harbor Works — Adjustment of Claims by Chief of Engineers — Act of June 25, 1910, Amended, 224.

CROSS-REFERENCE

See also COAST GUARD

[SEC. 1.] * * * [Panama Canal — employees — number — rate of compensation.] Except in cases of emergency, or conditions arising subsequent to and unforeseen at the time of submitting the annual estimates to Congress, and except for those employed in connection with the construction of permanent quarters, offices, and other necessary buildings, dry docks, repair shops, yards, docks, wharves, warehouses, storehouses, and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs, and supplies, and except for the permanent operating organization under which the compensation of the various positions is limited by section 4 of the Panama Canal Act, there shall not be employed at any time during the fiscal year 1921 under any of the foregoing appropriations for the Panama Canal, any greater number of persons than are specified in the notes submitted respectively, in connection with the estimates for each of said appropriations in the annual Book of Estimates for said year, nor shall there be paid to any such person during that fiscal year any greater rate of compensation than was author-

ized to be paid to persons occupying the same or like positions on July 1, 1919; and all employments made or compensation increased because of emergencies or conditions so arising shall be specifically set forth, with the reasons therefor, by the governor in his report for the fiscal year 1921. [41 Stat. L. 945.]

This is from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

An Act Making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes.

[Act of June 5, 1920, ch. 252, 41 Stat. L. 1009.]

SEC. 3. [New projects — undertaking as dependent on cost of completion.] That the last paragraph of section 1 of the River and Harbor Act approved March 2, 1919, which reads: "No work shall be undertaken upon any new project herein adopted unless the Secretary of War shall be of the opinion that, based upon the cost at the time of entering upon the work, the project can be completed at a cost not greater than forty per centum in excess of the estimate of cost in the report upon such project," be, and the same is hereby, repealed. [41 Stat. L. 1013.]

SEC. 5. [Contracts uncompleted prior to April 6, 1917 — readjustment of compensation — limitation of time for applying for relief.] That the time within which applications for relief under the provisions of section 10 of the River and Harbor Act approved March 2, 1919, may be filed by contractors with the Secretary of War, or with district engineers, or other contracting officials of the Engineer Department, is hereby limited to six months after the date of the approval of this Act. [41 Stat. L. 1014.]

For section 10 of Act of March 2, 1919, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 839.

SEC. 7. [Appropriations for river and harbor improvements — maintenance and repair — diversion.] That appropriations heretofore or herein made for works of river and harbor improvements, or so much thereof as shall be necessary, may, in the discretion of the Secretary of War, be used for maintenance and for the repair and restoration of said works whenever from any cause they may have become seriously impaired, as well as for the further authorized improvement of said works: *Provided*, That no appropriation shall be diverted from one project to another. [41 Stat. L. 1014.]

Section 8 relates to military supplies and their disposition, and will be found under WAR DEPARTMENT AND MILITARY ESTABLISHMENT, p. 363, *post*.

SEC. 9. [Damages resulting from prosecution of river and harbor works — adjustment of claims by Chief of Engineers — Act of June 25, 1910, amended.] That section 4 of the River and Harbor Act, approved June 25, 1910, be, and the same is hereby, amended so as to read as follows:

"SEC. 4. That whenever any vessel belonging to or employed by the United States engaged upon river and harbor works collides with and damages another vessel, pier, or other legal structure belonging to any person or corporation, and whenever, in the prosecution of river and harbor works, an accident occurs damaging or destroying property belong to any person or corporation, and

whenever personal property of employees of the United States, who are employed on or in connection with river and harbor works, is damaged or destroyed in connection with the loss, threatened loss, or damage to United States property, or through efforts to save life or to preserve United States property, the Chief of Engineers shall cause an immediate examination to be made, and if, in his judgment, the facts and circumstances are such as to make the whole or any part of the damages or destruction a proper charge against the United States, the Chief of Engineers, subject to the approval of the Secretary of War, shall have authority to adjust and settle all claims for damages or destruction caused by the above designated collisions, accidents, and so forth, in cases where the damage or expense does not exceed \$500, and pay the same from the appropriation directly involved, and to report such as exceed \$500 to Congress for its consideration." [41 Stat. L. 1015.]

For section 4 of Act of June 25, 1910, as originally enacted, see 9 Fed. Stat. Ann. (2d ed.) 36.

SCHOOLS

See COAST AND GEODETIC SURVEY; INDIANS; NAVY; VOCATIONAL
REHABILITATION

SCREW THREAD COMMISSION

See WEIGHTS AND MEASURES

SEAMEN

Act of June 5, 1920, ch. 250 (" Merchant Marine Act "), 225.

Sec. 31. Payment of Wages at Port, etc.—R. S. Sec. 4530 Amended, 225.

32 Advances and Allotment of Wages—Sec. 10 of Act of June 26, 1884, Amended, 226.

33. Personal Injuries—Damages—Death—Personal Representatives' Jurisdiction in Actions—Sec. 20 of Act of March 4, 1915, Amended, 227.

CROSS-REFERENCE

See also SHIPPING AND NAVIGATION

SEC. 31. [Payment of wages at port, etc.—R. S. sec. 4530 amended.] That section 4530 of the Revised Statutes of the United States is amended to read as follows:

"Sec. 4530. Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-

half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: *Provided*, Such a demand shall not be made before the expiration of, nor oftener than once in, five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 4529 of the Revised Statutes: *Provided further*, That notwithstanding any release signed by any seaman under section 4552 of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require: *And provided further*, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement." [41 Stat. L. 1006.]

This section and sections 32 and 33 which follow are from the "Merchant Marine Act" of June 5, 1920, ch. 250. The Act will be found under the title SHIPPING AND NAVIGATION.

For R. S. sec. 4530 here amended, see 9 Fed. Stat. Ann. (2d ed.) 158.

For R. S. secs. 4529, 4552, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 156, 183.

SEC. 32. [Advances and allotment of wages — sec. 10 of Act of June 26, 1884, amended.] That paragraph (a) of section 10 of the Act entitled "An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes," approved June 26, 1884, as amended, is hereby amended to read as follows:

"SEC. 10. (a) That it shall be, and is hereby, made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$25 nor more than \$100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment, whether made within or without the United States or territory subject to the jurisdiction thereof, shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than \$500." [41 Stat. L. 1006.]

See note to preceding section.

For section 10 of Act of June 26, 1884, here amended, see 9 Fed. Stat. Ann. (2d ed.) 174.

SEC. 33. [Personal injuries — damages — death — personal representatives' jurisdiction in actions — sec. 20 of Act of March 4, 1915, amended.] That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

"SEC. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." [41 Stat. L. 1007.]

See note to preceding section 31.

For section 20 of Act of March 4, 1915, here amended, see 9 Fed. Stat. Ann. (2d ed.) 180.

SECURITIES

See INTERSTATE COMMERCE

SEEDS

See AGRICULTURE

SEQUOIA NATIONAL PARK

See PUBLIC PARKS

SHIPPING AND NAVIGATION

Act of Feb. 19, 1920, ch. 83, 230.

- Sec. 1. Changing Names of Vessels — Authority of Commissioner of Navigation, 230.*
- 2. Rules and Regulations — Evidence — Order Changing Name — Publication, 231.*
- 3. Fees for Privilege of Securing Changes of Name, 231.*
- 4. Repeal of Legislation Affecting Same Subject, 231.*
- 5. Act When in Effect, 231.*

Act of March 9, 1920, ch. 95, 231.

- Sec. 1. Vessels or Cargo Belonging to United States — Arrest or Seizure by Judicial Process — Panama Railroad Company, 231.*
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An Act To authorize the Commissioner of Navigation to change the names of vessels.

[*Act of Feb. 19, 1920, ch. 83, 41 Stat. L. 436.*]

[**SEC. 1.**] [**Changing names of vessels — authority of Commissioner of Navigation.**] That the Commissioner of Navigation shall, under the direction of the Secretary of Commerce, be empowered to change the names of vessels of the United States on application of the owner or owners of such vessels when in his judgment there shall be sufficient cause for so doing. [*41 Stat. L. 436.*]

SEC. 2. [Rules and regulations — evidence — order changing name — publication.] That the Commissioner of Navigation, with the approval of the Secretary of Commerce, shall establish such rules and regulations and procure such evidence as to age, condition, where built, and pecuniary liability of the vessel as he may deem necessary to prevent injury to public or private interests; and when permission is granted by the Commissioner of Navigation, he shall cause the order for the change of name to be published at least in four issues in some daily or weekly paper at the place of documentation, and the cost of procuring evidence and advertising the change of name to be paid by the person or persons desiring such change of name. [41 Stat. L. 437.]

SEC. 3. [Fees for privilege of securing changes of name.] That for the privilege of securing such changes of name the following fees shall be paid by the owners of vessels to collectors of customs, to be deposited in the Treasury by such collectors as navigation fees: For vessels ninety-nine gross tons and under, \$10; for vessels one hundred gross tons and up to and including four hundred and ninety-nine gross tons, \$25; for vessels five hundred gross tons and up to and including nine hundred and ninety-nine gross tons, \$50; for vessels one thousand gross tons and up to and including four thousand nine hundred and ninety-nine gross tons, \$75; for vessels five thousand gross tons and over, \$100. [41 Stat. L. 437.]

SEC. 4. [Repeal of legislation affecting same subject.] That sections 1 and 2 of the Act of March 2, 1881, entitled "An Act to authorize the Secretary of the Treasury to change the name of vessels under certain circumstances," and section 5 of the Act of July 5, 1884, entitled "An Act to constitute a Bureau of Navigation in the Treasury Department," are hereby repealed. [41 Stat. L. 437.]

For Act of March 2, 1881, secs. 1 and 2 here repealed, see 9 Fed. Stat. Ann. (2d ed.) 289.
For Act of July 5, 1884, sec. 5, here repealed, see 9 Fed. Stat. Ann. (2d ed.) 247.

SEC. 5. [Act when in effect.] That this Act shall take effect thirty days after its passage. [41 Stat. L. 437.]

[An Act Authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes.

[Act of March 9, 1920, ch. 95, 41 Stat. L. 525.]

[Sec. 1.] [Vessels or cargo belonging to United States — arrest or seizure by judicial process — Panama Railroad Company.] That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein

made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this Act shall not apply to the Panama Railroad Company. [41 Stat. L. 525.]

SEC. 2. [Libel in personam — venue — service — cross libel — transfer of cause to another district.] That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation.] Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States. [41 Stat. L. 525.]

SEC. 3. [Hearing and determination — decree — appeals — election to proceed as in rem — bond or stipulation.] That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Elections so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder. Any such bond or stipulation heretofore given in admiralty causes by the United States, the United States Shipping Board, or the United States Shipping Board Emergency Fleet Corporation, shall become void and be surrendered and canceled upon the filing of a suggestion by the Attorney General or other duly authorized law officer that the United States is interested in such cause, and assumes liability to satisfy any decree included within said bond or stipulation, and thereafter any such decree shall be paid as provided in section 8 of this Act. [41 Stat. L. 526.]

SEC. 4. [Causes of action against United States affecting vessels formerly belonging to it — attachment of vessels.] That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libellant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act. [41 Stat. L. 526.]

SEC. 5. [Date of creation of cause of action as affecting right to sue — limitation of actions.] That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises. [41 Stat. L. 526.]

SEC. 6. [Exemptions and limitations of liability.] That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels. [41 Stat. L. 527.]

SEC. 7. [Seizures and suits in foreign jurisdiction.] That if any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation

of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: *Provided, however,* That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case. [41 Stat. L. 527.]

SEC. 8. [Satisfaction of judgment against United States.] That any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 4 and 7 of this Act, and any arbitration award or settlement had and agreed to under the provisions of section 9 of this Act, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor; otherwise there is hereby appropriated out of any money in the Treasury of the United States not otherwise appropriated, a sum sufficient to pay any such judgment or award or settlement. [41 Stat. L. 527.]

SEC. 9. [Arbitrating, compromising or settling claims.] That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of sections 2, 4, 7, and 10 of this Act. [41 Stat. L. 527.]

SEC. 10. [Salvage services.] That the United States, and the crew of any merchant vessel owned or operated by the United States, or such corporation, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such corporation, having control of the possession or operation of such vessel. [41 Stat. L. 528.]

SEC. 11. [Moneys recovered in suits by United States — disposition.] That all moneys recovered in any suit brought by the United States on any cause of action arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the United States Shipping Board, or of such aforesaid corporation, having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insurance fund, or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid. [41 Stat. L. 528.]

SEC. 12. [Reports to Congress of judgments rendered and settlements of claims arising under this Act.] That the Attorney General shall report to the Congress at each session thereof the suits under this Act in which final judgment shall have been rendered for or against the United States and such aforesaid corporation, and the Secretary of any department of the Government of the United States, and the United States Shipping Board, and the board of trustees of any such aforesaid corporation, shall likewise report the arbitration awards or settlements of claims which shall have been agreed to since the previous session, and in which the time to appeal shall have expired or have been waived. [41 Stat. L. 528.]

SEC. 13. [Repeal of inconsistent Acts.] That the provisions of all other Acts inconsistent herewith are hereby repealed. [41 Stat. L. 528.]

An Act Relating to the maintenance of actions for death on the high seas and other navigable waters.

[Act of March 30, 1920, ch. 111, 41 Stat. L. 537.]

[SEC. 1.] [Actions in Admiralty for death on high seas — parties — beneficiaries.] That whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued. [41 Stat. L. 537.]

SEC. 2. [Measure of compensation — apportionment.] That the recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought. [41 Stat. L. 537.]

SEC. 3. [Limitation of actions.] That such suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered. [41 Stat. L. 537.]

SEC. 4. [Actions in Admiralty brought under law of foreign state.] That whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding. [41 Stat. L. 537.]

SEC. 5. [Death from wrongful act during pendency of action — substitution of parties.] That if a person die as the result of such wrongful act, neglect, or default as is mentioned in section 1 during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this Act for the recovery of the compensation provided in section 2. [41 Stat. L. 537.]

SEC. 6. [Contributory negligence as bar to recovery.] That in suits under this Act the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly. [41 Stat. L. 537.]

SEC. 7. [State statutes as affected by this Act — certain waters expressly excepted from application of Act.] That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone. [41 Stat. L. 538.]

SEC. 8. [Pending actions as affected by Act.] That this Act shall not affect any pending suit, action, or proceeding. [41 Stat. L. 538.]

[SEC. 1.] * * * **[Emergency shipping fund — reduction of appropriation — compensation for ship construction — renting buildings in District of Columbia — expenditures for printing.]** The authorization of \$2,764,000,000, heretofore established for the construction of ships, is reduced to \$2,614,000,000.

The expenses of the United States Shipping Board Emergency Fleet Corporation, during the fiscal year ending June 30, 1921, for administrative purposes, the payment of claims arising from the cancellation of contracts, damage charges and miscellaneous adjustments, maintenance and operation of vessels, and the completion of vessels now under construction, shall be paid from the following sources: (a) The amount on hand July 1, 1920; (b) the amount received during the fiscal year 1921 from the operation of ships; (c) not to exceed \$15,000,000 from deferred payments on ships sold prior to the approval of this Act; (d) not to exceed \$25,000,000 from plant and material sold during the fiscal year 1921; and (e) not to exceed \$30,000,000 from ships sold during the fiscal year 1921: *Provided*, That, after the approval of this Act, no contract shall be entered into or work undertaken for the construction of any additional vessels for the United States Shipping Board or the United States Shipping Board Emergency Fleet Corporation.

No contracts for ship construction to be entered into shall provide that the compensation of the contractor shall be the cost of construction plus a percentage thereof for profit, or plus a fixed fee for profit.

No part of the funds of the United States Shipping Board Emergency Fleet Corporation shall be available for rent of buildings in the District of Columbia, during the fiscal year 1921, if suitable space is provided for the said corporation by the Public Buildings Commission.

No part of the appropriations made in this Act for the Shipping Board or the Emergency Fleet Corporation shall be expended for the preparation, printing, or publication of any bulletins, newspapers, magazines, or periodicals, or for services in connection with same, not including preparation and printing of reports or documents authorized by law. [41 Stat. L. 891.]

This is from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235. A somewhat similar provision appeared in the Sundry Civil Appropriation Act of July 19, 1919, ch. 24, 1919 Supp. Fed. Stat. Ann. 345.

An Act To provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes.

[Act of June 5, 1920, ch. 250, 41 Stat. L. 988.]

[SEC. 1.] [Merchant Marine Act—purposes stated—general duty of United States Shipping Board.] That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by the citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained. [41 Stat. L. 988.]

This is popularly known as the Jones Shipping Act.

SEC. 2. [Repeal of certain provisions of prior shipping acts—limitations attached to repeal enumerated.] (a) That the following Acts and parts of Acts are hereby repealed, subject to the limitations and exceptions hereinafter, in this Act, provided:

(1) The emergency shipping fund provisions of the Act entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," approved June 15, 1917, as amended by the Act entitled "An Act to amend the emergency shipping fund provisions of the Urgent Deficiency Appropriation Act, approved June 15, 1917, so as to empower the President and his designated agents to take over certain transportation systems for the transportation of shipyard and plant employees, and for other purposes," approved April 22, 1918, and as further amended by the Act entitled "An Act making appropriation to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, on account of war expenses, and for other purposes," approved November 4, 1918;

(2) Section 3 of such Act of April 22, 1918;

(3) The paragraphs numbered 2 and 3 under the heading "Emergency shipping fund" in such Act of November 4, 1918; and

(4) The Act entitled "An Act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposes," approved July 18, 1918.

(5) Sections 5, 7, and 8, Shipping Act, 1916.

(b) The repeal of such Acts or parts of Acts is subject to the following limitations:

(1) All contracts or agreements lawfully entered into before the passage of this Act under any such Act or part of Act shall be assumed and carried out by the United States Shipping Board, hereinafter called "the board."

(2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such Act or parts of Acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (c) of this section, as if this Act had not been passed.

(3) The repeal shall not have the effect of extinguishing any penalty incurred under such Acts or parts of Acts, but such Acts or parts of Acts shall remain in force for the purpose of sustaining a prosecution for enforcement of the penalty therein provided for the violation thereof.

(4) The board shall have full power and authority to complete or conclude any construction work begun in accordance with the provisions of such Acts or parts of Acts if, in the opinion of the board, the completion or conclusion thereof is for the best interests of the United States.

(c) As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed. [41 Stat. L. 988.]

For statutes repealed by the text, see 1918 Supp. Fed. Stat. Ann. 783, 1919 Supp. Fed. Stat. Ann. 340.

SEC. 3. (a) [United States Shipping Board — creation — membership, etc. — duties — rules and regulations — attorneys — sec. 3 of "Shipping Act, 1916," amended.] That section 3 of the "Shipping Act, 1916," is amended to read as follows:

"SEC. 3. That a board is hereby created to be known as the United States Shipping Board and hereinafter referred to as the board. The board shall be composed of seven commissioners, to be appointed by the President, by and with the advice and consent of the Senate; and the President shall designate the member to act as chairman of the board, and the board may elect one of its members as vice chairman. Such commissioners shall be appointed as soon as practicable after the enactment of this Act and shall continue in office two for a term of one year, and the remaining five for terms of two, three, four, five, and six years, respectively, from the date of their appointment, the term of

each to be designated by the President, but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he succeeds.

"The commissioners shall be appointed with due regard to their fitness for the efficient discharge of the duties imposed on them by this Act, and two shall be appointed from the States touching the Pacific Ocean, two from the States touching the Atlantic Ocean, one from the States touching the Gulf of Mexico, one from the States touching the Great Lakes and one from the interior, but not more than one shall be appointed from the same State. Not more than four of the commissioners shall be appointed from the same political party. A vacancy in the board shall be filled in the same manner as the original appointments. No commissioner shall take any part in the consideration or decision of any claim or particular controversy in which he has a pecuniary interest.

"Each commissioner shall devote his time to the duties of his office, and shall not be in the employ of or hold any official relation to any common carrier or other person subject to this Act, nor while holding such office acquire any stock or bonds thereof or become pecuniarily interested in any such carrier.

"The duties of the board may be so divided that under its supervision the directorship of various activities may be assigned to one or more commissioners. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the board shall not impair the right of the remaining members of the board to exercise all its powers. The board shall have an official seal, which shall be judicially noticed.

"The board may adopt rules and regulations in regard to its procedure and the conduct of its business. The board may employ within the limits of appropriations made therefor by Congress such attorneys as it finds necessary for proper legal service to the board in the conduct of its work, or for proper representation of the public interest in investigations made by it or proceedings pending before it whether at the board's own instance or upon complaint, or to appear for or represent the board in any case in court or other tribunal. The board shall have such other rights and perform such other duties not inconsistent with the Merchant Marine Act, 1920, as are conferred by existing law upon the board in existence at the time this section as amended takes effect.

"The commissioners in office at the time this section as amended takes effect shall hold office until all the commissioners provided for in this section as amended are appointed and qualify." [41 Stat. L. 989.]

Section 3 of the Shipping Act of 1916 as originally enacted will be found in 1918 Supp. Fed. Stat. Ann. 786.

(b) [United States Shipping Board—salaries—sec. 4 of "Shipping Act, 1916," amended.] The first sentence of section 4 of the "Shipping Act, 1916," is amended to read as follows:

"SEC. 4. That each member of the board shall receive a salary of \$12,000 per annum." [41 Stat. L. 990.]

SEC. 4. Vessels and other property acquired by President—transfer to Shipping Board.] That all vessels and other property or interests of whatsoever kind, including vessels or property in course of construction or contracted for, acquired by the President through any agencies whatsoever in pursuance of authority conferred by the Acts or parts of Acts repealed by

section 2 of this Act, or in pursuance of the joint resolution entitled "Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes," approved May 12, 1917, with the exception of vessels and property the use of which is in the opinion of the President required by any other branch of the Government service of the United States, are hereby transferred to the board: *Provided*, That all vessels in the military and naval service of the United States, including the vessels assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction or under contract by the War Department, shall be exempt from the provisions of this Act. [41 Stat. L. 990.]

The Act of May 12, 1917, mentioned in the text, will be found in 1918 Supp. Fed. Stat. Ann. 803.

SEC. 5. [Sale of government owned vessels to citizens.] That in order to accomplish the declared purposes of this Act, and to carry out the policy declared in section 1 hereof, the board is authorized and directed to sell, as soon as practicable, consistent with good business methods and the objects and purposes to be attained by this Act, at public or private competitive sale after appraisement and due advertisement, to persons who are citizens of the United States except as provided in section 6 of this Act, all of the vessels referred to in section 4 of this Act or otherwise acquired by the board. Such sale shall be made at such prices and on such terms and conditions as the board may prescribe, but the completion of the payment of the purchase price and interest shall not be deferred more than fifteen years after the making of the contract of sale. The board in fixing or accepting the sale price of such vessels shall take into consideration the prevailing domestic and foreign market price of, the available supply of, and the demand for vessels, existing freight rates and prospects of their maintenance, the cost of constructing vessels of similar types under prevailing conditions, as well as the cost of the construction or purchase price of the vessels to be sold, and any other facts or conditions that would influence a prudent, solvent business man in the sale of similar vessels or property which he is not forced to sell. All sales made under the authority of this Act shall be subject to the limitations and restrictions of section 9 of the "Shipping Act, 1916," as amended. [41 Stat. L. 990.]

Section 9 of the "Shipping Act, 1916," will be found in 1918 Supp. Fed. Stat. Ann. 788.

SEC. 6. [Sale of vessels to aliens.] That the board is authorized and empowered to sell to aliens, at such prices and on such terms and conditions as it may determine, not inconsistent with the provisions of section 5 (except that completion of the payment of the purchase price and interest shall not be deferred more than ten years after the making of the contract of sale), such vessels as it shall, after careful investigation, deem unnecessary to the promotion and maintenance of an efficient American merchant marine; but no such sale shall be made unless the board, after diligent effort, has been unable to sell, in accordance with the terms and conditions of section 5, such vessels to persons citizens of the United States, and has, upon an affirmative vote of not less than five of its members, spread upon the minutes of the board, determined to make such sale; and it shall make as a part of its records a full statement of its reasons for making such

sale. Deferred payments of purchase price of vessels under this section shall bear interest at the rate of not less than 5½ per centum per annum, payable semiannually. [41 Stat. L. 991.]

SEC. 7. [Steamship lines — establishment and operation — carrying mails.] That the board is authorized and directed to investigate and determine as promptly as possible after the enactment of this Act and from time to time thereafter what steamship lines should be established and put in operation from ports in the United States or any Territory, District, or possession thereof to such world and domestic markets as in its judgment are desirable for the promotion, development, expansion, and maintenance of the foreign and coastwise trade of the United States and an adequate postal service, and to determine the type, size, speed, and other requirements of the vessels to be employed upon such lines and the frequency and regularity of their sailings, with a view to furnishing adequate, regular, certain, and permanent service. The board is authorized to sell, and if a satisfactory sale can not be made, to charter such of the vessels referred to in section 4 of this Act or otherwise acquired by the board, as will meet these requirements to responsible persons who are citizens of the United States who agree to establish and maintain such lines upon such terms of payment and other conditions as the board may deem just and necessary to secure and maintain the service desired; and if any such steamship line is deemed desirable and necessary, and if no such citizen can be secured to supply such service by the purchase or charter of vessels on terms satisfactory to the board, the board shall operate vessels on such line until the business is developed so that such vessels may be sold on satisfactory terms and the service maintained, or unless it shall appear within a reasonable time that such line can not be made self-sustaining. The Postmaster General is authorized, notwithstanding the Act entitled "An Act to provide for ocean mail service between the United States and foreign ports, and to promote commerce," approved March 3, 1891, to contract for the carrying of the mails over such lines at such price as may be agreed upon by the board and the Postmaster General: *Provided*, That preference in the sale or assignment of vessels for operation on such steamship lines shall be given to persons who are citizens of the United States who have the support, financial and otherwise, of the domestic communities primarily interested in such lines if the board is satisfied of the ability of such persons to maintain the service desired and proposed to be maintained, or to persons who are citizens of the United States who may then be maintaining a service from the port of the United States to or in the general direction of the world market port to which the board has determined that such service should be established: *Provided further*, That where steamship lines and regular service have been established and are being maintained by ships of the board at the time of the enactment of this Act, such lines and service shall be maintained by the board until, in the opinion of the board, the maintenance thereof is unbusinesslike and against the public interests: *And provided further*, That whenever the board shall determine, as provided in this Act, that trade conditions warrant the establishment of a service or additional service under Government administration where a service is already being given by persons, citizens of the United States, the rates and charges for such Government service shall not be less than the cost thereof, including a proper interest and depreciation charge on the value of Government vessels and equipment employed therein. [41 Stat. L. 991.]

For Act of March 3, 1891, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 218.

SEC. 8. [Duty of Shipping Board with respect to developing ports and transportation facilities — investigations — rail rates, etc.] That it shall be the duty of the board, in cooperation with the Secretary of War, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water and highway and the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: *Provided*, That if after such investigation the board shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the board may submit its findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law. [41 Stat. L. 992.]

SEC. 9. [Vessels purchased on credit — duty of purchasers to insure.] That if the terms and conditions of any sale of a vessel made under the provisions of this Act include deferred payments of the purchase price, the board shall require, as part of such terms and conditions, that the purchaser of the vessel shall keep the same insured (a) against loss or damage by fire, and against marine risks and disasters, and war and other risks if the board so specifies, with such insurance companies, associations or underwriters, and under such forms of policies, and to such an amount, as the board may prescribe or approve; and (b) by protection and indemnity insurance with such insurance companies, associations, or underwriters and under such forms of policies, and to such an amount as the board may prescribe or approve. The insurance required to be carried under this section shall be made payable to the board and/or to the parties as interest may appear. The board is authorized to enter into any agreement that it deems wise in respect to the payment and/or the guarantee of premiums of insurance. [41 Stat. L. 992.]

SEC. 10. [Insurance fund — creation by Shipping Board.] That the board may create out of net revenue from operations and sales, and maintain and administer, a separate insurance fund, which it may use to insure in whole or in part, against all hazards commonly covered by insurance policies in such cases, any interest of the United States (1) in any vessel, either constructed or in

process of construction, and (2) in any plants or materials heretofore or hereafter acquired by the board or hereby transferred to the board. [41 Stat. L. 992.]

SEC. 11. [Construction loan fund—creation and use.] That during a period of five years from the enactment of this Act the board may annually set aside out of the revenues from sales and operations a sum not exceeding \$25,000,000, to be known as its construction loan fund, to be used in aid of the construction of vessels of the best and most efficient type for the establishment and maintenance of service on steamship lines deemed desirable and necessary by the board, and such vessels shall be equipped with the most modern, the most efficient, and the most economical machinery and commercial appliances. The board shall use such fund to the extent required upon such terms as the board may prescribe to aid persons, citizens of the United States, in the construction by them in private shipyards in the United States of the foregoing class of vessels. No aid shall be for a greater sum than two-thirds of the cost of the vessel or vessels to be constructed, and the board shall require such security, including a first lien upon the entire interest in the vessel or vessels so constructed as it shall deem necessary to insure the repayment of such sum with interest thereon and the maintenance of the service for which such vessel or vessels are built. [41 Stat. L. 993.]

SEC. 12. [Reconditioning and repair of unsold vessels—operation or lease by Shipping Board—Emergency Fleet Corporation—continuance in existence.] That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act, the provision in section 11 of the "Shipping Act, 1916," to the contrary notwithstanding. [41 Stat. L. 993.]

For section 11, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 790.

SEC. 13. [Property other than vessels in hands of Shipping Board—sale.] That the board is further authorized to sell all property other than vessels transferred to it under section 4 upon such terms and conditions as the board may determine and prescribe. [41 Stat. L. 993.]

SEC. 14. [Net proceeds derived by Shipping Board—disposition.] That the net proceeds derived by the board prior to July 1, 1921, from any activities authorized by this Act, or by the "Shipping Act, 1916," or by the Acts specified in section 2 of this Act, except such an amount as the board shall deem necessary to withhold as operating capital, for the purposes of section 12 hereof, and for the insurance fund authorized in section 10 hereof, and for the construction loan fund authorized in section 11 hereof, shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the construction.

requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts. The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the Acts or parts of Acts repealed by section 2 of this Act and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts. [41 Stat. L. 993.]

For "Shipping Act, 1916," see 1918 Fed. Stat. Ann. 785 *et seq.*

SEC. 15. [Vessels furnished War Department — payment for charter hire.] That the board shall not require payment from the War Department for the charter hire of vessels owned by the United States Government furnished by the board from July 1, 1918, to June 30, 1919, inclusive, for the use of such department. [41 Stat. L. 993.]

SEC. 16. [See LABOR.]

This section relates to the housing of shipyard employees and will be found under the title *LABOR, ante*, p. 134.

SEC. 17. [Docks, piers, warehouses, etc.—transfer to Shipping Board by President or Departments.] That the board is authorized and directed to take over on January 1, 1921, the possession and control of, and to maintain and develop, all docks, piers, warehouses, wharves and terminal equipment and facilities, including all leasehold easements, rights of way, riparian rights and other rights, estates and interests therein or appurtenant thereto, acquired by the President by or under the Act entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year ending June 30, 1918, and prior fiscal years, on account of war expenses, and for other purposes," approved March 28, 1918.

The possession and control of such other docks, piers, warehouses, wharves and terminal equipment and facilities or parts thereof, including all leasehold easements, rights of way, riparian rights and other rights, estates or interests therein or appurtenant thereto which were acquired by the War Department or the Navy Department for military or naval purposes during the war emergency may be transferred by the President to the board whenever the President deems such transfer to be for the best interests of the United States.

The President may at any time he deems it necessary, by order setting out the need therefor and fixing the period of such need, permit or transfer the possession and control of any part of the property taken over by or transferred to the board under this section to the War Department or the Navy Department for their needs, and when in the opinion of the President such need therefor ceases the possession and control of such property shall revert to the board. None of such property shall be sold except as may be hereafter provided by law. [41 Stat. L. 994.]

SEC. 18. [Registry, etc.—vessels purchased, etc., from Shipping Board — foreign built vessels — coastwise trade — restrictions on sales, transfers, and mortgages — foreign registry or flag — sec. 9 of "Shipping Act, 1916,"

amended.] That section 9 of the "Shipping Act, 1916," is amended to read as follows:

"**SEC. 9.** That any vessel purchased, chartered, or leased from the board, by persons who are citizens of the United States, may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto: *Provided*, That foreign-built vessels admitted to American registry or enrollment and license under this Act, and vessels owned by any corporation in which the United States is a stockholder, and vessels sold, leased, or chartered by the board to any person a citizen of the United States, as provided in this Act, may engage in the coastwise trade of the United States while owned, leased, or chartered by such a person.

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein.

"It shall be unlawful to sell, transfer or mortgage, or, except under regulations prescribed by the board, to charter, any vessel purchased from the board or documented under the laws of the United States to any person not a citizen of the United States, or to put the same under a foreign registry or flag, without first obtaining the board's approval.

"Any vessel chartered, sold, transferred or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than \$5,000, or to imprisonment for not more than five years, or both." [41 Stat. L. 994.]

For section 9 of "Shipping Act, 1916," here amended, see 1918 Supp. Fed. Stat. Ann. 788.

SEC. 19. [Rules and regulations affecting shipping in foreign trade.]

(1) The board is authorized and directed in aid of the accomplishment of the purposes of this Act

(a) To make all necessary rules and regulations to carry out the provisions of this Act;

(b) To make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country; and

(c) To request the head of any department, board, bureau, or agency of the Government to suspend, modify, or annul rules or regulations which have been established by such department, board, bureau, or agency, or to make new rules or regulations affecting shipping in the foreign trade other than such rules or regulations relating to the Public Health Service, the Consular Service, and the Steamboat Inspection Service.

(2) No rule or regulation shall hereafter be established by any department, board, bureau, or agency of the Government which affect shipping in the foreign trade, except rules or regulations affecting the Public Health Service, the Consular Service, and the Steamboat Inspection Service, until such rule or regulation has been submitted to the board for its approval and final action has been taken thereon by the board or the President.

(3) Whenever the head of any department, board, bureau, or agency of the Government refuses to suspend, modify, or annul any rule or regulation, or make a new rule or regulation upon request of the board, as provided in subdivision (c) of paragraph (1) of this section, or objects to the decision of the board in respect to the approval of any rule or regulation, as provided in paragraph (2) of this section, either the board or the head of the department, board, bureau, or agency which has established or is attempting to establish the rule or regulation in question may submit the facts to the President, who is hereby authorized to establish or suspend, modify, or annul such rule or regulation.

(4) No rule or regulation shall be established which in any manner gives vessels owned by the United States any preference or favor over those vessels documented under the laws of the United States and owned by persons who are citizens of the United States. [41 Stat. L. 995.]

SEC. 20. (1) [Common carriers by water — combinations and discriminations — “deferred rebates” — “fighting ships” — penalties — sec. 14 of “Shipping Act, 1916,” amended.] That section 14 of the Shipping Act, 1916, as amended, is amended to read as follows:

“SEC. 14. That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country,—

“First. Pay, or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow, a deferred rebate to any shipper. The term ‘deferred rebate’ in this Act means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

“Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term ‘fighting ship’ in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing or reducing competition by driving another carrier out of said trade.

“Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

“Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

"Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than \$25,000 for each offense." [41 Stat. L. 996.]

For section 14 of "Shipping Act, 1916," here amended, see 1918 Supp. Fed. Stat. Ann. 792.

(2) [Enforcement of penalties against common carriers by water — authority of Shipping Board — sec. 14-a added to "Shipping Act, 1916."] The Shipping Act, 1916, as amended, is amended by inserting after section 14 a new section to read as follows:

"Sec. 14a. The board upon its own initiative may, or upon complaint shall, after due notice to all parties in interest and hearing, determine whether any person, not a citizen of the United States and engaged in transportation by water of passengers or property —

"(1) Has violated any provision of section 14, or

"(2) Is a party to any combination, agreement, or understanding, express or implied, that involves in respect to transportation of passengers or property between foreign ports, deferred rebates or any other unfair practice designated in section 14, and that excludes from admission upon equal terms with all other parties thereto, a common carrier by water which is a citizen of the United States and which has applied for such admission.

"If the board determines that any such person has violated any such provision or is a party to any such combination, agreement, or understanding, the board shall thereupon certify such fact to the Secretary of Commerce. The Secretary shall thereafter refuse such person the right of entry for any ship owned or operated by him or by any carrier directly or indirectly controlled by him, into any port of the United States, or any Territory, District, or possession thereof, until the board certifies that the violation has ceased or such combination, agreement, or understanding has been terminated." [41 Stat. L. 996.]

SEC. 21. [Coastwise laws of United States — extension to island, etc., territories — steamship service established — registry — Philippine Islands.] That from and after February 1, 1922, the coastwise laws of the United States shall extend to the island Territories and possessions of the United States not now covered thereby, and the board is directed prior to the expiration of such year to have established adequate steamship service at reasonable rates to accommodate the commerce and the passenger travel of said islands and to maintain and operate such service until it can be taken over and operated and maintained upon satisfactory terms by private capital and enterprise: *Provided*, That if adequate shipping service is not established by February 1, 1922, the President shall extend the period herein allowed for the establishment of such service in the case of any island Territory or possession for such time as may be necessary for the establishment of adequate shipping facilities therefor: *Provided further*, That until Congress shall have authorized the registry as vessels of the United States of vessels owned in the Philippine Islands, the Government of the Philippine Islands is hereby authorized to adopt, from time to time, and enforce regulations governing the transportation of merchandise and passengers between ports or places in the Philippine Archipelago: *And provided further*, That the foregoing provisions of this section shall not take effect with reference to the Philippine Islands until the President of the United States after a full investi-

gation of the local needs and conditions shall, by proclamation, declare that an adequate shipping service has been established as herein provided and fix a date for the going into effect of the same. [41 Stat. L. 997.]

SEC. 22. [Coastwise trade — foreign built ships — American registry — Act of Oct. 6, 1917, repealed — permits for carrying passengers — Hawaii.] That the Act entitled "An Act giving the United States Shipping Board power to suspend present provisions of law and permit vessels of foreign registry and foreign-built vessels admitted to American registry under the Act of August 18, 1914, to engage in the coastwise trade during the present war and for a period of one hundred and twenty days thereafter, except the coastwise trade with Alaska," approved October 6, 1917, is hereby repealed: *Provided*, That all foreign-built vessels admitted to American registry, owned on February 1, 1920, by persons citizens of the United States, and all foreign-built vessels owned by the United States at the time of the enactment of this Act, when sold and owned by persons citizens of the United States, may engage in the coastwise trade so long as they continue in such ownership, subject to the rules and regulations of such trade: *Provided*, That the board is authorized to issue permits for the carrying of passengers in foreign ships if it deems it necessary so to do, operating between the Territory of Hawaii and the Pacific Coast up to February 1, 1922. [41 Stat. L. 997.]

For Act of Oct. 6, 1917, see 1918 Supp. Fed. Stat. Ann. 808.

SEC. 23. [Vessel owners — income taxes — deductions and exemptions.] That the owner of a vessel documented under the laws of the United States and operated in foreign trade shall, for each of the ten taxable years while so operated, beginning with the first taxable year ending after the enactment of this Act, be allowed as a deduction for the purpose of ascertaining his net income subject to the war-profits and excess-profits taxes imposed by Title III of the Revenue Act of 1918 an amount equivalent to the net earnings of such vessel during such taxable year, determined in accordance with rules and regulations to be made by the board: *Provided*, That such owner shall not be entitled to such deduction unless during such taxable year he invested, or set aside under rules and regulations to be made by the board in a trust fund for investment, in the building in shipyards in the United States of new vessels of a type and kind approved by the board, an amount, to be determined by the Secretary of the Treasury and certified by him to the board, equivalent to the war-profits and excess-profits taxes that would have been payable by such owner on account of the net earnings of such vessels but for the deduction allowed under the provisions of this section: *Provided further*, That at least two-thirds of the cost of any vessel constructed under this paragraph shall be paid for out of the ordinary funds or capital of the person having such vessel constructed.

That during the period of ten years from the enactment of this Act any person a citizen of the United States who may sell a vessel documented under the laws of the United States and built prior to January 1, 1914, shall be exempt from all income taxes that would be payable upon any of the proceeds of such sale, under Title I, Title II, and Title III of the Revenue Act of 1918 if the entire proceeds thereof shall be invested in the building of new ships in American shipyards, such ships to be documented under the laws of the United States and to be of a type approved by the board. [41 Stat. L. 997.]

For Revenue Act of 1918, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 82.

SEC. 24. [United States mails — carrying on American-built vessels.] That all mails of the United States shipped or carried on vessels shall, if practicable, be shipped or carried on American-built vessels documented under the laws of the United States. No contract hereafter made with the Postmaster General for carrying mails on vessels so built and documented shall be assigned or sublet, and no mails covered by such contract shall be carried on any vessel not so built and documented. No money shall be paid out of the Treasury of the United States on or in relation to any such contract for carrying mails on vessels so built and documented when such contract has been assigned or sublet or when mails covered by such contract are in violation of the terms thereof carried on any vessel not so built and documented. The board and the Postmaster General, in aid of the development of a merchant marine adequate to provide for the maintenance and expansion of the foreign or coastwise trade of the United States and of a satisfactory postal service in connection therewith, shall from time to time determine the just and reasonable rate of compensation to be paid for such service, and the Postmaster General is hereby authorized to enter into contracts within the limits of appropriations made therefor by Congress to pay for the carrying of such mails in such vessels at such rate. Nothing herein shall be affected by the Act entitled "An Act to provide for ocean mail service between the United States and foreign ports, and to promote commerce," approved March 3, 1891. [41 Stat. L. 998.]

For Act of March 3, 1891, mentioned in the text, see 8 Fed. Stat. Ann. (2d ed.) 218.

SEC. 25. [Classification of vessels owned by United States — American Bureau of Shipping.] That for the classification of vessels owned by the United States, and for such other purposes in connection therewith as are the proper functions of a classification bureau, all departments, boards, bureaus, and commissions of the Government are hereby directed to recognize the American Bureau of Shipping as their agency so long as the American Bureau of Shipping continues to be maintained as an organization which has no capital stock and pays no dividends: *Provided*, That the Secretary of Commerce and the chairman of the board shall each appoint one representative who shall represent the Government upon the executive committee of the American Bureau of Shipping, and the bureau shall agree that these representatives shall be accepted by them as active members of such committee. Such representatives of the Government shall serve without any compensation, except necessary traveling expenses: *Provided further*, That the official list of merchant vessels published by the Government shall hereafter contain a notation clearly indicating all vessels classed by the American Bureau of Shipping. [41 Stat. L. 998.]

SEC. 26. [Cargo vessels — carrying persons other than crew.] That cargo vessels documented under the laws of the United States may carry not to exceed sixteen persons in addition to the crew between any ports or places in the United States or its Districts, Territories, or possessions, or between any such port or place and any foreign port, or from any foreign port to another foreign port, and such vessels shall not be held to be "passenger vessels" or "vessels carrying passengers" within the meaning of the inspection laws and the rules and regulations thereunder: *Provided*, That nothing herein shall be taken to exempt such vessels from the laws, rules, and regulations respecting life-saving equipment: *Provided further*, That when any such vessel carries persons other than

the crew as herein provided for, the owner, agent, or master of the vessel shall first notify such persons of the presence on board of any dangerous articles, as defined by law, or of any other condition or circumstances which would constitute a risk of safety for passenger or crew.

The privilege bestowed by this section on vessels of the United States shall be extended insofar as the foreign trade is concerned to the cargo vessels of any nation which allows the like privilege to cargo vessels of the United States in trades not restricted to vessels under its own flag.

Failure on the part of the owner, agent, or master of the vessel to give such notice shall subject the vessel to a penalty of \$500, which may be mitigated or remitted by the Secretary of Commerce upon a proper representation of the facts. [41 Stat. L. 998.]

SEC. 27. [Merchandise transported between points in United States including territories — vessels employed.] That no merchandise shall be transported by water, or by land and water, on penalty of forfeiture thereof, between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States, or vessels to which the privilege of engaging in the coastwise trade is extended by sections 18 or 22 of this Act: *Provided*, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said commission when such routes are in part over Canadian rail lines and their own or other connecting water facilities: *Provided further*, That this section shall not become effective upon the Yukon river until the Alaska Railroad shall be completed and the Shipping Board shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic. [41 Stat. L. 999.]

SEC. 28. [Discriminations by common carriers in rates, etc.] That no common carrier shall charge, collect, or receive, for transportation subject to the Interstate Commerce Act of persons or property, under any joint rate, fare, or charge, or under any export, import, or other proportional rate, fare, or charge, which is based in whole or in part on the fact that the persons or property affected thereby is to be transported to, or has been transported from, any port in a possession or dependency of the United States, or in a foreign country, by a carrier by water in foreign commerce, any lower rate, fare, or charge than that charged, collected, or received by it for the transportation of persons, or of a like kind of property, for the same distance, in the same direction, and over the same route, in connection with commerce wholly within the United States, unless the vessel so transporting such persons or property is, or unless it was at the time of such transportation by water, documented under the laws of the United States. Whenever the board is of the opinion, however, that adequate shipping facilities to or from any port in a possession or dependency of the United States or a foreign country are not afforded by vessels so documented, it shall certify this fact to the Interstate Commerce Commission, and the commission may, by

order, suspend the operation of the provisions of this section with respect to the rates, fares, and charges for the transportation by rail of persons and property transported from, or to be transported, to such ports, for such length of time and under such terms and conditions as it may prescribe in such order, or in any order supplemental thereto. Such suspension of operation of the provisions of this section may be terminated by order of the commission whenever the board is of the opinion that adequate shipping facilities by such vessels to such ports are afforded and shall so certify to the commission. [41 Stat. L. 999.]

SEC. 29. (a) [Definitions — “association” — “marine insurance companies.”] That whenever used in this section —

(1) The term “association” means any association, exchange, pool, combination, or other arrangement for concerted action; and

(2) The term “marine insurance companies” means any persons, companies, or associations, authorized to write marine insurance or reinsurance under the laws of the United States or of a State, Territory, District, or possession thereof. [41 Stat. L. 1000.]

(b) [“Antitrust laws” — application to marine insurance business.] Nothing contained in the “antitrust laws” as designated in section 1 of the Act entitled “An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,” approved October 15, 1914, shall be construed as declaring illegal an association entered into by marine insurance companies for the following purposes: To transact a marine insurance and reinsurance business in the United States and in foreign countries and to reinsure or otherwise apportion among its membership the risks undertaken by such association or any of the component members. [41 Stat. L. 1000.]

For Act of Oct. 15, 1914, see 9 Fed. Stat. Ann. (2d ed.) 730.

SEC. 30. [“Ship Mortgage Act, 1920.”] Subsection A. That this section may be cited as the “Ship Mortgage Act, 1920.” [41 Stat. L. 1000.]

DEFINITIONS.

Subsection B. When used in this section —

(1) The term “document” includes registry and enrollment and license;

(2) The term “documented” means registered or enrolled or licensed under the laws of the United States, whether permanently or temporarily;

(3) The term “port of documentation” means the port at which the vessel is documented, in accordance with law;

(4) The term “vessel of the United States” means any vessel documented under the laws of the United States and such vessel shall be held to continue to be so documented until its documents are surrendered with the approval of the board; and

(5) The term “mortgagee,” in the case of a mortgage involving a trust deed and a bond issue thereunder, means the trustee designated in such deed. [41 Stat. L. 1000.]

RECORDING OF SALES, CONVEYANCES, AND MORTGAGES OF VESSELS OF THE UNITED STATES.

Subsection C. (a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of the United States, or any portion thereof, as the whole or any part of the property sold, conveyed, or mortgaged shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded in the office of the collector of customs of the port of documentation of such vessel, as provided in subdivision (b) of this subsection.

(b) Such collector of customs shall record bills of sale, conveyances, and mortgages, delivered to him, in the order of their reception, in books to be kept for that purpose and indexed to show —

- (1) The name of the vessel;
- (2) The names of the parties to the sale, conveyance, or mortgage;
- (3) The time and date of reception of the instrument;
- (4) The interest in the vessel so sold, conveyed, or mortgaged; and
- (5) The amount and date of maturity of the mortgage.

Subsection D. (a) A valid mortgage which, at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of subsection M, if —

(1) The mortgage is indorsed upon the vessel's documents in accordance with the provisions of this section;

(2) The mortgage is recorded as provided in subsection C, together with the time and date when the mortgage is so indorsed;

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof; and

(5) The mortgagee is a citizen of the United States.

(b) Any mortgage which complies in respect to any vessel with the conditions enumerated in this subsection is hereafter in this section called a "preferred mortgage" as to such vessel.

(c) There shall be indorsed upon the documents of a vessel covered by a preferred mortgage —

(1) The names of the mortgagor and mortgagee;

(2) The time and date the indorsement is made;

(3) The amount and date of maturity of the mortgage; and

(4) Any amount required to be indorsed by the provisions of subdivision (e) or (f) of this subsection.

(d) Such indorsement shall be made (1) by the collector of customs of the port of documentation of the mortgaged vessel, or (2) by the collector of customs of any port in which the vessel is found, if such collector is directed to make the indorsement by the collector of customs of the port of documentation; and no clearance shall be issued to the vessel until such indorsement is made. The collector of customs of the port of documentation shall give such direction by wire

or letter at the request of the mortgagee and upon the tender of the cost of communication of such direction. Whenever any new document is issued for the vessel, such indorsement shall be transferred to and indorsed upon the new document by the collector of customs.

(e) A mortgage which includes property other than a vessel shall not be held a preferred mortgage unless the mortgage provides for the separate discharge of such property by the payment of a specified portion of the mortgage indebtedness. If a preferred mortgage so provides for the separate discharge, the amount of the portion of such payment shall be indorsed upon the documents of the vessel.

(f) If a preferred mortgage includes more than one vessel and provides for the separate discharge of each vessel by the payment of a portion of the mortgage indebtedness, the amount of such portion of such payment shall be indorsed upon the documents of the vessel. In case such mortgage does not provide for the separate discharge of a vessel and the vessel is to be sold upon the order of a district court of the United States in a suit in rem in admiralty, the court shall determine the portion of the mortgage indebtedness increased by 20 per centum (1) which, in the opinion of the court, the approximate value of the vessel bears to the approximate value of all the vessels covered by the mortgage, and (2) upon the payment of which the vessel shall be discharged from the mortgage.

Subsection E. The collector of customs upon the recording of a preferred mortgage shall deliver two certified copies thereof to the mortgagor who shall place, and use due diligence to retain, one copy on board the mortgaged vessel and cause such copy and the documents of the vessel to be exhibited by the master to any person having business with the vessel, which may give rise to a maritime lien upon the vessel or to the sale, conveyance, or mortgage thereof. The master of the vessel shall, upon the request of any such person, exhibit to him the documents of the vessel and the copy of any preferred mortgage of the vessel placed on board thereof.

Subsection F. The mortgagor (1) shall, upon request of the mortgagee, disclose in writing to him prior to the execution of any preferred mortgage, the existence of any maritime lien, prior mortgage or other obligation or liability upon the vessel to be mortgaged, that is known to the mortgagor, and (2), without the consent of the mortgagee, shall not incur, after the execution of such mortgage and before the mortgagee has had a reasonable time in which to record the mortgage and have indorsements in respect thereto made upon the documents of the vessel, any contractual obligation creating a lien upon the vessel other than a lien for wages of stevedores when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, or for salvage, including contract salvage, in respect to the vessel.

Subsection G. (a) The collector of customs of the port of documentation shall, upon the request of any person, record notice of his claim of a lien upon a vessel covered by a preferred mortgage, together with the nature, date of creation, and amount of the lien, and the name and address of the person. Any person who has caused notice of his claim of lien to be so recorded shall, upon a discharge in whole or in part of the indebtedness, forthwith file with the collector of customs a certificate of such discharge. The collector of customs shall thereupon record the certificate.

(b) The mortgagor, upon a discharge in whole or in part of the mortgage indebtedness, shall forthwith file with the collector of customs for the port of

documentation of the vessel, a certificate of such discharge. Such collector of customs shall thereupon record the certificate. In case of a vessel covered by a preferred mortgage, the collector of customs at the port of documentation shall (1) indorse upon the documents of the vessel, or direct the collector of customs at any port in which the vessel is found, to so indorse, the fact of such discharge, and (2) shall deny clearance to the vessel until such indorsement is made.

Subsection H. (a) No bill of sale, conveyance, or mortgage shall be recorded unless it states the interest of the grantor or mortgagor in the vessel, and the interest so sold, conveyed, or mortgaged.

(b) No bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of discharge thereof, shall be recorded unless previously acknowledged before a notary public or other officer authorized by a law of the United States, or of a State, Territory, District, or possession thereof, to take acknowledgment of deeds.

(c) In case of a change in the port of documentation of a vessel of the United States, no bill of sale, conveyance, or mortgage shall be recorded at the new port of documentation unless there is furnished to the collector of customs of such port, together with the copy of the bill of sale, conveyance, or mortgage to be recorded, a certified copy of the record of the vessel at the former port of documentation furnished by the collector of such port. The collector of customs at the new port of documentation is authorized and directed to record such certified copy.

(d) A preferred mortgage may bear such rate of interest as is agreed by the parties thereto.

Subsection I. Each collector of customs shall permit records made under the provisions of this section to be inspected during office hours, under such reasonable regulations as the collector may establish. Upon the request of any person the collector of customs shall furnish him from the records of the collector's office (1) a certificate setting forth the names of the owners of any vessel, the interest held by each owner, and the material facts as to any bill of sale or conveyance of, any mortgage covering, or any lien or other incumbrance upon, a specified vessel, (2) a certified copy of any bill of sale, conveyance, mortgage, notice of claim of lien, or certificate of discharge in respect to such vessel, or (3) a certified copy as required by subdivision (c) of subsection H. The collector of customs shall collect a fee for any bill of sale, conveyance, or mortgage recorded, or any certificate or certified copy furnished, by him, in the amount of 20 cents a folio with a minimum charge of \$1.00. All such fees shall be covered into the Treasury of the United States as miscellaneous receipts. [41 Stat. L. 1000.]

PENALTIES.

Subsection J. (a) If the master of the vessel willfully fails to exhibit the documents of the vessel or the copy of any preferred mortgage thereof, as required by subsection E, the board of local inspectors of vessels having jurisdiction of the license of the master, may suspend or cancel such license, subject to the provisions of "An Act to provide for appeals from decision of boards of local inspectors of vessels and for other purposes," approved June 10, 1918.

(b) A mortgagor who, with intent to defraud, violates any provision of subsection F, and if the mortgagor is a corporation or association, the president or other principal executive officer of the corporation or association, shall upon conviction thereof be held guilty of a misdemeanor and shall be fined not more than

\$1,000 or imprisoned not more than 2 years, or both. The mortgaged indebtedness shall thereupon become immediately due and payable at the election of the mortgagee.

(c) If any person enters into any contract secured by, or upon the credit of, a vessel of the United States covered by a preferred mortgage, and suffers pecuniary loss by reason of the failure of the collector of customs, or any officer, employee, or agent thereof, properly to perform any duty required of the collector under the provisions of this section, the collector of customs shall be liable to such person for damages in the amount of such loss. If any such person is caused any such loss by reason of the failure of the mortgagor, or master of the mortgaged vessel, or any officer, employee, or agent thereof, to comply with any provision of subsection E or F or to file an affidavit as required by subdivision (a) of subsection D, correct in each particular thereof, the mortgagor shall be liable to such person for damages in the amount of such loss. The district courts of the United States are given jurisdiction (but not to the exclusion of the courts of the several States, Territories, Districts, or possessions) of suits for the recovery of such damages, irrespective of the amount involved in the suit or the citizenship of the parties thereto. Such suit shall be begun by personal service upon the defendant within the limits of the district. Upon judgment for the plaintiff in any such suit, the court shall include in the judgment an additional amount for costs of the action and a reasonable counsel's fee, to be fixed by the court. [41 Stat. L. 1003.]

FORECLOSURE OF PREFERRED MORTGAGES.

Subsection K. A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively. In addition to any notice by publication, actual notice of the commencement of any such suit shall be given by the libellant, in such manner as the court shall direct, to (1) the master, other ranking officer, or caretaker of the vessel, and (2) any person who has recorded a notice of claim of an undischarged lien upon the vessel, as provided in subsection G, unless after search by the libellant satisfactory to the court, such mortgagor, master, other ranking officer, caretaker, or claimant is not found within the United States. Failure to give notice to any such person, as required by this subsection, shall not constitute a jurisdictional defect; but the libellant shall be liable to such person for damages in the amount of his interest in the vessel terminated by the suit. Suit in personam for the recovery of such damages may be brought in accordance with the provisions of subdivision (c) of subsection J.

Subsection L. In any suit in rem in admiralty for the enforcement of the preferred mortgage lien, the court may appoint a receiver and, in its discretion, authorize the receiver to operate the mortgaged vessel. The marshal may be authorized and directed by the court to take possession of the mortgaged vessel notwithstanding the fact that the vessel is in the possession or under the control of any person claiming a possessory common-law lien.

Subsection M. (a) When used hereinafter in this section, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of

this section; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

3 (b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preëxisting claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court.]

Subsection N. (a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this section, bring suit in personam in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel or any deficiency in the full payment thereof.

(b) This section shall not be construed, in the case of a mortgage covering, in addition to vessels, realty or personalty other than vessels, or both, to authorize the enforcement by suit in rem in admiralty of the rights of the mortgagee in respect to such realty or personalty other than vessels. [41 Stat. L. 1003.]

TRANSFERS OF MORTGAGED VESSELS AND ASSIGNMENT OF VESSEL MORTGAGES.

Subsection O. (a) The documents of a vessel of the United States covered by a preferred mortgage may not be surrendered (except in the case of the forfeiture of the vessel or its sale by the order of any court of the United States or any foreign country) without the approval of the board. The board shall refuse such approval unless the mortgagee consents to such surrender.

(b) The interest of the mortgagee in a vessel of the United States covered by a mortgage, shall not be terminated by the forfeiture of the vessel for a violation of any law of the United States, unless the mortgagee authorized, consented, or conspired to effect the illegal act, failure, or omission which constituted such violation.

(c) Upon the sale of any vessel of the United States covered by a preferred mortgage, by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a maritime lien other than a preferred maritime lien, the vessel shall be sold free from all preëxisting claims thereon; but the court shall, upon the request of the mortgagee, the libellant, or an intervenor, require the purchaser at such sale to give and the mortgagor to accept a new mortgage of the vessel for the balance of the term of the original mortgage. The conditions of such new mortgage shall be the same, so far as practicable, as those of the original mortgage and shall be subject to the approval of the court. If such new mortgage is given, the mortgagee shall not be paid from the proceeds of the sale and the amount payable as the purchase price shall be held diminished in the amount of the new mortgage indebtedness.

(d) No rights under a mortgage of a vessel of the United States shall be assigned to any person not a citizen of the United States without the approval of the board. Any assignment in violation of any provision of this section shall be void.

(e) No vessel of the United States shall be sold by order of a district court of the United States in any suit in rem in admiralty to any person not a citizen of the United States. [41 Stat. L. 1004.]

MARITIME LIENS FOR NECESSARIES.

Subsection P. Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Subsection Q. The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessities for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

Subsection R. The officers and agents of a vessel specified in subsection Q shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel; but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessities was without authority to bind the vessel therefor.

Subsection S. Nothing in this section shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessities, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise; and this section shall not be construed to affect the rules of law now existing in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States.

Subsection T. This section shall supersede the provisions of all State statutes conferring liens on vessels, in so far as such statutes purport to create rights of action to be enforced by suits in rem in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway, and other necessities. [41 Stat. L. 1005.]

MISCELLANEOUS PROVISIONS.

Subsection U. This section shall not apply (1) to any existing mortgage, or (2) to any mortgage hereafter placed on any vessel now under an existing mortgage, so long as such existing mortgage remains undischarged.

Subsection V. The Secretary of Commerce is authorized and directed to furnish collectors of customs with all necessary books and records, and with certificates of registry and of enrollment and license in such form as provides for the making of all indorsements thereon required by this section.

Subsection W. The Secretary of Commerce is authorized to make such regulations in respect to the recording and indorsing of mortgages covering vessels of the United States, as he deems necessary to the efficient execution of the provisions of this section.

13 [Subsection X. Sections 4192 to 4196, inclusive, of the Revised Statutes of the United States, as amended, and the Act entitled "An Act relating to liens on vessels for repairs, supplies, or other necessities," approved June 23, 1910, are repealed. This section, however, so far as not inconsistent with any of the provisions of law so repealed, shall be held a reenactment of such repealed law, and any right or obligation based upon any provision of such law and accruing prior to such repeal, may be prosecuted in the same manner and to the same effect as if this Act had not been passed.] [41 Stat. L. 1006.]

For R. S. secs. 4192-4196 here repealed, see 9 Fed. Stat. Ann. (2d ed.) 284 et seq.
For Act of June 23, 1910, here repealed, see 9 Fed. Stat. Ann. (2d ed.) 346 et seq.

SECS. 31-33. (See SEAMEN.)

These sections relate to seamen and will be found under the title SEAMEN, *ante*, p. 225.

SEC. 34. [Discriminating customs duties — imports in foreign vessels — discriminatory tonnage dues on foreign vessels — treaties and conventions — termination.] That in the judgment of Congress, articles or provisions in treaties or conventions to which the United States is a party, which restrict the right of the United States to impose discriminating customs duties on imports entering the United States in foreign vessels and in vessels of the United States, and which also restrict the right of the United States to impose discriminatory tonnage dues on foreign vessels and on vessels of the United States entering the United States should be terminated, and the President is hereby authorized and directed within ninety days after this Act becomes law to give notice to the several Governments, respectively, parties to such treaties or conventions, that so much thereof as imposes any such restriction on the United States will terminate on the expiration of such periods as may be required for the giving of such notice by the provisions of such treaties or conventions. [41 Stat. L. 1007.]

SEC. 35. [Power and authority vested in Shipping Board — delegation to Emergency Fleet Corporation.] That the power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation. [41 Stat. L. 1007.]

SEC. 36. [Invalidity of part of Act — remainder unaffected.] That if any provision of this Act is declared unconstitutional or the application of any provision to certain circumstances be held invalid, the remainder of the Act and the application of such provisions to circumstances other than those as to which it is held invalid shall not be affected thereby. [41 Stat. L. 1007.]

SEC. 37. [Words and terms in Act defined.] That when used in this Act, unless the context otherwise requires, the terms "person," "vessel," "documented under the laws of the United States," and "citizen of the United States" shall have the meaning assigned to them by sections 1 and 2 of the "Shipping Act, 1916," as amended by this Act; the term "board" means the United States Shipping Board; and the term "alien" means any person not a citizen of the United States. [41 Stat. L. 1008.]

For "Shipping Act, 1916," mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 785.

SEC. 38. [Corporation, partnership, or association as citizen — controlling interest in corporation — alien ownership — act as including receivers and trustees — sec. 2 of "Shipping Act, 1916," amended.] That section 2 of the Shipping Act, 1916, is amended to read as follows:

"SEC. 2. (a) That within the meaning of this Act no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof, but in the case of a corporation, association, or partnership operating any vessel in the coastwise trade the amount of interest required to be owned by citizens of the United States shall be 75 per centum.

"(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

"(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to 75 per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if 75 per centum of the voting power in such corporation is not vested in citizens of the United States; or (c) if, through any contract or understanding it is so arranged that more than 25 per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of any interest in the corporation in excess of 25 per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

"(d) The provisions of this Act shall apply to receivers and trustees of all persons to whom the Act applies, and to the successors or assignees of such persons." [41 Stat. L. 1008.]

For section 2 of "Shipping Act, 1916," before this amendment, see 1918 Supp. Fed. Stat. Ann. 786.

SEC. 39. [Name of Act — "Merchant Marine Act, 1920."] That this Act may be cited as the Merchant Marine Act, 1920. [41 Stat. L. 1008.]

The Act is frequently referred to as the Jones Shipping Act.

• • • [Shipping bulletin — publication by Secretary of Navy.] The Secretary of the Navy is authorized to cause to be prepared in the Office of Communications, Navy Department, a publication known as the Shipping Bulletin, and to publish and furnish the same to the maritime interests of the United

States and other interested parties, at the cost of collecting and publishing the information, including the cost of printing and paper and other necessary expenses. The expenses of such bulletin shall be paid from the appropriation "Engineering," Bureau of Steam Engineering, fiscal year 1921. The money received from the sale of such publication shall be covered into the Treasury as miscellaneous receipts. [41 Stat. L. 1028.]

This is from the Deficiency Appropriation Act of June 5, 1920, ch. 253.

SIGNAL CORPS

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

SODIUM

See PUBLIC LANDS

SOLDIERS' HOMES

See HOSPITALS AND ASYLUMS

STATISTICS

See CENSUS

SUBTREASURY

See PUBLIC MONIES

SUFFRAGE

Constitutional amendment granting suffrage, see Index.

SUGAR

See FOOD AND FUEL

TEA

See IMPORTS AND EXPORTS

TELEGRAPHS, TELEPHONES AND CABLES

Res. of June 5, 1920, ch. 269, —.

Sec. 1. Radio Communication — Government Owned Stations — Use for Government Purposes.

2. Reception and Transmission of Commercial Messages — Authority of Secretary of Navy — Rates.

3. Statutory Provisions Regulating Government Owned Stations.

Joint Resolution To authorize the operation of Government owned radio stations for the use of the general public, and for other purposes.

[Res. of June 5, 1920, ch. 269, 41 Stat. L. 1061.]

[SEC. 1.] [Radio communication — government owned stations — use for government purposes.] That all land, ship, and airship radio stations, and all apparatus therein owned by the United States may be used by it for receiving and transmitting messages relating to Government business, compass reports, and the safety of ships. *[41 Stat. L. 1061.]*

SEC. 2. [Reception and transmission of commercial messages — authority of Secretary of Navy — rates.] That the Secretary of the Navy is hereby authorized, under terms and conditions and at rates prescribed by him, which rates shall be just and reasonable, and which, upon complaint, shall be subject to review and revision by the Interstate Commerce Commission, to use all radio stations and apparatus, wherever located, owned by the United States and under the control of the Navy Department — (a) for the reception and transmission of press messages offered by any newspaper published in the United States, its Territories or possessions, or published by citizens of the United States in foreign countries, or by any press association of the United States, and (b) for the reception and transmission of private commercial messages: *Provided*, That the rates fixed for the reception and transmission of commercial messages, other than press messages, shall not be less than the rates charged by privately owned and operated stations for like messages and service: *Provided further*, That the right to use such stations for any of the purposes named in this sec-

tion shall terminate and cease as between any countries or localities or between any locality and privately operated ships, whenever privately owned and operated stations are capable of meeting the normal communication requirements between such countries or localities or between any locality and privately operated ships, and the Secretary of Commerce shall have notified the Secretary of the Navy thereof, and all rights conferred by this section shall terminate and cease in any event two years from the date this resolution takes effect. [41 Stat. L. 1061.]

SEC. 3. [Statutory provisions regulating government owned stations.] That all stations owned and operated by the Government, except as herein otherwise provided, shall be used and operated in accordance with the provisions of the Act of Congress entitled "An Act to regulate radio communication," approved August 13, 1912. [41 Stat. L. 1061.]

For Act of Aug. 13, 1912, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 523.

TIMBER LANDS AND FOREST RESERVES

Act of May 31, 1920, ch. 217 (Agricultural Appropriation Act), 262.

Funds Appropriated for Forest Service — Use, 262.

Act of June 5, 1920, ch. 242, 263.

Sierra National Forest, California — Consolidation of Forest Lands, 263.

CROSS-REFERENCE

See also *PUBLIC PARKS*

• • • [Funds appropriated for Forest Service — use.] That no part of any funds appropriated for the Forest Service shall be used to pay the transportation or traveling expenses of any forest officer or agent except he be traveling on business directly connected with the Forest Service and in furtherance of the works, aims, and objects specified and authorized by law: *And provided also*, That no part of any funds appropriated for the Forest Service shall be paid or used for the purpose of paying for, in whole or in part, the preparation or publication of any newspaper or magazine article, but this shall not prevent the giving out to all persons, without discrimination, including newspaper and magazine writers and publishers, of any facts or official information of value to the public. [41 Stat. L. 710.]

This is from the Agricultural Appropriation Act of May 31, 1920, ch. 217.

An Act For the consolidation of forest lands in the Sierra National Forest, California, and for other purposes.

[*Act of June 5, 1920, ch. 242, 41 Stat. L. 980.*]

[**Sierra National Forest, California — consolidation of forest lands.**] That the Secretary of the Interior be, and hereby is, authorized in his discretion to accept on behalf of the United States title to any lands within the Sierra National Forest, California, if in the opinion of the Secretary of Agriculture the public interests will be benefited thereby and the lands are chiefly valuable for national forest purposes, and in exchange therefor may give not to exceed an equal value of such national forest land or timber within the national forests of California as may be determined by the Secretary of Agriculture, and in determining the relative values of the lands or timber to be exchanged, consideration shall be given to any reservations which either party may make of timber, minerals, or easements.

Timber given in such exchanges shall be cut and removed under the laws and regulations relating to the national forests, and under the direction and supervision and in accordance with the requirements of the Secretary of Agriculture. Lands conveyed to the United States under this Act shall, upon acceptance of title, become a part of the Sierra National Forest. [41 Stat. L. 980.]

TRADE COMBINATIONS AND TRUSTS

Act of Feb. 28, 1920, ch. 91, 263.

Sec. 501. Purchases, etc., by Common Carriers — Competitive Bidding — Clayton Act Amended, 263.

Act of May 26, 1920, ch. 206, 264.

Interlocking Directors, etc., of Banks — Section 8 of Clayton Act Amended, 264.

SEC. 501. [Purchases, etc., by common carriers — competitive bidding — Clayton Act amended.] The effective date on and after which the provisions of section 10 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, shall become and be effective is hereby deferred and extended to January 1, 1921: *Provided*, That such extension shall not apply in the case of any corporation organized after January 12, 1918. [41 Stat. L. 499.]

This is from the "Transportation Act, 1920," of Feb. 28, 1920, ch. 91. The rest of the Act will be found under the title INTERSTATE COMMERCE, *ante*, p. 72.

An Act To amend section 8 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended May 15, 1916.

[*Act of May 26, 1920, ch. 206, 41 Stat. L. 626.*]

[Interlocking directors, etc., of banks — section 8 of Clayton Act amended.]

That section 8 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended by the Act of May 15, 1916, be further amended by inserting in the proviso at the end of the second clause of said section after the word "prohibit" the words "any private banker or," so that the proviso as amended shall read:

"*And provided further*, That nothing in this Act shall prohibit any private banker or any officer, director, or employee of any member bank or class A director of a Federal reserve bank, who shall first procure the consent of the Federal Reserve Board, which board is hereby authorized, at its discretion, to grant, withhold, or revoke such consent, from being an officer, director, or employee of not more than two other banks, banking associations, or trust companies, whether organized under the laws of the United States or any State, if such other bank, banking association, or trust company is not in substantial competition with such banker or member bank.

"The consent of the Federal Reserve Board may be procured before the person applying therefor has been elected as a class A director of a Federal reserve bank or as a director of any member bank." [41 Stat. L. 626.]

For section 8 as it read before the above amendment, see 9 Fed. Stat. Ann. (2d ed.) 739; 1918 Supp. Fed. Stat. Ann. 844.

TRADEMARKS

Act of March 19, 1920, ch. 104, 265.

- Sec. 1. Trademarks and Commercial Names — International Registration, 265.*
- 2. Cancellation of Registration, 265.*
- 3. False Statements on Articles for Interstate or Foreign Commerce — Civil Liability, 265.*
- 4. Using Another's Trademark — Civil Liability, 266.*
- 5. Notice of Registration of Trademark, 266.*
- 6. Application of Provisions of Other Acts, 266.*
- 7. Evidence — Copies of Records, etc., 267.*
- 8. Fees for Copies of Papers, etc. — Fee on Filing Appeal, 267.*
- 9. Amendment of Trademark Act of Feb. 20, 1905 — Trademarks Which May Be Registered, 267.*

An Act To give effect to certain provisions of the convention for the protection of trade-marks and commercial names, made and signed in the city of Buenos Aires, in the Argentine Republic, August 20, 1910, and for other purposes.

[*Act of March 19, 1920, ch. 104, 41 Stat. L. 533.*]

[SEC. 1.] [Trademarks and commercial names — international registration.]

That the Commissioner of Patents shall keep a register of (a) all marks communicated to him by the international bureaus provided for by the convention for the protection of trade-marks and commercial names, made and signed in the city of Buenos Aires, in the Argentine Republic, August 20, 1910, in connection with which the fee of \$50 gold for the international registration established by article 2 of that convention has been paid, which register shall show a facsimile of the mark; the name and residence of the registrant; the number, date, and place of the first registration of the mark, including the date on which application for such registration was filed and the term of such registration, a list of goods to which the mark is applied as shown by the registration in the country of origin, and such other data as may be useful concerning the mark.

(b) All other marks not registerable under the Act of February 20, 1905, as amended, except those specified in paragraphs (a) and (b) of section 5 of that Act, but which have been in bona fide use for not less than one year in interstate or foreign commerce, or commerce with the Indian tribes by the proprietor thereof, upon or in connection with any goods of such proprietor upon which a fee of \$10 has been paid to the Commissioner of Patents and such formalities as required by the said commissioner have been complied with: *Provided*, That trade-marks which are identical with a known trade-mark owned and used in interstate and foreign commerce, or commerce with the Indian tribes by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers, shall not be placed on this register. [41 Stat. L. 533.]

For Act of Feb. 20, 1905, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 746.

SEC. 2. [Cancellation of registration.] That whenever any person shall deem himself injured by the inclusion of a trade-mark on this register, he may at any time apply to the Commissioner of Patents to cancel the registration thereof. The commissioner shall refer such application to the examiner in charge of interferences, who is empowered to hear and determine this question, and who shall give notice thereof to the registrant. If it appear after a hearing before the examiner that the registrant was not entitled to the exclusive use of the mark at or since the date of his application for registration thereof, or that the mark is not used by the registrants or has been abandoned, and the examiner shall so decide, the commissioner shall cancel the registration. Appeal may be taken to the commissioner in person from the decision of the examiner in charge of interferences. [41 Stat. L. 534.]

SEC. 3. [False statements on articles for interstate or foreign commerce — civil liability.] That any person who shall willfully and with intent to deceive, affix, apply, or annex, or use in connection with any article or articles of merchandise, or any container or containers of the same, a false designation of

origin, including words or other symbols, tending to falsely identify the origin of the merchandise, and shall then cause such merchandise to enter into interstate or foreign commerce, and any person who shall knowingly cause or procure the same to be transported in interstate or foreign commerce or commerce with Indian tribes, or shall knowingly deliver the same to any carrier to be so transported, shall be liable to an action at law for damages and to an action in equity for an injunction, at the suit of any person, firm, or corporation doing business in the locality falsely indicated as that of origin, or in the region in which said locality is situated, or at the suit of any association of such persons, firms, or corporations. [41 Stat. L. 534.]

SEC. 4. [Using another's trademark — civil liability.] That any person who shall without the consent of the owner thereof reproduce, counterfeit, copy, or colorably imitate any trade-mark on the register provided by this Act, and shall affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy, or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs. [41 Stat. L. 534.]

SEC. 5. [Notice of registration of trademark.] That it shall be the duty of a registrant under this Act of a mark falling within class (a) of section 1, to comply with the law of the country in which his original registration took place, in respect to giving notice to the public that the trade-mark is registered, in connection with the use of such trade-mark in the United States of America, and in any suit for infringement by a party failing to do this, no damages shall be recovered except on proof that the defendant was duly notified of the infringement and continued the same after such notice. [41 Stat. L. 534.]

SEC. 6. [Application of provisions of other Acts.] That the provisions of sections 15, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, and 28 (as to class (b) marks only) of the Act approved February 20, 1905, entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States, or with Indian tribes, and to protect the same," as amended to date, and the provisions of section 2 of the Act entitled "An Act to amend the laws of the United States relating to the registration of trade-marks," approved May 4, 1906, are hereby made applicable to marks placed on the register provided for by section 1 of this Act. [41 Stat. L. 535.]

For Act of Feb. 20, 1905, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 746.

For Act of May 4, 1906, sec. 2, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 790.

SEC. 7. [Evidence — copies of records, etc.] That written or printed copies of any records, books, papers, or drawings belonging to the Patent Office and relating to trade-marks placed on the register provided for by this Act, when authenticated by the seal of the Patent Office and certified by the commissioner thereof, shall be evidence in all cases wherein the originals could be evidence, and any person making application therefor and paying the fee required by law shall have certified copies thereof. [41 Stat. L. 535.]

SEC. 8. [Fees for copies of papers, etc.— fee on filing appeal.] That the same fees shall be required for certified and uncertified copies of papers and for records, transfers, and other papers, under this Act, as are required by law for such copies of patents and for recording assignments and other papers relating to patents.

On filing an appeal under this Act to the Commissioner of Patents from the decision of the examiner in charge of interferences, awarding ownership of a trade-mark, canceling or refusing to cancel the registration of a trade-mark, a fee of \$15 shall be payable. [41 Stat. L. 535.]

SEC. 9. [Amendment of Trademark Act of Feb. 20, 1905 — trademarks which may be registered.] That section 5 of the Trade-Mark Act of February 20, 1905, being Thirty-third Statutes at Large, page 725, as amended by Thirty-fourth Statutes at Large, page 1251, Thirty-sixth Statutes at Large, page 918, Thirty-seventh Statutes at Large, page 649, is hereby amended by adding the following words thereto: "And if any person or corporation shall have so registered a mark upon the ground of said use for ten years preceding February 20, 1905, as to certain articles or classes of articles to which said mark shall have been applied for said period, and shall have thereafter and subsequently extended his business so as to include other articles not manufactured by said applicant for ten years next preceding February 20, 1905, nothing herein shall prevent the registration of said trade-mark in the additional classes to which said new additional articles manufactured by said person or corporation shall apply, after said trade-mark has been used on said article in interstate or foreign commerce or with the Indian tribes for at least one year provided another person or corporation has not adopted and used previously to its adoption and use by the proposed registrant, and for more than one year such trade-mark or one so similar as to be likely to deceive in such additional class or classes." [41 Stat. L. 535.]

For Act of Feb. 20, 1905, sec. 5, as it read before the above amendment, see 9 Fed. Stat. Ann. (2d ed.) 753.

TRADING WITH THE ENEMY

Act of June 5, 1920, ch. 241, 268.

Claims against Property in Hands of Alien Property Custodian or United States Treasurer — Adjudication — Liens, etc.— Sec. 9 of Act of Oct. 6, 1917, amended, 268.

An Act To amend section 9 of an Act entitled "An Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, as amended.

[*Act of June 5, 1920, ch. 241, 41 Stat. L. 977.*]

[**Claims against property in hands of Alien Property Custodian or United States Treasurer — adjudication — liens, etc.— sec. 9 of Act of Oct. 6, 1917, amended.**] That section 9 of an Act entitled "An Act to define, regulate, and punish trading with the enemy, and for other purposes," approved October 6, 1917, as amended, be, and hereby is, amended so as to read as follows:

"SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the

Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

“(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was —

“(1) A citizen or subject of any nation or State or free city other than Germany or Austria or Hungary or Austria-Hungary, and is at the time of the return of such money or other property hereunder a citizen or subject of any such nation or State or free city; or

“(2) A woman who at the time of her marriage was a subject or citizen of a nation which has remained neutral in the war, or of a nation which was associated with the United States in the prosecution of said war, and who prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary and that the money or other property concerned was not acquired by such woman either directly or indirectly from any subject or citizen of Germany or Austria-Hungary; or

“(3) A woman who at the time of her marriage was a citizen of the United States (said citizenship having been acquired by birth in the United States), and who prior to April 6, 1917, intermarried with a subject or citizen of Germany or Austria-Hungary, and that the money or other property concerned was not acquired by such woman either directly or indirectly from any subject or citizen of Germany or Austria-Hungary; or

“(4) A citizen or subject of Germany or Austria or Hungary or Austria-Hungary and was, at the time of the severance of diplomatic relations between the United States and such nations, respectively, accredited to the United States as a diplomatic or consular officer of any such nation, or the wife or minor child of such officer, and that the money or other property concerned was within the territory of the United States by reason of the service of such officer in such capacity; or

“(5) A citizen or subject of Germany or Austria-Hungary, who by virtue of the provisions of sections 4067, 4068, 4069, and 4070 of the Revised Statutes, and of the proclamations and regulations thereunder, was transferred, after arrest, into the custody of the War Department of the United States for detention during the war and is at the time of the return of his money or other property hereunder living within the United States; or

“(6) A partnership, association, or other unincorporated body of individuals outside the United States, or a corporation incorporated within any country other than the United States, and was entirely owned at such time by subjects or citizens of nations, States, or free cities other than Germany or Austria or Hungary or Austria-Hungary and is so owned at the time of the return of its money or other property hereunder; or

“(7) The Government of Bulgaria or Turkey, or any political or municipal subdivision thereof; or

“(8) The Government of Germany or Austria or Hungary or Austria-

Hungary, and that the money or other property concerned was the diplomatic or consular property of such Government—then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian: *Provided*, That no person shall be deemed or held to be a citizen or subject of Germany or Austria or Hungary or Austria-Hungary for the purposes of this section, even though he was such citizen or subject at the time first specified in this subsection, if he has become or shall become, ipso facto or through exercise of option, a citizen or subject of any nation or State or free city other than Germany, Austria, or Hungary, (first) under the terms of such treaties of peace as have been or may be concluded subsequent to November 11, 1918, between Germany or Austria or Hungary (of the one part) and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part), or (second) under the terms of such treaties as have been or may be concluded in pursuance of the treaties of peace aforesaid between any nation, State, or free city (of the one part) whose territories, in whole or in part, on August 4, 1914, formed a portion of the territory of Germany or Austria-Hungary and the United States and/or three or more of the following-named powers: The British Empire, France, Italy, and Japan (of the other part). For the purposes of this section any citizen or subject of a State or free city which at the time of the proposed return of money or other property of such citizen or subject hereunder forms a part of the territory of any one of the following nations: Germany, Austria, or Hungary, shall be deemed to be a citizen or subject of such nation. And the receipt of the said owner or of the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian shall be a full acquittance and discharge of the Alien Property Custodian or the Treasurer of the United States, as the case may be, and of the United States in respect to all claims of all persons heretofore or hereafter claiming any right, title, or interest in said property, or compensation or damages arising from the capture of such property by the President or the Alien Property Custodian: *Provided further, however*, That except as herein provided no such action by the President shall bar any person from the prosecution of any suit at law or in equity to establish any right, title, or interest which he may have therein.

“(c) Any person whose property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof.

“(d) Whenever a person, deceased, would have been entitled, if living, to the return of his money or other property hereunder, then his legal representative may proceed for the return of such property as provided in subsection (a) hereof: *Provided, however*, That the President or the court, as the case may be, before granting such relief shall impose such conditions by way of security or

otherwise, as the President or the court, respectively, shall deem sufficient to insure that such legal representative will redeliver to the Alien Property Custodian such portion of the money or other property so received by him as shall be distributable to any person not eligible as a claimant under subsections (a) or (c) hereof.

“(e) No money or other property shall be returned nor any debt allowed under this section to any person who is a citizen or subject of any nation which was associated with the United States in the prosecution of the war, unless such nation in like case extends reciprocal rights to citizens of the United States; nor in any event shall a debt be allowed under this section unless it was owing to and owned by the claimant prior to October 6, 1917, and as to claimants other than citizens of the United States unless it arose with reference to the money or other property held by the Alien Property Custodian or Treasurer of the United States hereunder.

“(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

“(g) This section shall not apply, however, to money paid to the Alien Property Custodian under section 10 hereof.” [41 Stat. L. 977-980.]

For section 9 of Act of Oct. 6, 1917, here amended, see 1918 Supp. Fed. Stat. Ann. 846.

TREASURY DEPARTMENT

See INTERSTATE COMMERCE

TREASURY DEPARTMENT

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 271.

Sec. 1. Comptroller of Treasury — Countersigning Warrants, 271.
Office of Comptroller — Chief of Examining Division, 271.

CROSS-REFERENCES

See also *AGRICULTURE; INTERSTATE COMMERCE; PUBLIC CONTRACTS; PUBLIC MONEYS*

[SEC. 1.] * * * [Comptroller of Treasury — countersigning warrants.]
The Comptroller of the Treasury is authorized to designate such person or persons in his office as may be required from time to time to countersign in his name such classes of warrants as he may direct. [41 Stat. L. 647.]

This and the following paragraph are from the Legislative, Executive and Judicial Appropriation Act of May 29, 1920, ch. 214.

* * * [Office of Comptroller — chief of examining division.] That the comptroller may designate a national-bank examiner to act as chief of the examining division in his office. [41 Stat. L. 650.]

See note to preceding paragraph.

TRUSTS

See SHIPPING AND NAVIGATION; TRADE COMBINATIONS AND TRUSTS

UNIFORMS

See WAR DEPARTMENT AND MILITARY ESTABLISHMENT

VESSELS

See CUSTOMS DUTIES; INTERSTATE COMMERCE; SHIPPING AND NAVIGATION

VOCATIONAL REHABILITATION

Act of June 2, 1920, ch. 219, 272.

- Sec. 1. Appropriations — Apportionment to States — Expenditure — Conditions, 272.*
- 2. "Persons Disabled" — "Rehabilitation," 273.*
- 3. Use of Appropriations by States — Conditions, 273.*
- 4. Federal Board for Vocational Education — Co-operation with State Boards — Duties, 274.*
- 5. Payments to States — Use — Annual Report, 275.*
- 6. Federal Board for Vocational Education — Appropriation — Purpose — Report of Expenses — Salaries, 275.*
- 7. Federal Board for Vocational Education — Donations — Use — Report of Donations — Discrimination against Union Members, etc., 275.*

Act of June 5, 1920, ch. 253 (Deficiency Appropriation Act), 276.

Disabled Soldiers and Sailors — Additional Appropriation — Salary Limitations — Trainees, 276.

An Act To provide for the promotion of vocational rehabilitation of persons disabled in industry or otherwise and their return to civil employment.

[*Act of June 2, 1920, ch. 219, 41 Stat. L. 735.*]

[SEC. 1.] [Appropriations — apportionment to states — expenditure — conditions.] That in order to provide for the promotion of vocational rehabilitation of persons disabled in industry or in any legitimate occupation and their return to civil employment there is hereby appropriated for the use of the States, subject to the provisions of this Act, for the purpose of cooperating with them in the maintenance of vocational rehabilitation of such disabled persons, and in returning vocationally rehabilitated persons to civil employment for the fiscal

year ending June 30, 1921, the sum of \$750,000; for the fiscal year ending June 30, 1922, and thereafter for a period of two years, the sum of \$1,000,000 annually. Said sums shall be allotted to the States in the proportion which their population bears to the total population in the United States, not including Territories, outlying possessions, and the District of Columbia, according to the last preceding United States census: *Provided*, That the allotment of funds to any State shall not be less than a minimum of \$5,000 for any fiscal year. And there is hereby appropriated the following sums, or so much thereof as may be needed, which shall be used for the purpose of providing the minimum allotment to the States provided for in this section, for the fiscal year ending June 30, 1921, the sum of \$46,000; for the fiscal year ending June 30, 1922, and annually thereafter, the sum of \$34,000.

All moneys expended under the provisions of this Act from appropriations provided by section 1 shall be upon the condition (1) that for each dollar of Federal money expended there shall be expended in the State under the supervision and control of the State board at least an equal amount for the same purpose: *Provided*, That no portion of the appropriation made by this Act shall be used by any institution for handicapped persons except for the special training of such individuals entitled to the benefits of this Act as shall be determined by the Federal board; (2) that the State board shall annually submit to the Federal board for approval plans showing (a) the kinds of vocational rehabilitation and schemes of placement for which it is proposed the appropriation shall be used; (b) the plan of administration and supervision; (c) courses of study; (d) methods of instruction; (e) qualification of teachers, supervisors, directors, and other necessary administrative officers or employees; (f) plans for the training of teachers, supervisors, and directors; (3) that the State board shall make an annual report to the Federal board on or before September 1 of each year on the work done in the State and on the receipts and expenditures of money under the provisions of this Act; (4) that no portion of any moneys appropriated by this Act for the benefit of the States shall be applied, directly or indirectly, to the purchase, preservation, erection, or repair of any building or buildings or equipment, or for the purchase or rental of any lands; (5) that all courses for vocational rehabilitation given under the supervision and control of the State board and all courses for vocational rehabilitation maintained shall be available, under such rules and regulations as the Federal board shall prescribe, to any civil employee of the United States disabled while in the performance of his duty. [41 Stat. L. 735.]

SEC. 2. ["Persons disabled"—"rehabilitation."] That for the purpose of this Act the term "persons disabled" shall be construed to mean any person who, by reason of a physical defect or infirmity, whether congenital or acquired by accident, injury, or disease, is, or may be expected to be, totally or partially incapacitated for remunerative occupation; the term "rehabilitation" shall be construed to mean the rendering of a person disabled fit to engage in a remunerative occupation. [41 Stat. L. 735.]

SEC. 3. [Use of appropriations by states—conditions.] That in order to secure the benefits of the appropriations provided by section 1 any State shall, through the legislative authority thereof, (1) accept the provisions of this Act; (2) empower and direct the board designated or created as the State board for

vocational education to cooperate in the administration of the provisions of the Vocational Education Act, approved February 23, 1917, to cooperate as herein provided with the Federal Board for Vocational Education in the administration of the provisions of this Act; (3) in those States where a State workmen's compensation board, or other State board, department, or agency exists, charged with the administration of the State workmen's compensation or liability laws, the legislature shall provide that a plan of cooperation be formulated between such State board, department, or agency, and the State board charged with the administration of this Act, such plan to be effective when approved by the governor of the State; (4) provide for the supervision and support of the courses of vocational rehabilitation to be provided by the State board in carrying out the provisions of this Act; (5) appoint as custodian for said appropriations its State treasurer, who shall receive and provide for the proper custody and disbursement of all money paid to the State from said appropriations. In any State the legislature of which does not meet in regular session between the date of the passage of this Act and December 31, 1920, if the governor of that State shall accept the provisions of this Act, such State shall be entitled to the benefits of this Act until the legislature of such State meets in due course and has been in session sixty days. [41 Stat. L. 736.]

For the Act of Feb. 23, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 154.

SEC. 4. [Federal Board for Vocational Education — cooperation with state boards — duties.] That the Federal Board for Vocational Education shall have power to cooperate with State boards in carrying out the purposes and provisions of this Act, and is hereby authorized to make and establish such rules and regulations as may be necessary or appropriate to carry into effect the provisions of this Act; to provide for the vocational rehabilitation of disabled persons and their return to civil employment and to cooperate, for the purpose of carrying out the provisions of this Act, with such public and private agencies as it may deem advisable. It shall be the duty of said board (1) to examine plans submitted by the State boards and approve the same if believed to be feasible and found to be in conformity with the provisions and purposes of this Act; (2) to ascertain annually whether the several States are using or are prepared to use the money received by them in accordance with the provisions of this Act; (3) to certify on or before the 1st day of January of each year to the Secretary of the Treasury each State which has accepted the provisions of this Act and complied therewith, together with the amount which each State is entitled to receive under the provisions of this Act; (4) to deduct from the next succeeding allotment to any State whenever any portion of the fund annually allotted has not been expended for the purpose provided for in this Act a sum equal to such unexpended portion; (5) to withhold the allotment of moneys to any State whenever it shall be determined that moneys allotted are not being expended for the purposes and conditions of this Act; (6) to require the replacement by withholding subsequent allotments of any portion of the moneys received by the custodian of any State under this Act that by any action or contingency is diminished or lost: *Provided*, That if any allotment is withheld from any State, the State board of such State may appeal to the Congress of the United States, and if the Congress shall not, within one year from the time of said appeal, direct such sum to be paid, it shall be covered into the Treasury. [41 Stat. L. 736.]

SEC. 5. [Payments to States — use — annual report.] That the Secretary of the Treasury, upon the certification of the Federal board as provided in this Act, shall pay quarterly to the custodian of each State appointed as herein provided the moneys to which it is entitled under the provisions of this Act. The money so received by the custodian for any State shall be paid out on the requisition of the State board as reimbursement for services already rendered or expenditures already incurred and approved by said State board. The Federal Board for Vocational Education shall make an annual report to the Congress on or before December 1 on the administration of this Act and shall include in such report the reports made by the State boards on the administration of this Act by each State and the expenditure of the money allotted to each State. [41 Stat. L. 736.]

SEC. 6. [Federal Board for Vocational Education — appropriation — purpose — report of expenses — salaries.] That there is hereby appropriated to the Federal Board for Vocational Education the sum of \$75,000 annually for a period of four years for the purpose of making studies, investigations, and reports regarding the vocational rehabilitation of disabled persons and their placements in suitable or gainful occupations, and for the administrative expenses of said board incident to performing the duties imposed by this Act, including salaries of such assistants, experts, clerks, and other employees, in the District of Columbia or elsewhere as the board may deem necessary, actual traveling and other necessary expenses incurred by the members of the board and by its employees, under its orders, including attendance at meetings of educational associations and other organizations, rent and equipment of offices in the District of Columbia and elsewhere, purchase of books of reference, law books, and periodicals, stationery, typewriters and exchange thereof, miscellaneous supplies, postage on foreign mail, printing and binding to be done at the Government Printing Office, and all other necessary expenses.

A full report of all expenses under this section, including names of all employees and salaries paid them, traveling expenses and other expenses incurred by each and every employee and by members of the board, shall be submitted annually to Congress by the board.

No salaries shall be paid out of the fund provided in this section in excess of the following amounts: At the rate of \$5,000 per annum, to not more than one person; at the rate of \$4,000 per annum each, to not more than four persons; at the rate of \$3,500 per annum each, to not more than five persons; and no other employee shall receive compensation at a rate in excess of \$2,500 per annum: *Provided*, That no person receiving compensation at less than \$3,500 per annum shall receive in excess of the amount of compensation paid in the regular departments of the Government for like or similar services. [41 Stat. L. 737.]

SEC. 7. [Federal Board for Vocational Education — donations — use — report of donations — discrimination against union members, etc.] That the Federal Board for Vocational Education is hereby authorized and empowered to receive such gifts and donations from either public or private sources as may be offered unconditionally. All moneys received as gifts or donations shall be paid into the Treasury of the United States, and shall constitute a permanent fund, to be called the "Special fund for vocational rehabilitation of disabled persons," to be used under the direction of the said board to defray the

expenses of providing and maintaining courses of vocational rehabilitation in special cases, including the payment of necessary expenses of persons undergoing training. A full report of all gifts and donations offered and accepted, together with the names of the donors and the respective amounts contributed by each, and all disbursements therefrom shall be submitted annually to Congress by said board: *Provided*, That no discrimination shall be made or permitted for or against any person or persons who are entitled to the benefits of this Act because of membership or nonmembership in any industrial, fraternal, or private organization of any kind under a penalty of \$200 for every violation thereof. [41 Stat. L. 737.]

* * * [Disabled soldiers and sailors — additional appropriation — salary limitations — trainees.] For an additional amount for carrying out the provisions of the Act entitled "An Act to provide for the vocational rehabilitation and return to civil employment of disabled persons discharged from the military or naval forces of the United States, and for other purposes," approved June 27, 1918, as amended, including personal services in the District of Columbia and elsewhere, funeral and other incidental expenses (including the transportation of remains) of deceased trainees of the board, printing and binding to be done at the Government Printing Office, law books, books of reference, and periodicals, \$7,000,000: *Provided*, That the salary limitations placed upon the appropriation for vocational rehabilitation by the Sundry Civil Appropriation Act, approved July 19, 1919, shall apply to the appropriation herein made: *Provided further*, That the board may, after June 30, 1920, pay, subject to the conditions and limitations prescribed by section 2 of the Vocational Rehabilitation Act as amended, to all trainees undergoing training under said section residing where maintenance and support is above the average and comparatively high, in lieu of the monthly payments for maintenance and support prescribed by section 2, as amended, such sum as in the judgment of the said board is necessary for his maintenance and support and for the maintenance and support of persons dependent upon him, if any: *Provided, however*, That in no event shall the sum so paid such person while pursuing such course be more than \$100 per month for a single man without dependents, or for a man with dependents \$120 per month, plus the several sums prescribed as family allowances under section 204 of Article II of the War Risk Insurance Act. [41 Stat. L. 1020.]

This is from the Deficiency Appropriation Act of June 5, 1920, ch. 253.

For Act of June 27, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 875.

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CROSS-REFERENCES

See also *CHARITIES; CIVIL SERVICE; HOSPITALS AND ASYLUMS; MILITARY ACADEMY; PENSIONS; PUBLIC CONTRACTS; VOCATIONAL REHABILITATION*

An Act Relating to detached service of officers of the Regular Army.

[*Act of Jan. 17, 1920, ch. 48, 41 Stat. L. 394.*]

[Officers of regular army—detached service.] That, after the termination of the emergency incident to the war with Germany and Austria-Hungary, in the construction of any law relating to detached service of the officers of the Regular Army, all service performed by such officers during the said emergency shall be regarded as service with troops or organizations thereof. [*41 Stat. L. 394.*]

An Act To increase the efficiency of the Military Establishment of the United States.

[*Act of Jan. 24, 1920, ch. 53, 41 Stat. L. 396.*]

[**Ordinance sergeants — repeal of statutory provisions affecting.**] That section 1110, Revised Statutes, and the first proviso of section 12 of the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, be, and the same hereby are, repealed. [41 Stat. L. 396.]

For R. S. sec. 1110, and Act of June 3, 1916, sec. 12, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 993.

An Act To amend an Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1919," approved July 9, 1918.

[*Act of Jan. 24, 1920, ch. 55, 41 Stat. L. 398.*]

[**Sec. 1.**] [**Medals of honor — distinguished service crosses and medals — silver stars — Act of July 9, 1918, Amended.**] That so much of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1919," approved July 9, 1918, as constitutes the fifth section under the subheading "Medals of honor, distinguished-service crosses, and distinguished-service medals" (Fortieth Statutes at Large, page 871), be, and is hereby, amended so as to read as follows:

"That no more than one medal of honor or one distinguished-service cross or one distinguished-service medal shall be issued to any one person; but for each succeeding deed or act sufficient to justify the award of a medal of honor or a distinguished-service cross or a distinguished-service medal, respectively, the President may award a suitable bar or other suitable device, to be worn as he shall direct. And for each citation of an officer or enlisted man for gallantry in action, published in orders issued from the headquarters of a force commanded by, or which is the appropriate command of, a general officer, not warranting the award of a medal of honor or distinguished-service cross, he shall be permitted to wear, as the President shall direct, a silver star three-sixteenths of an inch in diameter." [41 Stat. L. 398.]

Sec. 2. [Repeal of conflicting laws.] That all laws and parts of laws in conflict herewith are rescinded. [41 Stat. L. 399.]

For the provision of the Act of July 9, 1918, here amended, see 1918 Supp. Fed. Stat. Ann. 887.

An Act Authorizing the Secretary of War to loan Army rifles to posts of the American Legion.

[Act of Feb. 10, 1920, ch. 64, 41 Stat. L. 403.]

[Loan of rifles to American Legion Posts — sale of ammunition.] That the Secretary of War is hereby authorized, under rules, limitations, and regulations to be prescribed by him, to loan obsolete or condemned Army rifles to posts of the American Legion for use by them in connection with the funeral ceremonies of deceased soldiers, sailors, and marines, and for other post ceremonial purposes; and to sell to such posts blank ammunition in suitable amounts for said rifles at cost price, plus cost of packing and transportation: *Provided, however,* That not to exceed ten such rifles shall be issued to any one post. [41 Stat. L. 403.]

This Act was amended by a provision in the Act of June 5, 1920, set out *infra*, this title, p. 363.

An Act To amend the Army Appropriation Act for 1920, and for the purchase of land and to provide for construction work at certain military posts, and for other purposes.

[Act of Feb. 28, 1920, ch. 90, 41 Stat. L. 453.]

SEC. 2. [Purchases of real estate — construction of Army camps or cantonments — industrial plants.] That the third paragraph under the heading "Reserve Corps" and subheading "Ordnance Supplies for Military Equipment of Schools and Colleges" of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1920, and for other purposes," approved July 11, 1919, be, and the same is hereby, amended to read as follows:

"That no part of any of the appropriations made herein nor any of the unexpended balances of appropriations heretofore made for the support and maintenance of the Army or the Military Establishment shall be expended for the purchase of real estate or for the construction of Army camps or cantonments, except in such cases at National Army or National Guard camps or cantonments which were in use prior to November 11, 1918, where it has been or may be found more economical to the Government, for the purpose of salvaging such camps or cantonments, to buy real estate than to continue to pay rentals or claims for damages thereon, and except where industrial plants have been constructed or taken over by the Government for war purposes, and the purchase of land is necessary in order to protect the interest of the Government:

* * * [41 Stat. L. 453.]

The paragraph of the Act of July 11, 1919, here amended, read as follows: "That no part of any of the appropriations made herein nor any of the unexpended balances of appropriations heretofore made for the support and maintenance of the Army or the Military Establishment shall be expended for the purchase of real estate of [sic] for the construction of Army camps or cantonments except in such cases at National Army or National Guard camps or cantonments which were in use prior to November 11, 1918, where it has been or may be found more economical to the Government for the purpose of salvaging such camps or cantonments to buy real estate than to continue to pay rentals or claims for damages thereon, and except where industrial plants have been constructed or taken over by the Government for war purposes and the purchase of land is necessary in order to protect the interest of the Government." [41 Stat. L. 128.]

SEC. 3. [Construction contracts — compensation — "cost-plus."] That no contract for construction covered by the appropriations contained in this Act, or any of the unexpended balances of appropriations heretofore made for the

support of the Military Establishment, except repair work, the cost of which can not be clearly estimated, shall be let to any contractor under what is known as the "cost-plus," "cost-plus percentage," or "cost-plus a fixed fee for compensation" system or form of contract: *Provided, however,* That work or construction let under such system or form of contract and now under process of completion may be concluded. [41 Stat. L. 456.]

This Act contained two other sections which are not set out because they are of no permanent value.

[SEC. 1.] * * * [Council of National Defense — salaries of officers and employees.] That no salary shall be paid to any officer or employee of the council in excess of \$6,000 per annum. [41 Stat. L. 503.]

This and the following paragraph are from the Deficiency Appropriation Act of March 6, 1920, ch. 94.

For Act creating Council of National Defense, see 1918 Supp. Fed. Stat. Ann. 975.

* * * [Surplus machine tools, etc.— transfer to Federal Board for Vocational Education.] The Secretary of War shall have authority to transfer to the Federal Board for Vocational Education, without compensation therefor, certain surplus machine tools and other equipment belonging to the War Department and now in possession of the Federal board and being used by that board as equipment in schools for vocational education controlled by the board. Property so transferred shall be dropped from the records of the War Department on the filing with the War Department of an itemized receipt for the articles thus transferred. An itemized statement of the articles transferred hereunder and the cost price thereof shall be reported to Congress by the Secretary of War. [41 Stat. L. 504.]

See note to preceding paragraph.

An Act To authorize the Secretary of War to transfer certain surplus motor-propelled vehicles and motor equipment and road-making material to various services and departments of the Government, and for the use of the States.

[Act of March 15, 1920, ch. 100, 41 Stat. L. 530.]

[SEC. 1.] [Surplus motor-propelled vehicles, etc.— transfer to various departments.] That the Secretary of War be, and he is hereby, authorized and directed to transfer such motor-propelled vehicles and motor equipment, including spare parts, pertaining to the Military Establishment as are or may hereafter be found to be surplus and no longer required for military purposes, to (a) the Department of Agriculture, for use in the improvement of highways and roads under the provisions of section 7 of the Act approved February 28, 1919, entitled "An Act making appropriations for the service of the Post Office Department, for the fiscal year 1920, and for other purposes": *Provided, however,* That no more motor-propelled vehicles, motor equipment, and other war material, equipment, and supplies, the transfer of which is authorized in

this Act, shall be transferred to the Department of Agriculture for the purposes named in section 7 of said Act than said Department of Agriculture shall certify can be efficiently used for such purposes within a reasonable time after such transfer; (b) the Post Office Department for use in the transmission of mails; and (c) the Treasury Department, for the use of the Public Health Service under the provisions of section 3 of the Act approved March 3, 1919, entitled "An Act to authorize the Secretary of the Treasury to provide hospital and sanatorium facilities for discharged sick and disabled soldiers, sailors, and marines." [41 Stat. L. 530.]

For Act of Feb. 28, 1919, sec. 7, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 300.

For Act of March 3, 1919, sec. 3, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 68.

SEC. 2. [Road-making material—transfer to Department of Agriculture.] That the Secretary of War is hereby authorized and directed to transfer to the Department of Agriculture, under the provisions of section 7 of the Act approved February 28, 1919, entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year 1920, and for other purposes," for use in the improvement of highways and roads, as therein provided, the following war material, equipment, and supplies pertaining to the Military Establishment as are or may hereafter be found to be surplus and not required for military purposes, to wit, road rollers, graders, and oilers; sprinkling wagons; concrete mixers; derricks; pile-driver outfits complete; air and steam drill outfits; centrifugal and diaphragm pumps with power; rock crushers; clamshell and orange-peel buckets; road scarifiers; caterpillar and drag-line excavators; plows; cranes; trailers; rubber and steam hose; asphalt plants; steam shovels; dump wagons; hoisting engines; air-compressor outfits with power; boilers; drag, Fresno, and wheel scrapers; stump pullers; wheelbarrows; screening plants; wagon loaders; blasting machines; hoisting cable; air hose; corrugated-metal culverts; explosives and exploders; engineers' transits, levels, tapes, and similar supplies and equipment; drafting machines; planimeters; fabricated bridge materials; industrial railway equipment; conveyors, gravity and power; donkey engines; corrugated-metal roofing; steel and iron pipe; wagons and similar equipment and supplies such as are used directly for road-building purposes. [41 Stat. L. 530.]

For Act of Feb. 28, 1919, sec. 7, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 300.

SEC. 3. [Surplus telephone supplies—transfer to Department of Agriculture.] That the Secretary of War is also hereby authorized and directed to transfer to the Department of Agriculture, for the use of the Forest Service, such telephone supplies pertaining to the Military Establishment which have been found to be surplus and no longer required for military purposes and are needed for the present use of the said service. [41 Stat. L. 531.]

SEC. 4. [Expenses incurred in transfer of surplus property—property transferred to states for highway purposes.] That freight charges incurred in the transfer of the property provided for in this Act shall not be defrayed by the War Department, and if the War Department shall load any of said property for shipment the expense of said loading shall be reimbursed the War Department by the department to which the property is transferred by an adjustment of the appropriations of the two departments: *Provided, however,* That any State receiving any of said property for use in the improvement of

public highways shall, as to the property it receives, pay to the Department of Agriculture the amount of 20 per centum of the estimated value of said property, as fixed by the Secretary of Agriculture or under his direction, against which sum the said State may set off all freight charges paid by it on the shipment of said property, not to exceed, however, said 20 per centum. [41 Stat. L. 531.]

SEC. 5. [Title to surplus property transferred to states for highway purposes — use.] That the title to said vehicles and equipment shall be and remain vested in the State for use in the improvement of the public highways, and no such vehicles and equipment in serviceable condition shall be sold or the title to the same transferred to any individual, company, or corporation: *Provided*, That any State highway department to which is assigned motor-propelled vehicles and other equipment and supplies, transferred herein to the Department of Agriculture, may, in its discretion, arrange for the use of such vehicles and equipment, for the purpose of constructing or maintaining public highways, with any State agency or municipal corporation at a fair rental which shall not be less than the cost of maintenance and repair of said vehicles and equipment. [41 Stat. L. 531.]

SEC. 6. [Previous legislation on same subject-matter how affected by Act.] That the provisions of the Act of July 16, 1914 (Thirty-eighth Statutes, page 454), prohibiting the expenditure of appropriations by any of the executive departments or other Government establishments for the maintenance, repair, or operation of motor-propelled or horse-drawn passenger-carrying vehicles in the absence of specific statutory authority, shall not apply to vehicles transferred, or hereafter to be transferred, by the Secretary of War to the Department of Agriculture for the use of the Department under the provisions of this Act, or under the provisions of section 7 of the Act of February 28, 1919, referred to in section 1 hereof: *Provided, however*, That nothing in this Act contained shall be held or construed to modify, amend, or repeal the provisions of the last proviso under the item entitled "Contingencies of the Army," as contained in the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1920, and for other purposes," approved July 11, 1919, except as to direction for the transfer of those articles enumerated in section 2 hereof. [41 Stat. L. 531.]

For provisions of Act of July 16, 1914, mentioned in the text, see 3 Fed. Stat. Ann. (2d ed.) 155.

For Act of Feb. 28, 1919, sec. 7, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 300.

SEC. 7. [Tractors — loan to state highway departments.] That the Secretary of War be, and he is hereby, authorized and empowered, at his discretion, and under such rules and regulations as he may prescribe, to loan to any State of the Union, when so requested by the highway department of the State, such tractors as are retained and not distributed under the act approved March 15, 1920, for use in highway construction by the highway department of such State: *Provided*, That all expenses for repairs and upkeep of tractors so loaned and the expenses of loading and freight shall be paid by the State, both in transfer to the State and the return to the Army. [41 Stat. L. 584.]

This is from the Postal Service Appropriation Act of April 24, 1920, ch. 161.

An Act To provide for the training of officers of the Army in aeronautic engineering.

[*Act of May 10, 1920, ch. 175, 41 Stat. L. 594.*]

[SEC. 1.] [**Aeronautic engineering—training of army officers.**] That the Secretary of War be, and he hereby is, authorized to detail such officers of the Army as he may select, not exceeding twenty-five at any one time, to attend and pursue courses of aeronautic engineering or associate study at such schools, colleges, and universities as he may select. [41 Stat. L. 594.]

SEC. 2. [**Payment of tuition, etc.**] That the Secretary of War is authorized to pay tuition for the officers so detailed and to provide them with necessary textbooks and technical supplies from any moneys available for the Air Service of the Army not otherwise specifically appropriated. [41 Stat. L. 594.]

An Act To increase the efficiency of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service.

[*Act of May 18, 1920, ch. 190, 41 Stat. L. 601.*]

[SEC. 1.] [**Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service—commissioned officers—pay and allowances—increases.**] That, commencing January 1, 1920, commissioned officers of the Army, Navy, and Marine Corps, and Public Health Service shall be paid, in addition to all pay and allowances now allowed by law, increases at rates per annum as follows: Colonels in the Army and Marine Corps, captains in the Navy, and assistant surgeons general in the Public Health Service, \$600; lieutenant colonels in the Army and Marine Corps, commanders in the Navy, and senior surgeons in the Public Health Service, \$600; majors in the Army and Marine Corps, lieutenant commanders in the Navy, and surgeons in the Public Health Service, \$840; captains in the Army and Marine Corps, lieutenants in the Navy, and passed assistant surgeons in the Public Health Service, \$720; first lieutenants in the Army and Marine Corps, lieutenants (junior grade), acting assistant surgeons and acting assistant dental surgeons in the Navy, and assistant surgeons in the Public Health Service, \$600; second lieutenants in the Army and Marine Corps, and ensigns in the Navy, \$420: *Provided*, That contract surgeons of the Army serving full time shall receive the pay of a second lieutenant. [41 Stat. L. 601.]

SEC. 2. [**Commissioned officers and enlisted men of Army—commutation of quarters, etc.**] That the rights and benefits prescribed under the Act of April 16, 1918, granting commutation of quarters, heat, and light during the present emergency to officers of the Army on duty in the field are hereby continued and made effective until June 30, 1922, and shall apply equally to officers of the Navy, Marine Corps, Coast Guard, and Public Health Service: *Provided*, That such rights and benefits as are prescribed for officers shall apply equally for enlisted men now entitled by regulations to quarters or to commutation therefor. [41 Stat. L. 602.]

For the Act of April 16, 1918, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1202.

SEC. 3. [**Warrant officers of Navy — increases in pay.**] That commencing January 1, 1920, warrant officers of the Navy shall be paid, in addition to all pay and allowances now allowed by law, an increase at the rate of \$240 per annum. [41 Stat. L. 602.]

SEC. 4. [**Enlisted men of Army and Marine Corps — Female Nurse Corps of Army and Navy — increases in pay.**] That, commencing January 1, 1920, the pay of all enlisted men of the Army and Marine Corps and of members of the female Nurse Corps of the Army and Navy is hereby increased 20 per centum: *Provided*, That such increase shall not apply to enlisted men whose initial pay, if it has already been permanently increased since April 6, 1917, is now less than \$33 per month. [41 Stat. L. 602.]

SEC. 5. [**Noncommissioned officers of Army and Marine Corps — commutation of ration — army field clerks, etc. — increases in pay — rates.**] That all noncommissioned officers of the Army of grade of color sergeant and above as fixed by existing Army Regulations and noncommissioned officers of the Marine Corps of corresponding grades shall be entitled to one ration or commutation therefor in addition to that to which they are now entitled. The commutation value shall be determined by the President on July 1 of each fiscal year, and for the current fiscal year the value shall be computed on the basis of 55 cents per ration: *Provided*, That Army field clerks and field clerks Quartermaster Corps, whose total pay and allowances do not exceed \$2,500 per annum, shall be paid an increase at the rate of \$240 per annum: *Provided further*, That such Army field clerks and field clerks Quartermaster Corps, whose total pay and allowances exceed \$2,500 but do not exceed \$2,740 per annum, shall be paid such additional amount as will make their total pay and allowances not to exceed \$2,740 per annum: *Provided further*, That this section shall not be construed to reduce the pay and allowances of any Army field clerk or field clerk Quartermaster Corps. [41 Stat. L. 602.]

SEC. 6. [**Noncommissioned officers and enlisted men of Navy — base pay — rates — Fleet Naval Reserve — retainer pay.**] That, commencing January 1, 1920, the following shall be the rate of base pay for each enlisted rating: Chief petty officers with acting appointments, \$99 per month; chief petty officers with permanent appointments and mates, \$126 per month; petty officers, first class, \$84 per month; petty officers, second class, \$72 per month; petty officers, third class, \$60 per month; nonrated men, first class, \$54 per month; nonrated men, second class, \$48 per month; nonrated men, third class, \$33 per month: *Provided*, That the base pay of firemen, first class, shall be \$60 per month; firemen, second class, \$54 per month; firemen, third class, \$48 per month: *Provided further*, That the rate of base pay for each rating in the Naval Academy Band shall be as follows: Second leader, with acting appointment, \$99 per month, with permanent appointment, \$126 per month; drum major, \$84 per month; musicians, first class, \$72 per month; musicians, second class, \$60 per month: *Provided further*, That the base pay of cabin stewards and cabin cooks shall be \$84 per month; wardroom stewards and wardroom cooks, \$72 per month; steerage stewards and steerage cooks, \$72 per month; warrant officers' stewards and warrant officers' cooks, \$60 per month; mess attendants, first class, \$42 per month; mess attendants, second class, \$36 per month; mess attendants, third

class, \$33 per month: *Provided further*, That the retainer pay of those members of the Fleet Naval Reserve who, pursuant to call, shall return to active duty within one month after the approval of this Act and shall continue on active duty until the Navy shall have been recruited up to its permanent authorized strength, or until the number in the grade to which they may be assigned is filled, but not beyond June 30, 1922, shall be computed upon the base pay they are receiving when retransferred to inactive duty, plus the additions or increases prescribed in the Naval Appropriation Act approved August 29, 1916, for members of the Fleet Naval Reserve: *Provided further*, That the rates of base pay herein fixed shall not be further increased 10 per centum as authorized by an Act approved May 13, 1908, nor by the temporary war increases as authorized by section 15 of the Act approved May 22, 1917, as amended by the Act approved July 11, 1919. [41 Stat. L. 602.]

For the Act of Aug. 29, 1916, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 557.

For the Act of May 13, 1908, mentioned in the text, see 6 Fed. Stat. Ann. (2d ed.) 1203.

For the Act of May 22, 1917, as amended by the Act of July 11, 1919, see 1919 Supp. Fed. Stat. Ann. 286.

SEC. 7. [Civilian professors and instructors at Naval Academy — readjustment of pay.] That the Secretary of the Navy is authorized, in his discretion, to readjust the prevailing rates of pay of civilian professors and instructors at the United States Naval Academy: *Provided*, That said readjustment, which shall be effective from January 1, 1920, shall not involve an additional expenditure in excess of \$55,000 for the remainder of the current fiscal year. [41 Stat. L. 603.]

SEC. 8. [Coast Guard — commissioned officers, enlisted men, etc.— pay, etc. — district superintendents — rank, etc.] That commissioned officers, warrant officers, petty officers, and other enlisted men of the Coast Guard shall receive the same pay, allowances, and increases as now are, herein are, or hereafter may be prescribed for corresponding grades or ratings and length of service in the Navy; and the grades and ratings of warrant officers, chief petty officers, petty officers and other enlisted persons in the Coast Guard shall be the same as in the Navy, in so far as the duties of the Coast Guard may require, with the continuance, in the Coast Guard, of the grade of surfman, whose base pay shall be \$70 per month: *Provided*, That the senior district superintendent, the three district superintendents next in order of seniority, the four district superintendents next below these three in order of seniority, and the junior five district superintendents shall have the rank, pay, and allowances of captain, first lieutenant, second lieutenant, and third lieutenant in the Coast Guard, respectively. [41 Stat. L. 603.]

SEC. 9. [Officers and enlisted men on inactive list — back pay, etc.] That nothing contained in this Act shall be construed as granting any back pay or allowances to any officer or enlisted man whose active service shall have terminated subsequent to December 31, 1919, and prior to the approval of this Act, unless such officers or enlisted men shall have been recalled to active service or shall have been reenlisted prior to the approval of this Act. [41 Stat. L. 603.]

SEC. 10. [Enlisted men, etc., in Navy — reenlistment — benefits.] That any enlisted man or apprentice seaman who shall reenlist in the Navy within one year from the date of his discharge therefrom shall, upon such reenlistment, be

entitled to and shall receive the same benefits as are now authorized by law for reenlistment within four months from date of last discharge from the service: *Provided*, That this section shall become inoperative six months after the date of the approval of this Act. [41 Stat. L. 603.]

SEC. 11. [Coast and Geodetic Survey — commissioned officers — pay and allowances — retirement — longevity pay in Army, Navy, Marine Corps, Coast Guard, Public Health Service and Coast and Geodetic Survey.] That in lieu of compensation now prescribed by law, commissioned officers of the Coast and Geodetic Survey shall receive the same pay and allowances as now are or hereafter may be prescribed for officers of the Navy with whom they hold relative rank as prescribed in the Act of May 22, 1917, entitled "An Act to temporarily increase the commissioned and warrant and enlisted strength of the Navy and Marine Corps, and for other purposes," including longevity; and all laws relating to the retirement of commissioned officers of the Navy shall hereafter apply to commissioned officers of the Coast and Geodetic Survey: *Provided*, That hereafter longevity pay for officers in the Army, Navy, Marine Corps, Coast Guard, Public Health Service, and Coast and Geodetic Survey shall be based on the total of all service in any or all of said services. [41 Stat. L. 603.]

For the Act of May 22, 1917, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 523.

SEC. 12. [Commissioned officers, etc.— permanent changes of station — transportation of wives and children — "permanent station" defined — transportation beyond continental limits — household effects.] That hereafter when any commissioned officer, noncommissioned officer of the grade of color sergeant and above, including any noncommissioned officer of the Marine Corps of corresponding grade, warrant officer, chief petty officer, or petty officer (first class), having a wife or dependent child or children, is ordered to make a permanent change of station, the United States shall furnish transportation in kind from funds appropriated for the transportation of the Army, the Navy, the Marine Corps, the Coast Guard, the Coast and Geodetic Survey, and the Public Health Service to his new station for the wife and dependent child or children: *Provided*, That for persons in the naval service the term "permanent station," as used in this section, shall be interpreted to mean a shore station or the home yard of the vessel to which the person concerned may be ordered; and a duly authorized change in home yard or home port of such vessel shall be deemed a change of station: *Provided further*, That if the cost of such transportation exceeds that for transportation from the old to the new station the excess cost shall be paid to the United States by the officer concerned: *Provided further*, That transportation supplied the wife or dependent child or children of such officer, to or from stations beyond the continental limits of the United States, shall not be other than by Government transport, if such transportation is available: *And provided further*, That the personnel of the Navy shall have the benefit of all existing laws applying to the Army and the Marine Corps for the transportation of household effects. [41 Stat. L. 604.]

SEC. 13. [Increased rates of pay — when effective — retired pay — Congressional committee — investigation — report.] That the provisions of sections 1, 3, 4, 5, and 6 of this Act shall remain effective until the close of the fiscal year ending June 30, 1922, unless sooner amended or repealed: *Provided*, That the

rates of pay prescribed in sections 4 and 6 hereof shall be the rates of pay during the current enlistment of all men in active service on the date of the approval of this Act, and for those who enlist, reenlist, or extend their enlistment prior to July 1, 1922, for the term of such enlistment, reenlistment, or extended enlistment: *Provided further*, That the increases provided in this Act shall not enter into the computation of the retired pay of officers or enlisted men who may be retired prior to July 1, 1922: *And provided further*, That a special committee, to be composed of five Members of the Senate, to be appointed by the Vice President, and five Members of the House of Representatives, to be appointed by the Speaker of the House of Representatives, shall make an investigation and report recommendations to their respective Houses not later than the first Monday in January, 1922, relative to the readjustment of the pay and allowances of the commissioned and enlisted personnel of the several services herein mentioned. [41 Stat. L. 604.]

SEC. 14. [Commissioned officers and enlisted men—reductions in pay—allowances and gratuities authorized by existing law.] That nothing contained in this Act shall operate to reduce the pay or allowances of any officer or enlisted man on the active or retired list: *Provided*, That the allowances and gratuities now authorized by existing law are not changed hereby, except as otherwise specified in this Act. [41 Stat. L. 604.]

SEC. 15. [Appropriations.] That the appropriations "Pay of the Navy, 1920," and "Pay Marine Corps, 1920," are hereby made available for any of the expenses authorized by this Act, and any part or all of the appropriations "Provisions, Navy, 1920," and "Maintenance, Quartermaster's Department Marine Corps, 1920," not required for the objects of expenditure specified in said appropriations, may be transferred to the appropriations "Pay of the Navy, 1920," or "Pay, Marine Corps, 1920," respectively, as may be required. [41 Stat. L. 604.]

Joint Resolution Authorizing and directing the accounting officers of the Treasury to allow credit to the disbursing clerk of the Bureau of War Risk Insurance in certain cases.

[Res. of May 26, 1920, No. 44, ch. 207, 41 Stat. L. 627.]

[Bureau of War Risk Insurance—accounts of disbursing clerk—credits.] That for such reasonable time as may be fixed by the Secretary of the Treasury, but not extending beyond the fiscal year ending June 30, 1921, the accounting officers of the Treasury are hereby authorized and directed to allow credit in the accounts of the disbursing clerk of the Bureau of War Risk Insurance for all payments of insurance installments heretofore or hereafter made under the provisions of Article IV of the War Risk Insurance Act in advance of the verification of the deduction on the pay rolls, or of the payment otherwise, of all premiums. [41 Stat. L. 627.]

[SEC. 1.] * * * [Signal office — services of skilled draftsmen, etc.] The services of skilled draftsmen and such other services as the Secretary of War may deem necessary may be employed only in the Signal Office to carry into effect the various appropriations for fortifications and other works of defense, and for the Signal Service of the Army, to be paid from such appropriations, in addition to the foregoing employees appropriated for in the Signal Office: *Provided*, That the entire expenditures for this purpose for the fiscal year 1921 shall not exceed \$53 280, and the Secretary of War shall each year in the annual estimates report to Congress the number of persons so employed, their duties, and the amount paid to each. [41 Stat. L. 659.]

This and the two following paragraphs are from the Legislative, Executive and Judicial Appropriation Act of May 29, 1920, ch. 214.

[Office of Chief of Ordnance— services of skilled draftsmen, etc.] The services of skilled draftsmen and such other services as the Secretary of War may deem necessary may be employed only in the office of the Chief of Ordnance to carry into effect the various appropriations for the armament of fortifications and for the arming and equipping of the National Guard, to be paid from such appropriations, in addition to the amount specifically appropriated for draftsmen in the Army Ordnance Bureau: *Provided*, That the entire expenditures for this purpose for the fiscal year 1921 shall not exceed \$400,000, and the Secretary of War shall each year in the annual estimates report to Congress the number of persons so employed, their duties, and the amount paid to each. [41 Stat. L. 660.]

See note to preceding paragraph.

[Office of Chief of Engineers — services of skilled draftsmen, civil engineers, etc.] The services of skilled draftsmen, civil engineers, and such other services as the Secretary of War may deem necessary, may be employed only in the office of the Chief of Engineers, to carry into effect the various appropriations for rivers and harbors, fortifications, and surveys and preparation for and the consideration of river and harbor estimates and bills, to be paid from such appropriations: *Provided*, That the expenditures on this account for the fiscal year 1921 shall not exceed \$50,400; the Secretary of War shall each year, in the annual estimates, report to Congress the number of persons so employed, their duties, and the amount paid to each. [41 Stat. L. 660.]

See note to second preceding paragraph.

An Act To amend an Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, and to establish military justice.

[Act of June 4, 1920, ch. 227, 41 Stat. L. 759.]

CHAPTER I.

[National Defense Act of June 3, 1916, Amended.]

[SEC. 1.] **[Army of United States — composition — sec. 1 of Act of June 3, 1916, amended.]** That the Act entitled "An Act for making further and more effectual provision for the national defense, and for other purposes," approved June 3, 1916, be amended as follows:

That section 1 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"That the Army of the United States shall consist of the Regular Army, the National Guard while in the service of the United States, and the Organized Reserves, including the Officers' Reserve Corps and the Enlisted Reserve Corps." [41 Stat. L. 759.]

For sec. 1, here amended, see 9 Fed. Stat. Ann. (2d ed.) 925.

SEC. 2. **[Composition of the Regular Army — sec. 2 of Act of June 3, 1916, amended.]** That section 2 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"SEC. 2. COMPOSITION OF THE REGULAR ARMY.—The Regular Army of the United States shall consist of the Infantry, the Cavalry, the Field Artillery, the Coast Artillery Corps, the Air Service, the Corps of Engineers, the Signal Corps, which shall be designated as the combatant arms or the line of the Army; the General Staff Corps; the Adjutant General's Department; the Inspector General's Department; the Judge Advocate General's Department; the Quartermaster Corps; the Finance Department; the Medical Department; the Ordnance Department; the Chemical Warfare Service; the officers of the Bureau of Insular Affairs; the officers and enlisted men under the jurisdiction of the Militia Bureau; the chaplains; the professors and cadets of the United States Military Academy; the present military storekeeper; detached officers; detached enlisted men; unassigned recruits; the Indian Scouts; the officers and enlisted men of the retired list; and such other officers and enlisted men as are now or may hereafter be provided for. Except in time of war or similar emergency when the public safety demands it, the number of enlisted men of the Regular Army shall not exceed two hundred and eighty thousand, including the Philippine Scouts." [41 Stat. L. 759.]

For sec. 2, here amended, see 9 Fed. Stat. Ann. (2d ed.) 926.

SEC. 3. **[Sec. 3 of Act of June 3, 1916, amended — sec. 3a added.]** That section 3 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"SEC. 3. ORGANIZATION OF THE ARMY.—The Organized peace establishment, including the Regular Army, the National Guard and the Organized Reserves, shall include all of those divisions and other military organizations necessary to form the basis for a complete and immediate mobilization for the national

defense in the event of a national emergency declared by Congress. The Army shall at all times be organized so far as practicable into brigades, divisions and army corps, and whenever the President may deem it expedient, into armies. For purposes of administration, training and tactical control, the continental area of the United States shall be divided on a basis of military population into corps areas. Each corps area shall contain at least one division of the National Guard or Organized Reserves, and such other troops as the President may direct. The President is authorized to group any or all corps areas into army areas or departments."

"SEC. 3a. THE INITIAL ORGANIZATION OF THE NATIONAL GUARD AND THE ORGANIZED RESERVES.—In the reorganization of the National Guard and in the initial organization of the Organized Reserves, the names, numbers and other designations, flags, and records of the divisions and subordinate units thereof that served in the World War between April 6, 1917, and November 11, 1918, shall be preserved as such as far as practicable. Subject to revision and approval by the Secretary of War, the plans and regulations under which the initial organization and territorial distribution of the National Guard and the Organized Reserves shall be made, shall be prepared by a committee of the branch or division of the War Department General Staff, hereinafter provided for, which is charged with the preparation of plans for the national defense and for the mobilization of the land forces of the United States. For the purpose of this task said committee shall be composed of members of said branch or division of the General Staff and an equal number of reserve officers, including reserve officers who hold or have held commissions in the National Guard. Subject to general regulations approved by the Secretary of War, the location and designation of units of the National Guard and of the Organized Reserves entirely comprised within the limits of any State or Territory shall be determined by a board, a majority of whom shall be reserve officers, including reserve officers who hold or have held commissions in the National Guard and recommended for this duty by the governor of the State or Territory concerned."

[41 Stat. L. 759.]

For sec. 3, here amended, see 9 Fed. Stat. Ann. (2d ed.) 928.

SEC. 4. [Sec. 4 of Act of June 3, 1916, amended — secs. 4a, 4b, 4c added.] That section 4 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"SEC. 4. OFFICERS.—Officers commissioned to and holding in the Army the office of a general officer shall hereafter be known as general officers of the line. Officers commissioned to and holding in the Army an office other than that of general officer, but to which the rank of a general officer is attached, shall be known as general officers of the staff. There shall be one general, as now authorized by law, until a vacancy occurs in that office, after which it shall cease to exist. On and after July 1, 1920, there shall be twenty-one major generals and forty-six brigadier generals of the line; five hundred and ninety-nine colonels; six hundred and seventy-four lieutenant colonels; two thousand two hundred and forty-five majors; four thousand four hundred and ninety captains; four thousand two hundred and sixty-six first lieutenants; two thousand six hundred and ninety-four second lieutenants; and also the number of officers of the Medical Department and chaplains, hereinafter provided for, professors as now authorized by law, and the present military storekeeper. who shall hereafter

have the rank, pay and allowances of major; and the numbers herein prescribed shall not be exceeded: *Provided*, That major generals of the line shall be appointed from officers of the grade of brigadier general of the line, and brigadier generals of the line shall be appointed from officers of the grade of colonel of the line whose names are borne on an eligible list prepared annually by a board of not less than five general officers of the line, not below the grade of major general: *Provided further*, That the first board convened after the passage of this Act may place upon such eligible list any officer of the line of not less than twenty-two years' commissioned service.

"Officers of all grades in the Infantry, Cavalry, Field Artillery, Coast Artillery Corps, Corps of Engineers, and Medical Department; officers above the grade of captain in the Signal Corps, Judge Advocate General's Department, Quartermaster Corps, Ordnance Department and Chemical Warfare Service, all chaplains and professors, and the military storekeeper shall be permanently commissioned in their respective branches. All officers of the General Staff Corps, Inspector General's Department, Bureau of Insular Affairs and Militia Bureau shall be obtained by detail from officers of corresponding grades in other branches. Other officers may be either detailed, or with their own consent, be permanently commissioned, in the branches to which they are assigned for duty.

"SEC. 4a. WARRANT OFFICERS.—In addition to those authorized for the Army Mine Planter Service, there shall be not more than one thousand one hundred and twenty warrant officers, including band leaders, who shall hereafter be warrant officers. Appointments shall be made by the Secretary of War from among noncommissioned officers who have had at least ten years' enlisted service; enlisted men who served as officers of the Army at some time between April 6, 1917, and November 11, 1918, and whose total service in the Army, enlisted and commissioned, amounts to five years; persons serving or who have served as Army field clerks or field clerks, Quartermaster Corps; and, in the case of those who are to be assigned to duty as band leaders, from among persons who served as Army band leaders at some time between April 6, 1917, and November 11, 1918, or enlisted men possessing suitable qualifications. Hereafter no appointments as Army field clerks or field clerks, Quartermaster Corps, shall be made. Warrant officers other than those of the Army Mine Planter Service, shall receive base pay of \$1,320 a year and the allowances of a second lieutenant, shall be entitled to longevity pay and to retirement under the same conditions as commissioned officers; and shall take rank next below second lieutenants and among themselves according to the dates of their respective warrants.

"SEC. 4b. ENLISTED MEN.—On and after July 1, 1920, the grades of enlisted men shall be such as the President may from time to time direct, with monthly base pay at the rate of \$74 for the first grade, \$53 for the second grade, \$45 for the third grade, \$45 for the fourth grade, \$37 for the fifth grade, \$35 for the sixth grade, and \$30 for the seventh grade. Of the total authorized number of enlisted men, those in the first grade shall not exceed 0.6 per centum, those in the second grade 1.8 per centum, those in the third grade 2 per centum, those in the fourth grade 9.5 per centum, those in the fifth grade 9.5 per centum, those in the sixth grade 25 per centum. The temporary increase of pay for enlisted men of the Army authorized by section 4 of the Act of Congress approved May 18, 1920, shall be computed upon the base pay provided for in this section, and shall apply only to enlisted men of the first five grades. The temporary allowance of

rations authorized by section 5, and the transportation privileges authorized by section 12, of the said Act, shall apply only to enlisted men of the first three grades.

" Existing laws providing for continuous service pay are repealed to take effect July 1, 1920, and thereafter enlisted men shall receive an increase of 10 per centum of their base pay for each five years of service in the Army, or service which by existing law is held to be the equivalent of Army service, such increase not to exceed 40 per centum.

" Under such regulations as the Secretary of War may prescribe, enlisted men in the sixth and seventh grades may be rated as specialists, and receive extra pay therefor per month, as follows: First class, \$25; second class, \$20; third class, \$15; fourth class, \$12; fifth class, \$8; sixth class, \$3. Of the total authorized number of enlisted men in the sixth and seventh grades, those rated as specialists of the first class shall not exceed 0.7 per centum; of the second class, 1.4 per centum; of the third class, 1.9 per centum; of the fourth class, 4.7 per centum; of the fifth class, 5 per centum; of the sixth class, 15.2 per centum. All laws and parts of laws providing for extra duty pay for enlisted men are repealed, to take effect July 1, 1920: *Provided*, That nothing in this section shall operate to reduce the pay which any enlisted man is now receiving, during his current enlistment and while he holds his present grade, nor to change the present rate of pay of any enlisted men now on the retired list.

" SEC. 4c. ASSIGNMENTS.— Officers and enlisted men shall be assigned to the several branches of the Army as hereafter directed, a suitable proportion of each grade in each branch, but the President may increase or diminish the number of officers or enlisted men assigned to any branch by not more than a total of 15 per centum: *Provided*, That the total number authorized in any grade by this Act is not exceeded: *Provided further*, That the number of enlisted men herein authorized for any branch shall include such number of Philippine Scouts as may be organized in that branch: *Provided further*, That no officer shall be transferred from one branch of the service to another under the provisions of this section without his own consent. Except as otherwise herein prescribed, chiefs and assistants to the chiefs of the several branches shall hereafter be appointed by the President, by and with the advice and consent of the Senate, for a period of four years, and such appointments shall not create vacancies. Appointment as chief of any branch shall be made from among officers commissioned in grades not below that of colonel, and as assistant from among officers of not less than fifteen years' commissioned service, who have demonstrated by actual and extended service in such branch or on similar duty that they are qualified for such appointment: *Provided*, That the chiefs of the several branches shall make recommendations to the Secretary of War for the appointment of their assistants: *Provided further*, That in making the first appointment to any such office created by this Act, the chief of a branch may be selected from among officers of not less than twenty-two years' commissioned service. Any officer who shall have served four years as chief of a branch, and who may subsequently be retired, shall be retired with the rank, pay and allowances authorized by law for the grade held by him as such chief. In time of peace no officer of the line shall be or remain detailed as a member of the General Staff Corps unless he has served for two of the next preceding six years in actual command of troops of one or more of the combatant arms; and in time of peace every officer serving in a grade below that of brigadier general shall perform duty with troops of one or more of the combatant arms for at least one year in every period of five con-

secutive years, except that officers of less than one year's commissioned service in the Regular Army may be detailed as students at service schools: *Provided*, That an officer commissioned in a staff corps shall not be or remain detailed as a member of the General Staff Corps unless he has served for one of the next preceding five years with troops of one or more of the combatant arms. In the administration of this provision; all duty performed between April 6, 1917, and July 1, 1920, inclusive, or as a student at service schools, other than those of the noncombatant branches, at any time, shall be regarded as satisfying the requirements of service with combatant arms. Existing laws in so far as they restrict the detail or assignment of officers are hereby repealed. The Secretary of War shall annually report to Congress the numbers, grades, and assignments of the officers and enlisted men of the Army, and the number, kinds, and strength of organizations pertaining to each branch of the service." [41 Stat. L. 760.]

For sec. 4, here amended, see 9 Fed. Stat. Ann. (2d ed.) 927.

SEC. 5. [Sec. 5 of Act of June 3, 1916, amended — secs. 5a and 5b added.] That section 5 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"SEC. 5. GENERAL STAFF CORPS.—The General Staff Corps shall consist of the Chief of Staff, the War Department General Staff and the General Staff with troops. The War Department General Staff shall consist of the Chief of Staff and four assistants to the Chief of Staff selected by the President from the general officers of the line, and eighty-eight other officers of grades not below that of captain. The General Staff with troops shall consist of such number of officers not below the grade of captain as may be necessary to perform the General Staff duties of the headquarters of territorial departments, armies, army corps, divisions, and brigades, and as military attachés abroad. In time of peace the detail of an officer as a member of the General Staff Corps shall be for a period of four years, unless sooner relieved, and such details shall be limited to officers whose names are borne on the list of General Staff Corps eligibles. The initial eligible list shall be prepared by a board consisting of the general of the army, the commandant of the General Staff College, the commandant of the General Service Schools, and two other general officers of the line, selected by the Secretary of War, who are not then members of the General Staff Corps. This board shall select and report the names of all officers of the Regular Army, National Guard, and Officers' Reserve Corps of the following classes who are recommended by them as qualified by education, military experience, and character for General Staff duty;

"(a) Those officers graduated from the Army Staff College or the Army War College prior to July 1, 1917, who, upon graduation, were specifically recommended for duty as commander or chief of staff of a division or higher tactical unit, or for detail in the General Staff Corps;

"(b) Those officers who, since April 6, 1917, have commanded a division or higher tactical unit, or have demonstrated by actual service in the World War that they are qualified for General Staff duty.

"After the completion of the initial General Staff Corps eligible list, the name of no officer shall be added thereto unless upon graduation from the General Staff School he is specifically recommended as qualified for General Staff duty, and hereafter no officer of the General Staff Corps except the Chief of Staff shall be assigned as a member of the War Department General Staff unless he is a grad-

uate of the General Staff College or his name is borne on the initial eligible list. The Secretary of War shall publish annually the list of officers eligible for General Staff duty, and such eligibility shall be noted in the annual Army Register. If at any time the number of officers available and eligible for detail to the General Staff is not sufficient to fill all vacancies therein, majors or captains may be detailed as acting General Staff Officers under such regulations as the President may prescribe: *Provided*, That in order to insure intelligent cooperation between the General Staff and the several noncombatant branches officers of such branches may be detailed as additional members of the General Staff Corps under such special regulations as to eligibility and redetail as may be prescribed by the President; but not more than two officers from each such branch shall be detailed as members of the War Department General Staff.

"The duties of the War Department General Staff shall be to prepare plans for national defense and the use of the military forces for that purpose, both separately and in conjunction with the naval forces, and for the mobilization of the manhood of the Nation and its material resources in an emergency, to investigate and report upon all questions affecting the efficiency of the Army of the United States, and its state of preparation for military operations; and to render professional aid and assistance to the Secretary of War and the Chief of Staff.

"All policies and regulations affecting the organization, distribution and training of the National Guard and the Organized Reserves, and all policies and regulations affecting the appointment, assignment, promotion, and discharge of reserve officers, shall be prepared by committees of appropriate branches or divisions of the War Department General Staff, to which shall be added an equal number of reserve officers, including reserve officers who hold or have held commissions in the National Guard, and whose names are borne on lists of officers suitable for such duty, submitted by the governors of the several States and Territories. For the purposes specified herein, they shall be regarded as additional members of the General Staff while so serving: *Provided*, That prior to January 1, 1921, National Guard officers who do not hold reserve commissions, if recommended by the governors of the several States and Territories, may be designated by the President as members of the committees herein provided for, and while so serving such officers shall receive the pay and allowances of their corresponding grades in the Regular Army.

"The duties of the General Staff with troops shall be to render professional aid and assistance to the general officers over them; to act as their agents in harmonizing the plans, duties, and operations of the various organizations and services under their jurisdiction, in preparing detailed instructions for the execution of the plans of the commanding generals, and in supervising the execution of such instructions.

"The Chief of Staff shall preside over the War Department General Staff and, under the direction of the President, or of the Secretary of War under the direction of the President, shall cause to be made, by the War Department General Staff, the necessary plans for recruiting, organizing, supplying, equipping, mobilizing, training, and demobilizing the Army of the United States and for the use of the military forces for national defense. He shall transmit to the Secretary of War the plans and recommendations prepared for that purpose by the War Department General Staff and advise him in regard thereto; upon the approval of such plans or recommendations by the Secretary of War, he shall act as the agent of the Secretary of War in carrying the same into effect. Whenever any plan or recommendation involving legislation by Congress affecting national defense or

the reorganization of the Army is presented by the Secretary of War to Congress, or to one of the committees of Congress, the same shall be accompanied, when not incompatible with the public interest, by a study prepared in the appropriate division of the War Department General Staff, including the comments and recommendations of said division for or against such plan, and such pertinent comments for or against the plan as may be made by the Secretary of War, the Chief of Staff, or individual officers of the division of the War Department General Staff in which the plan was prepared.

“ Hereafter, members of the General Staff Corps shall be confined strictly to the discharge of duties of the general nature of those specified for them in this section and in the Act of Congress approved February 14, 1903, and they shall not be permitted to assume or engage in work of an administrative nature that pertains to established bureaus or offices of the War Department, or that, being assumed or engaged in by members of the General Staff Corps, would involve impairment of the responsibility or initiative of such bureaus or offices, or would cause injurious or unnecessary duplication of or delay in the work thereof.

“ SEC. 5a. [ASSISTANT SECRETARY OF WAR.] Hereafter, in addition to such other duties as may be assigned him by the Secretary of War, the Assistant Secretary of War, under the direction of the Secretary of War, shall be charged with supervision of the procurement of all military supplies and other business of the War Department pertaining thereto and the assurance of adequate provision for the mobilization of matériel and industrial organizations essential to war-time needs. The Assistant Secretary of War shall receive a salary of \$10,000 per annum. There shall be detailed to the office of the Assistant Secretary of War from the branches engaged in procurement such number of officers and civilian employees as may be authorized by regulations approved by the Secretary of War. The offices of Second Assistant Secretary of War and Third Assistant Secretary of War are hereby abolished.

“ Under the direction of the Secretary of War chiefs of branches of the Army charged with the procurement of supplies for the Army shall report direct to the Assistant Secretary of War regarding all matters of procurement. He shall cause to be manufactured or produced at the Government arsenals or Government-owned factories of the United States all such supplies or articles needed by the War Department as said arsenals or Government-owned factories are capable of manufacturing or producing upon an economical basis. And all appropriations for manufacture of matériel pertaining to approved projects, which are placed with arsenals of Government-owned factories or other ordnance establishments shall remain available for such purpose until the close of the next ensuing fiscal year.

“ SEC. 5b. THE WAR COUNCIL.— The Secretary of War, the Assistant Secretary of War, the general of the Army, and the Chief of Staff shall constitute the War Council of the War Department, which council shall from time to time meet and consider policies affecting both the military and munitions problems of the War Department. Such questions shall be presented to the Secretary of War in the War Council, and his decision with reference to such questions of policy, after consideration of the recommendations thereon by the several members of the War Council, shall constitute the policy of the War Department with reference thereto.” [41 Stat. L. 762.]

For sec. 5, here amended, see 9 Fed. Stat. Ann. (2d ed.) 947.

SEC. 6. [Adjutant General's Department — sec. 6 of Act of June 3, 1916, amended.] That section 6 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"**SEC. 6. ADJUTANT GENERAL'S DEPARTMENT.**—The Adjutant General's Department shall consist of The Adjutant General with the rank of major general, one assistant with the rank of brigadier general, who shall be Chief of the Personnel Bureau, and one hundred and fifteen officers in grades from colonel to captain, inclusive. The Personnel Bureau shall be charged, under such regulations as may be prescribed by the Secretary of War, with the operating functions of procurement, assignment, promotion, transfer, retirement, and discharge of all officers and enlisted men of the Army: *Provided*, That territorial commanders and the chiefs of the several branches of the Army shall be charged with such of the above-described duties within their respective jurisdictions as may be prescribed by the Secretary of War." [41 Stat. L. 765.]

For sec. 6, here amended, see 9 Fed. Stat. Ann. (2d ed.) 952.

SEC. 7. [Inspector General's Department — sec. 7 of Act of June 3, 1916, amended.] That section 7 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"**SEC. 7. INSPECTOR GENERAL'S DEPARTMENT.**—The Inspector General's Department shall consist of one Inspector General with the rank of major general and sixty-one officers in grades from colonel to captain, inclusive." [41 Stat. L. 765.]

For sec. 7, here amended, see 9 Fed. Stat. Ann. (2d ed.) 955.

SEC. 8. [Judge Advocate General's Department — sec. 8 of Act of June 3, 1916, amended.] That section 8 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"**SEC. 8. JUDGE ADVOCATE GENERAL'S DEPARTMENT.**—The Judge Advocate General's Department shall consist of one Judge Advocate General with the rank of major general and one hundred and fourteen officers in grades from colonel to captain, inclusive: *Provided*, That immediately upon the passage of this Act the number of colonels of the Judge Advocate General's Department shall be increased by five, and the vacancies thus created shall be filled by promotion in the manner heretofore provided by law." [41 Stat. L. 765.]

For sec. 8, here amended, see 9 Fed. Stat. Ann. (2d ed.) 956.

SEC. 9. [Sec. 9 of Act of June 3, 1916, amended — sec. 9a added.] That section 9 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"**SEC. 9. QUARTERMASTER CORPS.**—The Quartermaster Corps shall consist of one Quartermaster General with the rank of major general, three assistants with the rank of brigadier general, one thousand and fifty officers in grades from colonel to second lieutenant, inclusive, and twenty thousand enlisted men. The Quartermaster General, under the authority of the Secretary of War, shall be charged with the purchase and procurement for the Army of all supplies of standard manufacture and of all supplies common to two or more branches but not with the purchase or the procurement of special or technical articles to be used or issued exclusively by other supply departments; with the direction of all work

pertaining to the construction, maintenance, and repair of buildings, structures, and utilities other than fortifications connected with the Army; with the storage and issue of supplies; with the operation of utilities; with the acquisition of all real estate and the issue of licenses in connection with Government reservations; with the transportation of the Army by land and water, including the transportation of troops and supplies by mechanical or animal means; with the furnishing of means of transportation of all classes and kinds required by the Army; and with such other duties not otherwise assigned by law as the Secretary of War may prescribe: *Provided*, That special and technical articles used or issued exclusively by other branches of the service may be purchased or procured with the approval of the Assistant Secretary of War by the branches using or issuing such articles, and the chief of each branch may be charged with the storage and issue of property pertaining thereto: *Provided further*, That utilities pertaining exclusively to any branch of the Army may be operated by such branches.

“SEC. 9a. FINANCE DEPARTMENT.— There is hereby created a Finance Department. The Finance Department shall consist of one Chief of Finance with the rank of brigadier general, one hundred and forty-one officers in grades from colonel to second lieutenant, inclusive, and nine hundred enlisted men.

“The Chief of Finance, under the authority of the Secretary, shall be charged with the disbursement of all funds of the War Department, including the pay of the Army and the mileage for officers and the accounting therefor; and with such other fiscal and accounting duties as may be required by law, or assigned to him by the Secretary of War: *Provided*, That under such regulations as may be prescribed by the Secretary of War, officers of the Finance Department, accountable for public moneys, may intrust moneys to other officers for the purpose of having them make disbursements as their agents, and the officer to whom the moneys are intrusted, as well as the officer who intrusts the moneys to him, shall be held pecuniarily responsible therefor to the United States.” [41 Stat. L. 766.]

For sec. 9, here amended, see 9 Fed. Stat. Ann. (2d ed.) 963.

SEC. 10. [Medical Department — sec. 10 of Act of June 3, 1916, amended.] That section 10 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

“SEC. 10. MEDICAL DEPARTMENT.— The Medical Department shall consist of one Surgeon General with the rank of major general, two assistants with the rank of brigadier general, the Medical Corps, the Dental Corps, the Veterinary Corps, the Medical Administrative Corps, a number of enlisted men which until June 30, 1921, shall not exceed 5 per centum of the authorized enlisted strength and thereafter 5 per centum of the actual strength, commissioned and enlisted, of the Regular Army, the Army Nurse Corps as now constituted by law, and such contract surgeons as are now authorized by law. The number of officers of the Medical Corps shall be six and one-half for every thousand, and of the Medical Administrative Corps, one for every two thousand, of the total enlisted strength of the Regular Army, authorized from time to time, and within the peace strength permitted by this Act. The number of officers of the Dental Corps shall be one for every thousand of the total strength of the Regular Army, authorized from time to time, and within the peace strength permitted by this Act. The number of officers of the Veterinary Corps shall be 175.

" Hereafter an officer of the Medical or Dental Corps shall be promoted to the grade of captain after three years' service, to the grade of major after twelve years' service, to the grade of lieutenant colonel after twenty years' service, and to the grade of colonel after twenty-six years' service. An officer of the Veterinary Corps shall be promoted to the grade of first lieutenant after three years' service, to the grade of captain after seven years' service, to the grade of major after fourteen years' service, to the grade of lieutenant colonel after twenty years' service, and to the grade of colonel after twenty-six years' service. An officer of the Medical Administrative Corps shall be promoted to the grade of first lieutenant after five years' service, and to the grade of captain after ten years' service. For purposes of promotion there shall be credited to officers of the Medical Department all active commissioned service in the Regular Army whenever rendered; and also all such service rendered since April 6, 1917, in the Army or in the National Guard when in active service under a call by the President, except service under a reserve commission while in attendance at a school or camp for the training of candidates for commission. To officers of the Dental Corps shall be credited their service as contract dental surgeons and acting dental surgeons, and to officers of the Veterinary Corps, their governmental veterinary service rendered prior to June 3, 1916. The length of service of any officer who shall have lost files by reason of sentence of court-martial or failure in examination for promotion shall be regarded as diminished to the equivalent of the service of the officer of his corps immediately preceding him in relative rank.

" Of the vacancies in the Medical Department existing on July 1, 1920, such number as the President may direct shall be filled by the appointment on that date in any grade authorized by this section, of persons under the age of fifty-eight years, other than officers of the Regular Army, who served as officers of the Army at some time between April 6, 1917, and the date of the passage of this Act, the selection to be made by the board of general officers provided for in section 24, and subject to the restrictions as to age therein prescribed. Appointees in the Medical Administrative Corps must also have had at least five years' enlisted service in the Medical Department, and the number appointed in the grades of captain and first lieutenant under the provisions of this paragraph shall not exceed one-half of the whole number authorized for said corps. For purposes of future promotion, any person so appointed in the Medical or Dental Corps shall be considered as having had, on the date of appointment, service equal to that of the junior officer of his grade and corps now in the Regular Army; and in the Veterinary or Medical Administrative Corps, sufficient service to bring him to his grade under the rules established in this section.

" Hereafter the members of the Army Nurse Corps shall have relative rank as follows: The superintendent shall have the relative rank of major; the assistant superintendents, director and assistant directors, the relative rank of captain; chief nurses, the relative rank of first lieutenant; head nurses and nurses, the relative rank of second lieutenant; and as regards medical and sanitary matters and all other work within the line of their professional duties shall have authority in and about military hospitals next after the officers of the Medical Department. The Secretary of War shall make the necessary regulations prescribing the rights and privileges conferred by such relative rank." [41 Stat. L. 766.]

For sec. 10, here amended, see 9 Fed. Stat. Ann. (2d ed.) 972.

SEC. 11. [Corps of Engineers — sec. 11 of Act of June 3, 1916, amended.] That section 11 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

" **SEC. 11. CORPS OF ENGINEERS.**— The Corps of Engineers shall consist of one Chief of Engineers with the rank of major general, one assistant with the rank of brigadier general, six hundred officers in grades from colonel to second lieutenant, inclusive, and twelve thousand enlisted men, such part of whom as the President may direct being formed into tactical units organized as he may prescribe." [41 Stat. L. 768.]

For sec. 11, here amended, see 9 Fed. Stat. Ann. (2d ed.) 990.

SEC. 12. [Sec. 12 of Act of June 3, 1916, amended — sec. 12a added.] That section 12 of said Act be, and the same is hereby, amended by striking out the same, and inserting the following in lieu thereof:

" **SEC. 12. ORDNANCE DEPARTMENT.**— The Ordnance Department shall consist of one Chief of Ordnance with the rank of major general, two assistants with the rank of brigadier general, three hundred and fifty officers in grades from colonel to second lieutenant, inclusive, and four thousand five hundred enlisted men.

" **SEC. 12a. CHEMICAL WARFARE SERVICE.**— There is hereby created a Chemical Warfare Service. The Chemical Warfare Service shall consist of one Chief of the Chemical Warfare Service with the rank of brigadier general, one hundred officers in grades from colonel to second lieutenant, inclusive, and one thousand two hundred enlisted men. The Chief of the Chemical Warfare Service under the authority of the Secretary of War shall be charged with the investigation, development, manufacture, or procurement and supply to the Army of all smoke and incendiary materials, all toxic gases, and all gas-defense appliances; the research, design, and experimentation connected with chemical warfare and its material; and chemical projectile filling plants and proving grounds; the supervision of the training of the Army in chemical warfare, both offensive and defensive, including the necessary schools of instruction; the organization, equipment, training, and operation of special gas troops, and such other duties as the President may from time to time prescribe." [41 Stat. L. 768.]

For sec. 12, here amended, see 9 Fed. Stat. Ann. (2d ed.) 993.

SEC. 13. [Sec. 13 of Act of June 3, 1916, amended — sec. 13a added.] That section 13 of said Act be, and the same is hereby, amended by striking out the same, and inserting the following in lieu thereof:

" **SEC. 13. SIGNAL CORPS.**— The Signal Corps shall consist of one Chief Signal Officer with the rank of major general, three hundred officers in grades from colonel to second lieutenant, inclusive, and five thousand enlisted men, such part of whom as the President may direct being formed into tactical units organized as he may prescribe.

" **SEC. 13a. AIR SERVICE.**— There is hereby created an Air Service. The Air Service shall consist of one Chief of the Air Service with the rank of major general, one assistant with the rank of brigadier general, one thousand five hundred and fourteen officers in grades from colonel to second lieutenant, inclusive, and sixteen thousand enlisted men, including not to exceed two thousand five hundred flying cadets, such part of whom as the President may direct being formed into tactical units, organized as he may prescribe: *Provided*, That not to exceed 10 per centum of the officers in each grade below that of brigadier general who fail to qualify as aircraft pilots or as observers within one year after the date of detail or assignment shall be permitted to remain detailed or assigned to the Air Service. Flying units shall in all cases be commanded by flying officers.

Officers and enlisted men of the Army shall receive an increase of 50 per centum of their pay while on duty requiring them to participate regularly and frequently in aerial flights; and hereafter no person shall receive additional pay for aviation duty except as prescribed in this section: *Provided*, That nothing in this Act shall be construed as amending existing provisions of law relating to flying cadets." [41 Stat. L. 768.]

For sec. 13, here amended, see 9 Fed. Stat. Ann. (2d ed.) 998.

SEC. 14. [Bureau of Insular Affairs — sec. 14 of Act of June 3, 1916, amended.] That section 14 of said Act be, and the same is hereby, amended by striking out the same, and inserting the following in lieu thereof:

"**SEC. 14. BUREAU OF INSULAR AFFAIRS.**— The officers of the Bureau of Insular Affairs shall be one Chief of the Bureau with the rank of brigadier general, and two officers below the grade of brigadier general: *Provided*, That during the tenure of office of the present Chief of the Bureau of Insular Affairs he shall have the rank of major general." [41 Stat. L. 769.]

For sec. 14, here amended, see 9 Fed. Stat. Ann. (2d ed.) 923.

SEC. 15. [Chaplains — sec. 15 of Act of June 3, 1916, amended.] That section 15 of said Act be, and the same is hereby, amended by striking out the same, and inserting the following in lieu thereof:

"**SEC. 15. CHAPLAINS.**— There shall be one chaplain for every twelve hundred officers and enlisted men of the Regular Army, exclusive of the Philippine Scouts and the unassigned recruits, authorized from time to time in accordance with law and within the peace strength permitted by this Act. Chaplains shall hereafter have rank, pay, and allowances according to length of active commissioned service in the Army, or, since April 6, 1917, in the National Guard while in active service under a call by the President, as follows: Less than five years, first lieutenant; five to fourteen years, captain; fourteen to twenty years, major; over twenty years, lieutenant colonel. One chaplain, of rank not below that of major may be appointed by the President, by and with the advice and consent of the Senate, to be chief of chaplains. He shall serve as such for four years, and shall have the rank, pay, and allowances of colonel while so serving. His duties shall include investigation into the qualifications of candidates for appointment as chaplain, and general coordination and supervision of the work of chaplains. Of the vacancies existing on July 1, 1920, such number as the President may direct shall be filled by appointment on that date of persons under the age of fifty-eight years, other than chaplains of the Regular Army, who served as chaplains in the Army at some time between April 6, 1917, and the date of the passage of this Act. Such appointments may be made in grades above the lowest under the same restrictions as to age and rank as are hereinafter prescribed for original appointments in other branches of the service, and in accordance with the recommendation of the board of officers provided for in section 24. For purposes of future promotion, persons so appointed shall be considered as having had, on the date of appointment, sufficient prior service to bring them to their respective grades under the rules of promotion established in this section." [41 Stat. L. 769.]

For sec. 15, here amended, see 9 Fed. Stat. Ann. (2d ed.) 1011.

SEC. 16. [Veterinarians — sec. 16 of Act of June 3, 1916, repealed.] That said Act be, and the same is hereby, amended by striking out section 16. [41 Stat. L. 769.]

For sec. 16, here repealed, see 9 Fed. Stat. Ann. (2d ed.) 931.

SEC. 17. [Infantry — tank units — sec. 17 of Act of June 3, 1916, amended.] That section 17 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

“**SEC. 17. INFANTRY.**—The Infantry shall consist of one Chief of Infantry with the rank of major general; four thousand two hundred officers in grades from colonel to second lieutenant, inclusive, and one hundred and ten thousand enlisted men, organized into such Infantry units as the President may direct. Hereafter all tank units shall form a part of the Infantry.” [41 Stat. L. 769.]

For sec. 17, here amended, see 9 Fed. Stat. Ann. (2d ed.) 939.

SEC. 18. [Cavalry — sec. 18 of Act of June 3, 1916, amended.] That section 18 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

“**SEC. 18. CAVALRY.**—The Cavalry shall consist of one Chief of Cavalry with the rank of major general, nine hundred and fifty officers in grades from colonel to second lieutenant, inclusive, and twenty thousand enlisted men, organized into Cavalry units as the President may direct.” [41 Stat. L. 770.]

For sec. 18, here amended, see 9 Fed. Stat. Ann. (2d ed.) 929.

SEC. 19. [Field Artillery — sec. 19 of Act of June 3, 1916, amended.] That section 19 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

“**SEC. 19. FIELD ARTILLERY.**—The Field Artillery shall consist of one Chief of Field Artillery with the rank of major general, one thousand nine hundred officers in grades from colonel to second lieutenant, inclusive, and thirty-seven thousand enlisted men, organized into Field Artillery units as the President may direct.” [41 Stat. L. 770.]

For sec. 19, here amended, see 9 Fed. Stat. Ann. (2d ed.) 936.

SEC. 20. [Coast Artillery Corps — sec. 20 of Act of June 3, 1916, amended.] That section 20 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

“**SEC. 20. COAST ARTILLERY CORPS.**—The Coast Artillery Corps shall consist of one Chief of Coast Artillery with the rank of major general, one thousand two hundred officers in grades from colonel to second lieutenant, inclusive, the warrant officers of the Army Mine Planter Service as now authorized by law, and thirty thousand enlisted men, organized into such Coast Artillery units as the President may direct.” [41 Stat. L. 770.]

For sec. 20, here amended, see 9 Fed. Stat. Ann. (2d ed.) 934.

SEC. 21. [Porto Rico Regiment of Infantry — sec. 21 of Act of June 3, 1916, amended.] That section 21 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

“**SEC. 21. PORTO RICO REGIMENT OF INFANTRY.**—The Porto Rico Regiment of Infantry and the officers and enlisted men of such regiment shall become a part of the Infantry branch herein provided for, and its officers shall, on July 1, 1920, be recommissioned in the Infantry with their present grades and dates of rank, unless promoted on that date in accordance with the provisions of section 24 hereof.” [41 Stat. L. 770.]

For sec. 21, here amended, see 9 Fed. Stat. Ann. (2d ed.) 945.

SEC. 22. [Philippine Scouts — sec. 22a added to Act of June 3, 1916.] That said Act be, and the same is hereby, amended by adding after section 22 a new section, to be numbered 22a, and to read as follows:

"SEC. 22a. PHILIPPINE SCOUTS.—The President is authorized to form the Philippine Scouts into such branches and tactical units as he may deem expedient, within the limit of strength prescribed by law, organized similarly to those of the Regular Army, the officers to be detailed from those authorized in section 4 hereof. On July 1, 1920, all officers of the Philippine Scouts on the active list, who are citizens of the United States and are found qualified under such regulations as the President may prescribe, shall be recommissioned in some one of the branches provided for by this Act, and those not so recommissioned shall continue to serve under their commissions as officers of the Philippine Scouts. No further appointments shall be made as officers of Philippine Scouts except of citizens of the Philippine Islands, who may be appointed in the grade of second lieutenant, under such regulations as the President may prescribe. Officers commissioned in the Philippine Scouts shall be subject to promotion, classification, and elimination, as hereinafter prescribed for officers of the Regular Army. Those now on the retired list shall hereafter receive the same pay as a retired second lieutenant of equal service. Officers of the Philippine Scouts shall hereafter be retired under the same conditions, and those hereafter placed on the retired list shall receive the same retired pay, as other officers of like grades and length of service, and shall be equally eligible for advancement on account of active duty performed since retirement. Nothing in this Act shall be construed to alter in any respect the present status of enlisted men of the Philippine Scouts." [41 Stat. L. 770.]

SEC. 23. [Provisional appointments — sec. 23 of Act of June 3, 1916, amended.] That section 23 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"SEC. 23. PROVISIONAL APPOINTMENTS.—All laws providing that certain appointments of officers shall be provisional for a period of time are hereby repealed." [41 Stat. L. 771.]

For sec. 23, here amended, see 9 Fed. Stat. Ann. (2d ed.) 1062.

SEC. 24. [Sec. 24 of Act of June 3, 1916, amended — secs. 24a, 24b, 24c, 24d, 24e added.] That section 24 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"SEC. 24. FILLING OF VACANCIES.—Not less than one-half of the total number of vacancies caused by this Act, exclusive of those in the Medical Department and among chaplains, shall be filled by the appointment, to date from July 1, 1920, and subject to such examination as the President may prescribe, of persons other than officers of the Regular Army who served as officers of the United States Army at any time between April 6, 1917, and the date of the passage of this Act. A suitable number of such officers shall be appointed in each of the grades below that of brigadier general, according to their qualifications for such grade as may be determined by the board of general officers provided for in this section. No such person above the age of fifty years shall be appointed in a combatant branch, or above the age of fifty-eight in a noncombatant branch. No such person below the age of forty-eight years shall be appointed in the grade of colonel, or below the age of forty-five years in the

grade of lieutenant colonel, or below the age of thirty-six years in the grade of major. Not less than three such persons shall be appointed to the grade of colonel in the Judge Advocate General's Department, and not less than eight to the grade of lieutenant colonel in the Judge Advocate General's Department, provided a sufficient number of applicants for such appointments are legally eligible and are found by the board provided for in this section to be properly qualified. Any person originally appointed under the provisions of this Act at an age greater than forty-five years shall, when retired, receive retired pay at the rate of 4 per centum of active pay for each complete year of commissioned service in the United States Army, the total to be not more than 75 per centum. Vacancies remaining in grades above the lowest which are not filled by such appointments shall be filled by promotion to date from July 1, 1920, in accordance with the provisions of section 24c hereof. The selection of officers to be appointed under the provisions of this section, under such rules and regulations as may be approved by the Secretary of War, shall be made by a board consisting of the General of the Army, three bureau chiefs and three general officers of the line, to be appointed by the Secretary of War: *Provided*, That no officer shall be appointed in any branch of the service under the provisions of this section except with the approval of the chief of such branch or officer acting as such.

" SEC. 24a. PROMOTION LIST.—For the purpose of establishing a more uniform system for the promotion of officers, based on equity, merit, and the interests of the Army as a whole, the Secretary of War shall cause to be prepared a promotion list, on which shall be carried the names of all officers of the Regular Army and Philippine Scouts below the grade of colonel, except officers of the Medical Department, chaplains, professors, the military storekeeper and certain second lieutenants of the Quartermaster Corps hereinafter specified. The names on the list shall be arranged, in general, so that the first name on the list shall be that of the officer having the longest commissioned service; the second name that of the officer having the next longest commissioned service, and so on. In computations for the purpose of determining the position of officers on the promotion list there shall be credited all active commissioned service in the Army performed while under appointment from the United States Government, whether in the Regular, provisional, or temporary forces, except service under a reserve commission while in attendance at a school or camp for the training of candidates for commission; also commissioned service in the National Guard while in active service since April 6, 1917, under a call by the President; and also commissioned service in the Marine Corps when detached for service with the Army by order of the President. In determining position on the promotion list, and relative rank, commissioned service in the Regular Army or the Philippine Scouts, if continuous to the present time, shall be counted as having begun on the date of original commission. The original promotion list shall be formed by a board of officers appointed by the Secretary of War, consisting of one colonel of each of six branches of the service in which officers are permanently commissioned under the terms of this Act, and one officer who, as a member of the personnel branch of the General Staff, has made a special study of merging the present promotion lists into a single list. The steps in the formation of the original promotion list shall be as follows:

" First, officers below the grade of colonel in the Corps of Engineers, Signal Corps, Infantry, Cavalry, Field Artillery, Coast Artillery Corps. Porto Rico Regiment, and Philippine Scouts, who were originally appointed in the Regular

Army or Philippine Scouts prior to April 6, 1917, shall be arranged without changing the present order of officers on the lineal lists of their own branches, but otherwise as nearly as practicable according to length of commissioned service. The following shall be omitted:

"(a) Officers who, as a result of voluntary transfer, occupy positions on the lineal list other than those they would have held if their original commissions had been in their present branches;

"(b) Officers of other branches appointed in the Field Artillery or the Coast Artillery Corps to fill vacancies created by the Act approved January 25, 1907;

"(c) Officers appointed in the Regular Army since January 1, 1903, while serving as officers of the Porto Rico Provisional Regiment of Infantry or Philippine Scouts;

"(d) Former officers of the Regular Army or Philippine Scouts who have been reappointed in these forces and who are now below normally placed officers of less commissioned service than theirs.

"Officers of classes (a), (b), and (c) shall be placed on the list in the positions they would have occupied if they had remained in their original branches of the service. Officers of class (d) shall be placed on the list in the position that would normally be occupied by an officer of continuous service equal to the total active commissioned service of such officers in the Army.

"Second, officers of the Judge Advocate General's Department, Quartermaster Corps, and Ordnance Department shall be placed on the list according to length of commissioned service, except those second lieutenants of the Quartermaster Corps who are found not qualified for promotion as provided in section 24b hereof.

"Third, captains and lieutenants of the Regular Army and Philippine Scouts, originally appointed since April 6, 1917, shall be arranged among themselves according to commissioned service rendered prior to November 11, 1918, and shall be placed at the foot of the list as prepared to this point.

"Fourth, persons to be appointed as captains or lieutenants under the provisions of section 24, hereof, shall be placed according to commissioned service rendered prior to November 11, 1918, among the officers referred to in the next preceding clause; and where such commissioned service is equal, officers now in the Regular Army shall precede persons to be appointed under the provisions of this Act, and the latter shall be arranged according to age.

"Fifth, persons appointed as lieutenant colonels or majors under the provisions of section 24 hereof, shall be placed immediately below all officers of the Regular Army who, on July 1, 1920, are promoted to those grades respectively under the provisions of section 24 hereof: *Provided*, That the board charged with the preparation of the promotion list may in its discretion, assign to any such officer a position on the list higher than that to which he would otherwise be entitled, but not such as to place him above any officer of greater age, whose commissioned service commenced prior to April 6, 1917, and who would precede him on the list under the general provisions of this section.

"Any former officer of the Regular Army and any retired officer who may hereafter be appointed to the active list in the manner provided by law shall be placed on the promotion list in accordance with his total active commissioned service; except that former officers appointed to field grades on July 1, 1920, under the provisions of section 24, may be placed as provided in the next preceding paragraph of this section. A reserve judge advocate appointed in the Regular Army shall be placed as provided in section 24c.

“ Other officers on original appointment shall be placed at the foot of the list. The place of any officer on the promotion list once established shall not thereafter be changed, except as the result of the sentence of a court-martial.

“ SEC. 24b. CLASSIFICATION OF OFFICERS.— Immediately upon the passage of this Act, and in September of 1921 and every year thereafter, the President shall convene a board of not less than five general officers, who shall arrange all officers in two classes, namely: Class A, consisting of officers who should be retained in the service, and Class B, of officers who should not be retained in the service. Until otherwise finally classified, all officers shall be regarded as belonging to Class A, and shall be promoted according to the provisions of this Act to fill any vacancies which may occur prior to such final classification. No officer shall be finally classified in Class B until he shall have been given an opportunity to appear before a court of inquiry. In such court of inquiry he shall be furnished with a full copy of the official records upon which the proposed classification is based and shall be given an opportunity to present testimony in his own behalf. The record of such court of inquiry shall be forwarded to the final classification board for reconsideration of the case, and after such consideration the finding of said classification board shall be final and not subject to further revision except upon the order of the President. Whenever an officer is placed in Class B, a board of not less than three officers shall be convened to determine whether such classification is due to his neglect, misconduct or avoidable habits. If the finding is affirmative, he shall be discharged from the Army; if negative, he shall be placed on the unlimited retired list with pay at the rate of $2\frac{1}{2}$ per centum of his active pay multiplied by the number of complete years of commissioned service, or service which under the provisions of this Act is counted as its equivalent, unless his total commissioned service or equivalent service shall be less than ten years, in which case he shall be honorably discharged with one year's pay. The maximum retired pay of an officer retired under the provisions of this section prior to January 1, 1924, shall be 75 per centum of active pay, and of one retired on or after that date, 60 per centum. If an officer is thus retired before the completion of thirty years' commissioned service, he may be employed on such active duty as the Secretary of War considers him capable of performing until he has completed thirty years' commissioned service. The board convened upon the passage of this Act shall also report the names of those second lieutenants of the Quartermaster Corps who were commissioned under the provisions of section 9 of the Act of June 3, 1916, who are not qualified for further promotion. The officers so reported shall continue in the grade of second lieutenant for the remainder of their service and the others shall be placed upon the promotion list according to their commissioned service, as hereinbefore provided.

“ SEC. 24c. PROMOTION OF OFFICERS.— Up to and including June 30, 1920, except as otherwise provided herein, promotions shall continue to be made in accordance with law existing prior to the passage of this Act, and on the basis of the number heretofore authorized for each grade and branch. On and after July 1, 1920, vacancies in grades below that of brigadier general shall be filled by the promotion of officers in the order in which they stand on the promotion list, without regard to the branches in which they are commissioned. Existing laws providing for the examination of officers for promotion are hereby repealed, except those relating to physical examination, which shall continue to be required for promotion to all grades below that of brigadier general, and except also those governing the examination of officers of the Medical, Dental, and

Veterinary Corps. Officers of said three Corps shall be examined in accordance with laws governing examination of officers of the Medical Corps, second lieutenants of the Veterinary Corps being subject to the same provisions as first lieutenants.

" SEC. 24d. TRANSFER OF OFFICERS.— Upon his own application any officer may be transferred to another branch without loss of rank or change of place on the promotion list.

" SEC. 24e. APPOINTMENT OF OFFICERS.— Except as otherwise herein provided, appointments shall be made in the grade of second lieutenant, first, from graduates of the United States Military Academy; second, from warrant officers and enlisted men of the Regular Army between the ages of twenty-one and thirty years, who have had at least two years' service; and, third, from reserve officers, and from officers, warrant officers and enlisted men of the National Guard, members of the enlisted Reserve Corps and graduates of technical institutions approved by the Secretary of War, all between the ages of twenty-one and thirty years. Any vacancy in the grade of captain in the Judge Advocate General's Department, not filled by transfer or detail from another branch, may, in the discretion of the President, be filled by appointment from reserve judge advocates between the ages of thirty and thirty-six years, and such appointee shall be placed upon the promotion list immediately below the junior captain on said list. Appointments in the Medical and Dental Corps shall be made in the grade of first lieutenant from reserve medical and dental officers, respectively, between the ages of twenty-three and thirty-two years; in the Veterinary Corps in the grade of second lieutenant from reserve veterinary officers between the ages of twenty-one and thirty years; and in the Medical Administrative Corps in the grade of second lieutenant from enlisted men of the Medical Department between the ages of twenty-one and thirty-two years, who have had at least two years' service. To be eligible for appointment in the Dental Corps, a candidate must be a graduate of a recognized dental college, and have been engaged in the practice of his profession for at least two years subsequent to graduation. Appointments as chaplains shall be made from among persons duly accredited by some religious denomination or organization, and of good standing therein, between the ages of twenty-three and forty-five years. Former officers of the Regular Army and retired officers may be reappointed to the active list, if found competent for active duty, and shall be commissioned in the grades determined by the places assigned to them on the promotion list under the provisions of section 24a hereof." [41 Stat. L. 771.]

For sec. 24, here amended, see 9 Fed. Stat. Ann. (2d ed.) 1060.

SEC. 25. [Detached officers and enlisted men — sec. 25 of Act of June 3, 1916, amended.] That section 25 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

" SEC. 25. DETACHED OFFICERS AND ENLISTED MEN.— All officers and enlisted men authorized by law and not assigned to duty with any branch or bureau herein provided for shall be carried on the Detached Officers' List and Detached Enlisted Men's List, respectively." [41 Stat. L. 775.]

For sec. 25, here amended, see 9 Fed. Stat. Ann. (2d ed.) 1110.

SEC. 26. [Retirement of officers of Philippine Scouts — sec. 26 of Act of June 3, 1916, repealed.] That said Act be, and the same is hereby, amended by striking out section 26. [41 Stat. L. 775.]

For sec. 26, here repealed, see 9 Fed. Stat. Ann. (2d ed.) 1168.

same grade and length of active service, and mileage from his home to his first station and from his last station to his home, but shall not be entitled to retirement or retired pay." [41 Stat. L. 775.]

For sec. 37, here amended, see 9 Fed. Stat. Ann. (2d ed.) 1016.

SEC. 33. [Secs. 40, 41, 42, 43, 45 and 46 of Act of June 3, 1916, repealed — secs. 40, 40a, 40b added.] That said Act be, and the same is hereby, amended by striking out sections 40, 41, 42, 43, 45, and 46 and inserting the following in lieu thereof:

" SEC. 40. RESERVE OFFICERS' TRAINING CORPS — ORGANIZATION.— The President is hereby authorized to establish and maintain in civil educational institutions a Reserve Officers' Training Corps, one or more units in number, which shall consist of a senior division organized at universities and colleges granting degrees, including State universities and those State institutions that are required to provide instruction in military tactics under the Act of Congress of July 2, 1862, donating lands for the establishment of colleges where the leading object shall be practical instruction in agriculture and the mechanic arts, including military tactics, and at those essentially military schools not conferring academic degrees, specially designated by the Secretary of War as qualified, and a junior division organized at all other public and private educational institutions, and each division shall consist of units of the several arms, corps, or services in such number and such strength as the President may prescribe: *Provided*, That no such unit shall be established or maintained at any institution until an officer of the Regular Army shall have been detailed as professor of military science and tactics, nor until such institution shall maintain under military instruction at least one hundred physically fit male students, except that in the case of units other than infantry, cavalry or artillery, the minimum number shall be fifty: *Provided further*, That except at State institutions described in this section, no unit shall be established or maintained in an educational institution until the authorities of the same agree to establish and maintain a two years' elective or compulsory course of military training as a minimum for its physically fit male students, which course, when entered upon by any student, shall, as regards such student, be a prerequisite for graduation unless he is relieved of this obligation by regulations to be prescribed by the Secretary of War.

" SEC. 40a. RESERVE OFFICERS' TRAINING CORPS COURSES.— The Secretary of War is hereby authorized to prescribe standard courses of theoretical and practical military training for units of the Reserve Officers' Training Corps, and no unit of such corps shall be organized or maintained at any educational institution the authorities of which fail or neglect to adopt into their curriculum the prescribed courses of military training or to devote at least an average of three hours per week per academic year to such military training, except as provided in section 47c of this Act.

" SEC. 40b. PERSONNEL FOR DUTY WITH RESERVE OFFICERS' TRAINING CORPS.— The President is hereby authorized to detail such numbers of officers, warrant officers, and enlisted men of the Regular Army, either active or retired, as may be necessary for duty as professors of military science and tactics, assistant professors of military science and tactics, and military instructors at educational institutions where one or more units of the Reserve Officers' Training Corps are maintained. In time of peace retired officers, retired warrant officers, or retired

enlisted men shall not be detailed under the provisions of this section without their consent, and no officer on the active list shall be detailed for recruiting service or for duty at a school or college, not including schools of the service, where officers on the retired list can be secured who are competent for such duty. Hereafter retired officers below the grade of brigadier general and retired warrant officers and enlisted men shall, when on active duty, receive full pay and allowances." [41 Stat. L. 776.]

For secs. 40, 41, 42, 43, 45 and 46, here repealed, see 9 Fed. Stat. Ann. (2d ed.) 1020, 1021, 1022.

SEC. 34. [SECS. 47, 48, 49, 50, 51, 52, 53, 54 of Act of June 3, 1916, repealed — SECS. 47, 47a, 47b, 47c, 47d added.] That said Act be, and the same is hereby, amended by striking out sections 47, 48, 49, 50, 51, 52, 53, and 54 and inserting the following in lieu thereof:

"SEC. 47. SUPPLIES FOR RESERVE OFFICERS' TRAINING CORPS.—The Secretary of War, under such regulations as he may prescribe, is hereby authorized to issue to institutions at which one or more units of the Reserve Officers' Training Corps are maintained such public animals, transportation, arms, ammunition, supplies, tentage, equipment, and uniforms belonging to the United States as he may deem necessary, and to forage at the expense of the United States public animals so issued, to pay commutation in lieu of uniforms at a rate to be fixed annually by the Secretary of War, and to authorize such expenditures from proper Army appropriations as he may deem necessary for the efficient maintenance of the Reserve Officers' Training Corps. He shall require from each institution to which property of the United States is issued a bond in the value of the property issued for the care and safe-keeping thereof, except for uniforms, expendable articles, and supplies expended in operation, maintenance, and instruction, and for its return when required.

"SEC. 47a. RESERVE OFFICERS' TRAINING CORPS CAMPS.—The Secretary of War is hereby authorized to maintain camps for the further practical instruction of the members of the Reserve Officers' Training Corps, no such camps to be maintained for a longer period than six weeks in any one year, except in time of actual or threatened hostilities; to transport members of such corps to and from such camps at the expense of the United States so far as appropriations will permit, to subsist them at the expense of the United States while traveling to and from such camps and while remaining therein so far as appropriations will permit, or in lieu of transporting them to and from such camps and subsisting them while en route, to pay them travel allowances at the rate of 5 cents per mile for the distance by the shortest usually traveled route from the places from which they are authorized to proceed to the camp and for the return travel thereto, and to make the payment of travel allowances for the return journey in advance of the actual performance of the same, and to admission to military hospitals at such camps, and to furnish medical attendance and supplies; to use the troops of the Regular Army, and such Government property as he may deem necessary, for the military training of the members of such corps while in attendance at such camps; and to prescribe regulations for the government of such camps.

"SEC. 47b. APPOINTMENT OF GRADUATES OF RESERVE OFFICERS' TRAINING CORPS AS RESERVE OFFICERS.—The President alone, under such regulations as he may prescribe, is hereby authorized to appoint as a reserve officer of the Army of the United States any graduate of the senior division of the Reserve

Officers' Training Corps who shall have satisfactorily completed the further training provided for in section 47a of this Act, or any graduate of the junior division who shall have satisfactorily completed the courses of military training prescribed for the senior division and the further training provided for in section 47a of this Act, and shall have participated in such practical instruction subsequent to graduation as the Secretary of War shall prescribe, who shall have arrived at the age of twenty-one years and who shall agree, under oath in writing, to serve the United States in the capacity of a reserve officer of the Army of the United States during a period of at least five years from the date of his appointment as such reserve officer, unless sooner discharged by proper authority: *Provided*, That no reserve officer appointed pursuant to this Act shall be entitled to retirement, or to retired pay, and shall be eligible for pension only for disability incurred in line of duty in active service or while serving with the Army pursuant to provisions of this Act.

“ SEC. 47c. PAY AND COMMUTATION OF SUBSISTENCE, RESERVE OFFICERS' TRAINING CORPS.—When any member of the senior division of the Reserve Officers' Training Corps has completed two academic years of service in that division, and has been selected for advanced training by the president of the institution and by the professor of military science and tactics, and has agreed in writing to continue in the Reserve Officers' Training Corps for the remainder of his course at the institution, devoting five hours per week to the military training prescribed by the Secretary of War and has agreed in writing to pursue the course in camp training prescribed by the Secretary of War, he may be furnished at the expense of the United States commutation of subsistence at such rate, not exceeding the cost of the garrison ration prescribed for the Army, as may be fixed by the Secretary of War, during the remainder of his service in the Reserve Officers' Training Corps, not exceeding two years: *Provided*, That any medical, dental, or veterinary student may be admitted to a Medical, Dental, or Veterinary Corps unit of the Reserve Officers' Training Corps for a course of training at the rate of ninety hours of instruction per annum for the four collegiate years, and if at the end of two years of such training he has been selected by the professor of military science and tactics and the head of the institution for advanced training, and has agreed in writing to continue in the Reserve Officers' Training Corps for the remainder of his course at the institution, and has agreed in writing to pursue the course in camp training prescribed by the Secretary of War, he may be furnished, at the expense of the United States, with commutation of subsistence at such rate not exceeding the cost of the garrison ration prescribed for the Army, as may be fixed by the Secretary of War, during the remainder of his service in the Reserve Officers' Training Corps, not exceeding two years: *Provided further*, That any reserve officer who is also a medical, dental, or veterinary student may be admitted to such Medical, Dental, or Veterinary Corps unit for such training, under such rules and regulations as the Secretary of War may prescribe: *Provided further*, That members of the Reserve Officers' Training Corps, or other persons authorized by the Secretary of War to attend advanced course camps, shall be paid for attendance at such camps at the rate prescribed for soldiers of the seventh grade of the Regular Army.

“ SEC. 47d. TRAINING CAMPS.—The Secretary of War is hereby authorized to maintain, upon military reservations or elsewhere, schools or camps for the military instruction and training, with a view to their appointment as reserve officers or noncommissioned officers, of such warrant officers, enlisted men, and

civilians as may be selected upon their own application; to use for the purpose of maintaining said camps and imparting military instruction and training thereat, such arms, ammunition, accoutrements, equipments, tentage, field equipage, and transportation belonging to the United States as he may deem necessary; to furnish at the expense of the United States uniforms, subsistence, transportation by the most usual and direct route within such limits as to territory as the Secretary of War may prescribe, or in lieu of furnishing such transportation and subsistence to pay them travel allowances at the rate of 5 cents per mile for the distance by the shortest usually traveled route from the places from which they are authorized to proceed to the camp, and for the return travel thereto, and to make the payment of travel allowances for the return journey in advance of the actual performance of the same, and medical attendance and supplies to persons receiving instruction at said camps during the period of their attendance thereat, to authorize such expenditures, from proper Army appropriations, as he may deem necessary for water, fuel, light, temporary structures, not including quarters for officers nor barracks for men, screening, and damages resulting from field exercises, and other expenses incidental to the maintenance of said camps, and the theoretical winter instruction in connection therewith; and to sell to persons receiving instructions at said camps, for cash and at cost price, plus 10 per centum, quartermaster and ordnance property, the amount of such property sold to any one person to be limited to that which is required for his proper equipment. All moneys arising from such sales shall remain available throughout the fiscal year following that in which the sales are made, for the purpose of that appropriation from which the property sold was authorized to be supplied at the time for the sale. The Secretary of War is authorized further to prescribe the courses of theoretical and practical instruction to be pursued by persons attending the camps authorized by this section; to fix the periods during which such camps shall be maintained; to prescribe rules and regulations for the government thereof; and to employ thereat officers, warrant officers, and enlisted men of the Regular Army in such numbers and upon such duties as he may designate." [41 Stat. L. 777.]

For sec. 47, here repealed, see 9 Fed. Stat. Ann. (2d ed.) 1022.

For secs. 48, 49, 50, see same volume, p. 1024.

For secs. 51 and 52, see same volume, p. 1019.

For sec. 53, see same volume, p. 1062.

For sec. 54, see vol. 6, p. 470.

SEC. 35. [Secs. 55 and 56 of Act of June 3, 1916, repealed — secs. 55, 55a, 55b, 55c added.] That said Act be, and the same is hereby, amended by striking out sections 55 and 56 and inserting the following in lieu thereof:

“ **SEC. 55. THE ENLISTED RESERVE CORPS.**— The Enlisted Reserve Corps shall consist of persons voluntarily enlisted therein. The period of enlistment shall be three years, except in the case of persons who served in the Army, Navy, or Marine Corps at some time between April 6, 1917, and November 11, 1918, who may be enlisted for one year periods and who, in time of peace, shall be entitled to discharge within ninety days if they make application therefor. Enlistments shall be limited to persons eligible for enlistment in the Regular Army who have had such military or technical training as may be prescribed by regulations of the Secretary of War. All enlistments in force at the outbreak of war, or entered into during its continuation, whether in the Regular Army or the Enlisted Reserve Corps, shall continue in force until six months after its termination unless sooner terminated by the President.

"**SEC. 55a. ORGANIZATION OF THE ENLISTED RESERVE CORPS.**—The President may form any or all members of the Enlisted Reserve Corps into tactical organizations similar to those of the Regular Army, similarly armed, uniformed, and equipped, and composed so far as practicable of men residing in the same locality, may officer them by the assignment of reserve officers or officers of the Regular Army, active or retired, and may detail such personnel of the Army as may be necessary for the administration of such organizations and the care of Government property issued to them.

"**SEC. 55b. RESERVISTS ON ACTIVE DUTY.**—Members of the Enlisted Reserve Corps may be placed on active duty, as individuals or organizations, in the discretion of the President, but except in time of a national emergency expressly declared by Congress no reservist shall be ordered to active duty in excess of the number permissible under appropriations made for this specific purpose, nor for a longer period than fifteen days in any one calendar year without his own consent. While on active duty they shall receive the same pay and allowances as other enlisted men of like grades and length of service.

"**SEC. 55c. MILITARY EQUIPMENT AND INSTRUCTORS AT OTHER SCHOOLS AND COLLEGES.**—The Secretary of War is hereby authorized, under such regulations as he may prescribe, to issue such arms, tentage, and equipment as he shall deem necessary for proper military training to schools and colleges, other than those provided for in section 40 of this Act, having a course of military training prescribed by the Secretary of War and having not less than one hundred physically fit male students above the age of fourteen years; and the Secretary of War is hereby authorized to detail such available active or retired officers, warrant officers, and enlisted men of the Regular Army as he may deem necessary to said schools and colleges, other than those provided for in section 40 of this Act: *Provided*, That while so detailed they shall receive active pay and allowances: *Provided further*, That in time of peace retired officers, warrant officers, or enlisted men shall not be detailed under the provisions of this section without their consent." [41 Stat. L. 780.]

For sec. 55, here repealed, see 9 Fed. Stat. Ann. (2d ed.) 1039.

For sec. 56, see same volume, p. 1103.

SEC. 36. [Organization of National Guard units — sec. 60 of Act of June 3, 1916, amended.] That section 60 of said Act be, and the same is hereby, amended by adding the following at the end thereof: "Until July 1, 1921, companies and corresponding units of the National Guard may be recognized at a minimum enlisted strength of fifty: *Provided*, That the National Guard of any State, Territory, and the District of Columbia may include such detachments or parts of units as may be necessary in order to form complete tactical units when combined with troops of other States." [41 Stat. L. 780.]

For sec. 60, here amended, see 6 Fed. Stat. Ann. (2d ed.) 436.

SEC. 37. [Enlistments in the National Guard — sec. 69 of Act of June 3, 1916, amended.] That section 69 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"**SEC. 69.** Original enlistments in the National Guard shall be for a period of three years and subsequent enlistments for periods of one year each: *Provided*, That persons who have served in the Army for not less than six months, and have been honorably discharged therefrom, may, within two years

after the passage of this Act, enlist in the National Guard for a period of one year and reenlist for like periods." [41 Stat. L. 781.]

For sec. 69, here amended, see 6 Fed. Stat. Ann. (2d ed.) 439.

SEC. 38. [Federal enlistment contract—sec. 70 of Act of June 3, 1916, amended.] That section 70 of said Act be, and the same is hereby amended by striking out the same and inserting the following in lieu thereof:

"SEC. 70. Men, enlisting in the National Guard of the several States, Territories, and the District of Columbia, shall sign an enlistment contract and subscribe to the following oath of enlistment: 'I do hereby acknowledge to have voluntarily enlisted this _____ day of _____, 19—, as a soldier in the National Guard of the United States and of the State of _____, for the period of three (or one) year —, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of _____, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the President of the United States and of the governor of the State of _____, and of the officers appointed over me according to law and the rules and Articles of War.'" [41 Stat. L. 781.]

For sec. 70, here amended, see 6 Fed. Stat. Ann. (2d ed.) 439.

SEC. 39. [Federal enlistment contract—oath—sec. 71 of Act of June 3, 1916, repealed.] That said Act be, and the same is hereby, amended by striking out section 71. [41 Stat. L. 781.]

For sec. 71, here repealed, see 6 Fed. Stat. Ann. (2d ed.) 440.

SEC. 40. [Discharge of enlisted men from the National Guard—sec. 72 of Act of June 3, 1916, amended.] That section 72 of said Act be, and the same is hereby amended, by striking out the same, and inserting the following in lieu thereof:

"SEC. 72. DISCHARGE OF ENLISTED MEN FROM THE NATIONAL GUARD.—An enlisted man discharged from service in the National Guard, except when drafted into the military service of the United States under the provisions of section 111 of this Act, shall receive a discharge in writing in such form and with such classification as is or shall be prescribed for the Regular Army, and in time of peace discharges may be given prior to the expiration of terms of enlistment under such regulations as the President may prescribe." [41 Stat. L. 781.]

For sec. 72, here amended, see 6 Fed. Stat. Ann. (2d ed.) 440.

SEC. 41. [Qualifications for National Guard officers—sec. 74 of Act of June 3, 1916, amended.] That section 74 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"SEC. 74. QUALIFICATIONS FOR NATIONAL GUARD OFFICERS.—Persons hereafter commissioned as officers of the National Guard shall not be recognized as such under any of the provisions of this Act unless they shall have been selected from the following classes, and shall have taken and subscribed to the oath of office prescribed in the preceding section of this Act; officers or enlisted men of the National Guard; officers, active or retired, reserve officers, and former

officers of the Army, Navy, or Marine Corps, enlisted men and former enlisted men of the Army, Navy, or Marine Corps who have received an honorable discharge therefrom; graduates of the United States Military and Naval Academies; and graduates of schools, colleges, universities, and officers' training camps, where they have received military instruction under the supervision of an officer of the Regular Army who certified their fitness for appointment as commissioned officers; and for the technical branches or Staff Corps and departments, such other civilians as may be specially qualified for duty therein." [41 Stat. L. 781.]

For sec. 74, here amended, see 6 Fed. Stat. Ann. (2d ed.) 440.

SEC. 42. [The National Guard Reserve — enlistments — oath — pay and allowances — sec. 78 of Act of June 3, 1916, amended.] That section 78 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"SEC. 78. That hereafter, men duly qualified under regulations prescribed by the Secretary of War may enlist in the National Guard Reserve for a period of one or three years, under such regulations as the Secretary of War shall prescribe, and on so enlisting they shall subscribe to the following enlistment contract and take the oath therein specified: 'I do hereby acknowledge to have voluntarily enlisted this _____ day of _____, 19—, as a soldier in the National Guard Reserve of the United States and of the State of _____, for a period of one (or three) year—, unless sooner discharged by proper authority, and I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of _____, and that I will serve them honestly and faithfully against all their enemies whomsoever and that I will obey the orders of the President of the United States and the governor of the State of _____, and of the officers appointed over me according to law and the rules and Articles of War': *Provided*, That members of said reserve, officers and enlisted men, when engaged in field or coast defense training with the active National Guard, shall receive the same Federal pay and allowances as those occupying like grades on the active list of said guard when likewise engaged: *Provided further*, That, except as otherwise specifically provided in this Act, no commissioned or enlisted reservist shall receive any pay or allowances out of any appropriation made by Congress for National Guard purposes." [41 Stat. L. 782.]

For sec. 78, here amended, see 6 Fed. Stat. Ann. (2d ed.) 441.

SEC. 43. [Reserve battalions for recruit training— sec. 79 of Act of June 3, 1916, repealed.] That said Act be, and the same is hereby, amended by striking out section 79. [41 Stat. L. 782.]

For sec. 79, here repealed, see 6 Fed. Stat. Ann. (2d ed.) 441.

SEC. 44. [Militia Bureau of the War Department — sec. 81 of Act of June 3, 1916, amended.] That section 81 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"SEC. 81. MILITIA BUREAU OF THE WAR DEPARTMENT.— The Militia Division of the War Department shall hereafter be known as the Militia Bureau of the War Department. After January 1, 1921, the Chief of the Militia Bureau shall be appointed by the President, by and with the advice and consent of the Senate,

by selection from lists of present and former National Guard officers, recommended by the Governors of the several States and Territories as suitable for such appointment, who hold commissions in the Officers' Reserve Corps, who have had ten or more years' commissioned service in the National Guard, at least five of which has been in the line, and who have attained at least the grade of major. He shall hold office for four years, unless sooner removed for cause, and shall have the rank, pay and allowances of a major general of the Regular Army during his tenure of office, but shall not be entitled to retirement or retired pay. While serving as chief, his reserve commission shall continue in force, and shall not be terminated except for cause assigned. Until the chief is appointed, as provided in this section, the President may assign an officer of the Regular Army, not below the grade of colonel, to perform the duties of chief. For duty in the Militia Bureau and for the instruction of the National Guard the President shall assign such number of officers and enlisted men of the Regular Army as he may deem necessary. The President may also assign, with their consent, and within the limits of the appropriations previously made for this specific purpose, not exceeding five hundred officers of the National Guard, who hold reserve commissions, to duty with the Regular Army, in addition to those attending service schools; and while so assigned they shall receive the same pay and allowances as Regular Army officers of like grades, to be paid out of the whole fund appropriated for the support of the militia." [41 Stat. L. 782.]

For sec. 81, here amended, see 9 Fed. Stat. Ann. (2d ed.) 475.

SEC. 45. [Animals for National Guard — sec. 89 of Act of June 3, 1916, amended.] That section 89 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"**SEC. 89. ANIMALS FOR NATIONAL GUARD.**—Funds allotted by the Secretary of War for the support of the National Guard shall be available for the purchase, under such regulations as the Secretary of War may prescribe, of animals conforming to the Regular Army standards for the training of the National Guard, said animals to remain the property of the United States and to be used solely for military purposes.

"The number of animals so issued shall not exceed thirty-two for each battery of field artillery or troop of cavalry, and a proportionate number for other mounted organizations, under such regulations as the Secretary of War may prescribe; and the Secretary of War is further authorized to issue, in lieu of purchase, for the training of such organizations, condemned Army animals which are no longer fit for service, but which may be suitable for the purposes of instruction, such animals to be sold as now provided by law when said purposes shall have been served." [41 Stat. L. 783.]

For sec. 89, here amended, see 6 Fed. Stat. Ann. (2d ed.) 460.

SEC. 46. [Funds allotted for support of National Guard — availability for purchases and help — sec. 90 of Act of June 3, 1916, amended.] That section 90 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"**SEC. 90.** Funds allotted by the Secretary of War for the support of the National Guard shall be available for the purchase and issue of forage, bedding, shoeing, and veterinary services, and supplies for the Government animals issued to any organization, and for the compensation of competent help for the care of the material, animals, and equipment thereof, under such regulations

as the Secretary of War may prescribe: *Provided*, That the men to be compensated, not to exceed five for each organization, shall be duly enlisted therein and shall be detailed by the organization commander, under such regulations as the Secretary of War may prescribe, and shall be paid by the United States disbursing officer in each State, Territory, and the District of Columbia." [41 Stat. L. 783.]

For sec. 90, here amended, see 6 Fed. Stat. Ann. (2d ed.) 461.

SEC. 47. [Pay for the National Guard officers — sec. 109 of Act of June 3, 1916, amended.] That section 109 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"**SEC. 109. PAY FOR THE NATIONAL GUARD OFFICERS.**— Captains and lieutenants belonging to organizations of the National Guard shall receive compensation at the rate of one-thirtieth of the monthly base pay of their grades as prescribed for the Regular Army for each regular drill or other period of instruction authorized by the Secretary of War, not exceeding five in any one calendar month, at which they shall have been officially present for the entire required period, and at which at least 50 per centum of the commissioned strength and 60 per centum of the enlisted strength attend and participate for not less than one and one-half hours. Captains commanding organizations shall receive \$240 a year in addition to the drill pay herein prescribed. Officers above the grade of captain shall receive not more than \$500 a year, and officers below the grade of major, not belonging to organizations, shall receive not more than four-thirtieths of the monthly base pay of their grades for satisfactory performance of their appropriate duties under such regulations as the Secretary of War may prescribe. Pay under the provisions of this section shall not accrue to any officer during a period when he shall be lawfully entitled to the same pay as an officer of corresponding grade in the Regular Army: *Provided*, That section 9 of an Act amending the Act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' approved May 18, 1917, approved August 31, 1918, shall also apply to the purchase of uniforms, accouterments, and equipment for cash by officers of the National Guard and National Guard Reserve, whether in State or Federal service, on proper identification and under such rules and regulations as the Secretary of War may prescribe." [41 Stat. L. 783.]

For sec. 109, here amended, see 6 Fed. Stat. Ann. (2d ed.) 443.

SEC. 48. [Pay for National Guard enlisted men — sec. 110 of Act of June 3, 1916, amended.] That section 110 of said Act be, and the same is hereby, amended by striking out the first paragraph and inserting the following in lieu thereof:

"**SEC. 110. PAY FOR NATIONAL GUARD ENLISTED MEN.**— Each enlisted man belonging to an organization of the National Guard shall receive compensation at the rate of one-thirtieth of the initial monthly pay of his grade in the Regular Army for each drill ordered for his organization where he is officially present and in which he participates for not less than one and one-half hours, not exceeding eight in any one calendar month, and not exceeding sixty drills in one year: *Provided*, That no enlisted man shall receive any pay under the provisions of this section for any month in which he shall have attended less than 60 per centum of the drills or other exercises prescribed for his organization: *Provided further*, That the proviso contained in section 92 of this Act

shall not operate to prevent the payment of enlisted men actually present at any duly ordered drill or other exercise: *And provided further*, That periods of any actual military duty equivalent to the drills herein prescribed (except those periods of service for which members of the National Guard may become lawfully entitled to the same pay as officers and enlisted men of the corresponding grades in the Regular Army) may be accepted as service in lieu of such drills when so provided by the Secretary of War." [41 Stat. L. 784.]

For sec. 110, here amended, see 6 Fed. Stat. Ann. (2d ed.) 443.

SEC. 49. [National Guard when drafted into Federal service — sec. 111 of Act of June 3, 1916, amended.] That section 111 of said Act be, and the same is hereby, amended by striking out the same and inserting the following in lieu thereof:

"**SEC. 111. NATIONAL GUARD WHEN DRAFTED INTO FEDERAL SERVICE.**— When Congress shall have authorized the use of the armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination, as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war or emergency, unless sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Army, whose permanent retention in the military service is not contemplated by law, and shall be organized into units corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct. The commissioned officers of said organizations shall be appointed from among the members thereof; officers with rank not above that of colonel to be appointed by the President alone, and all other officers to be appointed by the President by and with the advice and consent of the Senate. Officers and enlisted men while in the service of the United States under the terms of this section shall have the same pay and allowances as officers and enlisted men of the Regular Army of the same grades and the same prior service. On the termination of the emergency all persons so drafted shall be discharged from the Army, shall resume their membership in the militia, and, if the State so provide, shall continue to serve in the National Guard until the dates upon which their enlistments entered into prior to their draft, would have expired if uninterrupted." [41 Stat. L. 784.]

For sec. 111, here amended, see 6 Fed. Stat. Ann. (2d ed.) 444.

SEC. 50. [Temporary vacancies in Regular Army due to details to the National Guard — sec. 114 of Act of June 3, 1916, repealed.] That said Act be, and the same is hereby, amended by striking out section 114. [41 Stat. L. 785.]

For sec. 114, here repealed, see 9 Fed. Stat. Ann. (2d ed.) 1054.

SEC. 51. [Miscellaneous provisions — sec. 127a added to Act of June 3, 1916.] That said Act be, and the same is hereby, amended by inserting after section 127 a new section, to be numbered 127a, and to read as follows:

"**SEC. 127a. MISCELLANEOUS PROVISIONS.**— Hereafter no detail, rating, or assignment of an officer shall carry advanced rank, except as otherwise specifically provided herein: *Provided*, That in lieu of the 50 per centum increase of

CHAPTER II.

[Articles of War.]

[SEC. 1.] [New Articles of War enacted in place of former Articles.] The articles included in this section shall be known as the Articles of War and shall at all times and in all places govern the armies of the United States. [41 Stat. L. 787.]

I. PRELIMINARY PROVISIONS.

ARTICLE 1. DEFINITIONS.—The following words when used in these articles shall be construed in the sense indicated in this article, unless the context shows that a different sense is intended, namely:

- (a) The word "officer" shall be construed to refer to a commissioned officer;
- (b) The word "soldier" shall be construed as including a noncommissioned officer, a private, or any other enlisted man;
- (c) The word "company" shall be understood as including a troop or battery; and
- (d) The word "battalion" shall be understood as including a squadron. [41 Stat. L. 787.]

ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles: *Provided*, That nothing contained in this Act, except as specifically provided in Article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft or order to obey the same;

(b) Cadets;

(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: *Provided*, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

(e) All persons under sentence adjudged by courts-martial;

(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia. [41 Stat. L. 787.]

II. COURTS-MARTIAL.

ART. 3. COURTS-MARTIAL CLASSIFIED.— Courts-martial shall be of three kinds, namely:

- First, general courts-martial;
- Second, special courts-martial; and
- Third, summary courts-martial. [41 Stat. L. 788.]

A. COMPOSITION.

ART. 4. WHO MAY SERVE ON COURTS-MARTIAL.—All officers in the military service of the United States, and officers of the Marine Corps when detached for service with the Army by order of the President, shall be competent to serve on courts-martial for the trial of any persons who may lawfully be brought before such courts for trial. When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof. [41 Stat. L. 788.]

ART. 5. GENERAL COURTS-MARTIAL.— General courts-martial may consist of any number of officers not less than five. [41 Stat. L. 788.]

ART. 6. SPECIAL COURTS-MARTIAL.— Special courts-martial may consist of any number of officers — not less than three. [41 Stat. L. 788.]

ART. 7. SUMMARY COURTS-MARTIAL.—A summary court-martial shall consist of one officer. [41 Stat. L. 788.]

B. BY WHOM APPOINTED.

ART. 8. GENERAL COURTS-MARTIAL.— The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, an army corps, a division, or a separate brigade, and, when empowered by the President, the commanding officer of any district or of any force or body of troops may appoint general courts-martial; but when any such commander is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

The authority appointing a general court-martial shall detail as one of the members thereof a law member, who shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the appointing authority shall detail instead an officer of some other branch of the service selected by the appointing authority as specially qualified to perform the duties of law member. The law member, in addition to his duties as a member, shall perform such other duties as the President may by regulations prescribe. [41 Stat. L. 788.]

ART. 9. SPECIAL COURTS-MARTIAL.—The commanding officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command may appoint special courts-martial; but when any such commanding officer is the accuser or the prosecutor of the person or persons to be tried, the court shall be appointed by superior authority, and may in any case be appointed by superior authority when by the latter deemed desirable; and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution. [41 Stat. L. 788.]

ART. 10. SUMMARY COURTS-MARTIAL.—The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him. [41 Stat. L. 789.]

ART. 11. APPOINTMENT OF TRIAL JUDGE ADVOCATES AND COUNSEL.—For each general or special court-martial the authority appointing the court shall appoint a trial judge advocate and a defense counsel and for each general court-martial one or more assistant trial judge advocates and one or more assistant defense counsel when necessary: *Provided, however*, That no officer who has acted as member, trial judge advocate, assistant trial judge advocate, defense counsel, or assistant defense counsel in any case shall subsequently act as staff judge advocate to the reviewing or confirming authority upon the same case. [41 Stat. L. 789.]

C. JURISDICTION.

ART. 12. GENERAL COURTS-MARTIAL.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy: *Provided further*, That the officer competent to appoint a general court-martial for the trial of any particular case may, when in his judgment the interest of the service shall so require, cause any case to be tried by a special court-martial notwithstanding the limitations upon the jurisdiction of the special court-martial as to offenses set out in article 13; but the limitations upon jurisdiction as to persons and upon punishing power set out in said article shall be observed. [41 Stat. L. 789.]

ART. 13. SPECIAL COURTS-MARTIAL.—Special courts-martial shall have power to try any person subject to military law for any crime or offense not capital made punishable by these articles: *Provided*, That the President may, by regulations, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

Special courts-martial shall not have power to adjudge confinement in excess of six months, nor to adjudge forfeiture of more than two-thirds pay per month, for a period of not exceeding six months. [41 Stat. L. 789.]

ART. 14. SUMMARY COURTS-MARTIAL.—Summary courts-martial shall have power to try any person subject to military law, except an officer, a member of the Army Nurse Corps, a warrant officer, an Army field clerk, a field clerk Quartermaster Corps, a cadet, or a soldier holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by these articles: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial: *Provided further*, That the President may, by regulations, except from the jurisdiction of summary courts-martial any class or classes of persons subject to military law.

Summary courts-martial shall not have power to adjudge confinement in excess of one month, restriction to limits for more than three months, or forfeiture or detention of more than two-thirds of one month's pay. [41 Stat. L. 789.]

ART. 15. JURISDICTION NOT EXCLUSIVE.—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals. [41 Stat. L. 790.]

ART. 16. OFFICERS, HOW TRIABLE.—Officers shall be triable only by general and special courts-martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank. [41 Stat. L. 790.]

D. PROCEDURE.

ART. 17. TRIAL JUDGE ADVOCATE TO PROSECUTE; COUNSEL TO DEFEND.—The trial judge advocate of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of its proceedings. The accused shall have the right to be represented in his defense before the court by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by the defense counsel duly appointed for the court pursuant to article 11. Should the accused have counsel of his own selection, the defense counsel and assistant defense counsel, if any, of the court, shall, if the accused so desires, act as his associate counsel. [41 Stat. L. 790.]

ART. 18. CHALLENGES.—Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause. [41 Stat. L. 790.]

ART. 19. OATHS.—The trial judge advocate of a general or special court-martial shall administer to the members of the court, before they proceed upon any trial, the following oath or affirmation: "You, A. B., do swear (or affirm)

that you will well and truly try and determine, according to the evidence, the matter now before you, between the United States of America and the person to be tried, and that you will duly administer justice, without partiality, favor, or affection, according to the provisions of the rules and articles for the government of the armies of the United States, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the custom of war in like cases; and you do further swear (or affirm) that you will not divulge the findings or sentence of the court until they shall be published by the proper authority or duly announced by the court, except to the trial judge advocate and assistant trial judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court-martial upon a challenge or upon the findings or sentence, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God."

When the oath of affirmation has been administered to the members of a general or special court-martial, the president of the court shall administer to the trial judge advocate and to each assistant trial judge advocate, if any, an oath or affirmation in the following form: "You, A. B., do swear (or affirm) that you will faithfully and impartially perform the duties of a trial judge advocate, and will not divulge the findings or sentence of the court to any but the proper authority until they shall be duly disclosed. So help you God."

All persons who give evidence before a court-martial shall be examined on oath or affirmation in the following form: "You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God."

Every reporter of the proceedings of a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will faithfully perform the duties of reporter to this court. So help you God."

Every interpreter in the trial of any case before a court-martial shall, before entering upon his duties, make oath or affirmation in the following form: "You swear (or affirm) that you will truly interpret in the case now in hearing. So help you God."

In case of affirmation the closing sentence of adjuration will be omitted. [41 Stat. L. 790.]

ART. 20. CONTINUANCES.—A court-martial may, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just. [41 Stat. L. 791.]

ART. 21. REFUSAL OR FAILURE TO PLEAD.—When an accused arraigned before a court-martial fails or refuses to plead, or answers foreign to the purpose, or after a plea of guilty makes a statement inconsistent with the plea, or when it appears to the court that he entered a plea of guilty improvidently or through lack of understanding of its meaning and effect, the court shall proceed to trial and judgment as if he had pleaded not guilty. [41 Stat. L. 791.]

ART. 22. PROCESS TO OBTAIN WITNESSES.—Every trial judge advocate of a general or special court-martial and every summary court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of

the United States, having criminal jurisdiction, may lawfully issue; but such process shall run to any part of the United States, its Territories, and possessions. [41 Stat. L. 791.]

ART. 23. REFUSAL TO APPEAR OR TESTIFY.—Every person not subject to military law who, being duly subpoenaed to appear as a witness before any military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before such court, commission, court of inquiry, or board, willfully neglects or refuses to appear, or refuses to qualify as a witness, or to testify, or produce documentary evidence which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States or in a court of original criminal jurisdiction in any of the territorial possessions of the United States, jurisdiction being hereby conferred upon such courts for such purpose; and it shall be the duty of the United States district attorney or the officer prosecuting for the Government in any such court of original criminal jurisdiction, on the certification of the facts to him by the military court, commission, court of inquiry, or board, to file an information against and prosecute the person so offending, and the punishment of such person, on conviction, shall be a fine of not more than \$500 or imprisonment not to exceed six months, or both, at the discretion of the court: *Provided*, That the fees of such witness and his mileage, at the rates allowed to witnesses attending the courts of the United States, shall be duly paid or tendered said witness, such amounts to be paid out of the appropriation for the compensation of witnesses: *Provided further*, That every person not subject to military law, who before any court-martial, military tribunal, or military board, or in connection with, or in relation to any proceedings or investigation before it or had under any of the provisions of this Act, is guilty of any of the acts made punishable as offenses against public justice by any provision of chapter 6 of the Act of March 4, 1909, entitled "An Act to codify, revise, and amend the penal laws of the United States" (volume 35, United States Statutes at Large, page 1088), or any amendment thereof, shall be punished as therein provided. [41 Stat. L. 791.]

ART. 24. COMPULSORY SELF-INCRIMINATION PROHIBITED.—No witness before a military court, commission, court of inquiry, or board, or before any officer conducting an investigation, or before any officer, military or civil, designated to take a deposition to be read in evidence before a military court, commission, court of inquiry, or board, or before an officer conducting an investigation, shall be compelled to incriminate himself or to answer any question the answer to which may tend to incriminate him, or to answer any question not material to the issue when such answer might tend to degrade him. [41 Stat. L. 792.]

ART. 25. DEPOSITIONS — WHEN ADMISSIBLE.—A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or District in which the court, commission, or board is ordered to sit, or beyond the distance of one hundred miles from the place of trial or hearing, or when it

appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing: *Provided*, That testimony by deposition may be adduced for the defense in capital cases. [41 Stat. L. 792.]

ART. 26. DEPOSITIONS—BEFORE WHOM TAKEN.—Depositions to be read in evidence before military courts, commissions, courts of inquiry, or military boards, or for other use in military administration, may be taken before and authenticated by any officer, military or civil, authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths. [41 Stat. L. 792.]

ART. 27. COURTS OF INQUIRY—RECORDS OF, WHEN ADMISSIBLE.—The record of the proceedings of a court of inquiry may, with the consent of the accused, be read in evidence before any court-martial or military commission in any case not capital nor extending to the dismissal of an officer, and may also be read in evidence in any proceeding before a court of inquiry or a military board: *Provided*, That such evidence may be adduced by the defense in capital cases or cases extending to the dismissal of an officer. [41 Stat. L. 792.]

ART. 28. CERTAIN ACTS TO CONSTITUTE DESERTION.—Any officer who, having tendered his resignation and prior to due notice of the acceptance of the same, quits his post or proper duties without leave and with intent to absent himself permanently therefrom shall be deemed a deserter.

Any soldier who, without having first received a regular discharge, again enlists in the Army, or in the militia when in the service of the United States, or in the Navy or Marine Corps of the United States, or in any foreign army, shall be deemed to have deserted the service of the United States and, where the enlistment is in one of the forces of the United States mentioned above, to have fraudulently enlisted therein.

Any person subject to military law who quits his organization or place of duty with the intent to avoid hazardous duty or to shirk important service shall be deemed a deserter. [41 Stat. L. 792.]

ART. 29. COURT TO ANNOUNCE ACTION.—Whenever the court has acquitted the accused upon all specifications and charges, the court shall at once announce such result in open court. Under such regulations as the President may prescribe, the findings and sentence in other cases may be similarly announced. [41 Stat. L. 792.]

ART. 30. CLOSED SESSIONS.—Whenever a general or special court-martial shall sit in closed session, the trial judge advocate and the assistant trial judge advocate, if any, shall withdraw; and when their assistance in referring to the recorded evidence is required, it shall be obtained in open court, and in the presence of the accused and of his counsel, if there be any. [41 Stat. L. 793.]

ART. 31. METHOD OF VOTING.—Voting by members of a general or special court martial upon questions of challenge, on the findings, and on the sentence shall be by secret written ballot. The junior member of the court shall in each case count the votes, which count shall be checked by the president, who will

forthwith announce the result of the ballot to the members of the court. The law member of the court, if any, or if there be no law member of the court, then the president, may rule in open court upon interlocutory questions, other than challenges, arising during the proceedings: *Provided*, That unless such ruling be made by the law member of the court if any member object thereto the court shall be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *And provided further*, That if any such ruling be made by the law member of the court upon any interlocutory question other than an objection to the admissibility of evidence offered during the trial, and any member object to the ruling, the court shall likewise be cleared and closed and the question decided by a majority vote, viva voce, beginning with the junior in rank: *Provided further, however*, That the phrase, "objection to the admissibility of evidence offered during the trial," as used in the next preceding proviso hereof, shall not be construed to include questions as to the order of the introduction of witnesses or other evidence, nor of the recall of witnesses for further examination, nor as to whether expert witnesses shall be admitted or called upon any question, nor as to whether the court shall view the premises where an offense is alleged to have been committed, nor as to the competency of witnesses, as, for instance, of children, witnesses alleged to be mentally incompetent, and the like, nor as to the insanity of accused, or whether the existence of mental disease or mental derangement on the part of the accused has become an issue in the trial, or accused required to submit to physical examination, nor whether any argument or statement of counsel for the accused or of the trial judge advocate is improper, nor any ruling in a case involving military strategy or tactics or correct military action; but, upon all these questions arising on the trial, if any member object to any ruling of the law member, the court shall be cleared and closed and the question decided by majority vote of the members in the manner aforesaid. [41 Stat. L. 793.]

ART. 32. CONTEMPTS.—A military tribunal may punish as for contempt any person who uses any menacing words, signs, or gestures in its presence, or who disturbs its proceedings by any riot or disorder: *Provided*, That such punishment shall in no case exceed one month's confinement, or a fine of \$100, or both. [41 Stat. L. 793.]

ART. 33. RECORDS — GENERAL COURTS-MARTIAL.—Each general court-martial shall keep a separate record of its proceedings in the trial of each case brought before it, and such record shall be authenticated by the signature of the president and the trial judge advocate; but in case the record can not be authenticated by the president and trial judge advocate, by reason of the death, disability, or absence of either or both of them, it shall be signed by a member in lieu of the president and by an assistant trial judge advocate, if there be one, in lieu of the trial judge advocate; otherwise by another member of the court. [41 Stat. L. 793.]

ART. 34. RECORDS — SPECIAL AND SUMMARY COURTS-MARTIAL.—Each special court-martial and each summary court-martial shall keep a record of its proceedings, separate for each case, which record shall contain such matter and be authenticated in such manner as may be required by regulations which the President may from time to time prescribe. [41 Stat. L. 794.]

ART. 35. DISPOSITION OF RECORDS — GENERAL COURTS-MARTIAL.—The trial judge advocate of each general court-martial shall, with such expedition as circumstances may permit, forward to the appointing authority or to his successor in command the original record of the proceedings of such court in the trial of each case. All records of such proceedings shall, after having been acted upon, be transmitted to the Judge Advocate General of the Army. [41 Stat. L. 794.]

ART. 36. DISPOSITION OF RECORDS — SPECIAL AND SUMMARY COURTS-MARTIAL.—After having been acted upon by the officer appointing the court, or by the officer commanding for the time being, the record of each trial by special court-martial and a report of each trial by summary court-martial shall be transmitted to such general headquarters as the President may designate in regulations, there to be filed in the office of the judge advocate. When no longer of use, records of summary courts-martial may be destroyed. [41 Stat. L. 794.]

ART. 37.—IRREGULARITIES — EFFECT OF.—The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused: *Provided*, That the act or omission upon which the accused has been tried constitutes an offense denounced and made punishable by one or more of these articles: *Provided further*, That the omission of the words “hard labor” in any sentence of a court-martial adjudging imprisonment or confinement shall not be construed as depriving the authorities executing such sentence of imprisonment or confinement of the power to require hard labor as a part of the punishment in any case where it is authorized by the Executive order prescribing maximum punishments. [41 Stat. L. 794.]

ART. 38. PRESIDENT MAY PRESCRIBE RULES.—The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually. [41 Stat. L. 794.]

E. LIMITATIONS UPON PROSECUTIONS.

ART. 39. AS TO TIME.—Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: *Provided*, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this code the period of limitations upon trial and punishment by court-martial shall be three years: *Provided further*, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused

shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: *And provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law. [41 Stat. L. 794.]

ART. 40. AS TO NUMBER.—No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

No authority shall return a record of trial to any court-martial for reconsideration of—

- (a) An acquittal; or
- (b) A finding of not guilty of any specification; or
- (c) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of war; or
- (d) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial, in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited. [41 Stat. L. 795.]

F. PUNISHMENTS.

ART. 41. CRUEL AND UNUSUAL PUNISHMENTS PROHIBITED.—Cruel and unusual punishments of every kind including flogging, branding, marking, or tattooing on the body, are prohibited. [41 Stat. L. 795.]

ART. 42. PLACES OF CONFINEMENT — WHEN LAWFUL.—Except for desertion in time of war; repeated desertion in time of peace, and mutiny, no person shall under the sentence of a court-martial be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also, the period of confinement authorized and adjudged by such court-martial is more than one year: *Provided*, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: *Provided further*, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: *Provided further*, That persons sentenced to dishonorable discharge and to confinement not in a penitentiary shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary. [41 Stat. L. 795.]

ART. 43. DEATH SENTENCE — WHEN LAWFUL.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote. [41 Stat. L. 795.]

ART. 44. COWARDICE; FRAUD.—ACCESSORY PENALTY.—When an officer is dismissed from the service for cowardice or fraud, the crime, punishment, name, and place of abode of the delinquent shall be published in the newspapers in and about the camp and in the State from which the offender came or where he usually resides; and after such publication it shall be scandalous for an officer to associate with him. [41 Stat. L. 796.]

ART. 45. MAXIMUM LIMITS.—Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not exceed such limit or limits as the President may from time to time prescribe: *Provided*, That in time of peace the period of confinement in a penitentiary shall in no case exceed the maximum period prescribed by the law which, under article 42 of these articles, permits confinement in a penitentiary, unless in addition to the offense so punishable under such law the accused shall have been convicted at the same time of one or more other offenses. [41 Stat. L. 796.]

G. ACTION BY APPOINTING OR SUPERIOR AUTHORITY.

ART. 46. ACTION BY CONVENING AUTHORITY.—Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being. [41 Stat. L. 796.]

ART. 47. POWERS INCIDENT TO POWER TO APPROVE.—The power to approve the sentence of a court-martial shall be held to include:

(a) The power to approve or disapprove a finding and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to approve, the evidence of record requires a finding of only the lesser degree of guilt; and

(b) The power to approve or disapprove the whole or any part of the sentence.

(c) The power to remand a case for rehearing, under the provisions of article 50½. [41 Stat. L. 796.]

ART. 48. CONFIRMATION — WHEN REQUIRED.— In addition to the approval required by article forty-six, confirmation by the President is required in the following cases before the sentence of a court-martial is carried into execution, namely:

- (a) Any sentence respecting a general officer.
- (b) Any sentence extending to the dismissal of an officer, except that in time of war a sentence extending to the dismissal of an officer below the grade of brigadier general may be carried into execution upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division;
- (c) Any sentence extending to the suspension or dismissal of a cadet; and
- (d) Any sentence of death, except in the cases of persons convicted in time of war of murder, rape, mutiny, desertion, or as spies; and in such excepted cases a sentence of death may be carried into execution, subject to the provisions of article 50½, upon confirmation by the commanding general of the Army in the field or by the commanding general of the territorial department or division.

When the authority competent to confirm the sentence has already acted as the approving authority no additional confirmation by him is necessary. [41 Stat. L. 796.]

ART. 49. POWERS INCIDENT TO POWER TO CONFIRM.— The power to confirm the sentence of a court-martial shall be held to include:

- (a) The power to confirm or disapprove a finding, and to confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense when, in the opinion of the authority having power to confirm, the evidence of record requires a finding of only the lesser degree of guilt; and
- (b) The power to confirm or disapprove the whole or any part of the sentence;
- (c) The power to remand a case for rehearing, under the provisions of article 50½. [41 Stat. L. 797.]

ART. 50. MITIGATION OR REMISSION OF SENTENCES.— The power to order the execution of the sentence adjudged by a court-martial shall be held to include, *inter alia*, the power to mitigate or remit the whole or any part of the sentence.

Any unexecuted portion of a sentence adjudged by a court-martial may be mitigated or remitted by the military authority competent to appoint, for the command, exclusive of penitentiaries and the United States Disciplinary Barracks, in which the person under sentence is held, a court of the kind that imposed the sentence, and the same power may be exercised by superior military authority; but no sentence approved or confirmed by the President shall be remitted or mitigated by any other authority, and no approved sentence of loss of files by an officer shall be remitted or mitigated by any authority inferior to the President, except as provided in the fifty-second article.

When empowered by the President so to do, the commanding general of the Army in the field or the commanding general of the territorial department or division, may approve or confirm and commute (but not approve or confirm without commuting), mitigate, or remit and then order executed as commuted, mitigated, or remitted any sentence which under these articles requires the confirmation of the President before the same may be executed.

The power of remission or mitigation shall extend to all uncollected forfeitures adjudged by sentence of court-martial. [41 Stat. L. 797.]

ART. 50¹/₂. REVIEW; REHEARING.—The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld under the provisions of this paragraph legally sufficient to support the findings and sentence, the Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of review holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part.

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based

upon a finding of guilty of an offense not considered upon the merits in the original proceeding: *Provided*, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless, in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President.

Every record of trial by general court-martial, examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall be examined by the board of review, and the board, if it also finds that such record is legally insufficient to support the findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President. In any such case the President may approve, disapprove, or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments and officers of the Government.

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President. [41 Stat. L. 797.]

ART. 51. SUSPENSION OF SENTENCES OF DISMISSAL OR DEATH.—The authority competent to order the execution of a sentence of dismissal of an officer or a sentence of death may suspend such sentence until the pleasure of the President be known, and in case of such suspension a copy of the order of suspension, together with a copy of the record of trial, shall immediately be transmitted to the President. [41 Stat. L. 799.]

ART. 52. SUSPENSION OF SENTENCES.—The authority competent to order the execution of the sentence of a court-martial may, at the time of the approval of such sentence, suspend the execution, in whole or in part, of any such sen-

tence as does not extend to death, and may restore the person under sentence to duty during such suspension; and the Secretary of War or the commanding officer holding general court-martial jurisdiction over any such offender, may at any time thereafter, while the sentence is being served, suspend the execution, in whole or in part, of the balance of such sentence and restore the person under sentence to duty during such suspension. A sentence, or any part thereof, which has been so suspended may be remitted, in whole or in part, except in cases of persons confined in the United States Disciplinary Barracks or its branches, by the officer who suspended the same, by his successor in office, or by any officer exercising appropriate court-martial jurisdiction over the command in which the person under sentence may be serving at the time, and, subject to the foregoing exceptions, the same authority may vacate the order of suspension at any time and order the execution of the sentence or the suspended part thereof in so far as the same shall not have been previously remitted, subject to like power of suspension. The death or honorable discharge of a person under a suspended sentence shall operate as a complete remission of any unexecuted or unremitted part of such sentence. [41 Stat. L. 799.]

ART. 53. EXECUTION OR REMISSION—CONFINEMENT IN DISCIPLINARY BARRACKS.—When a sentence of dishonorable discharge has been suspended until the soldier's release from confinement, the execution or remission of any part of his sentence shall, if the soldier be confined in the United States Disciplinary Barracks, or any branch thereof, be directed by the Secretary of War. [41 Stat. L. 800.]

III. PUNITIVE ARTICLES.

A. ENLISTMENT; MUSTER; RETURNS.

ART. 54. FRAUDULENT ENLISTMENT.—Any person who shall procure himself to be enlisted in the military service of the United States by means of willful misrepresentation or concealment as to his qualifications for enlistment, and shall receive pay or allowances under such enlistment, shall be punished as a court-martial may direct. [41 Stat. L. 800.]

ART. 55. OFFICER MAKING UNLAWFUL ENLISTMENT.—Any officer who knowingly enlists or musters into the military service any person whose enlistment or muster in is prohibited by law, regulations, or orders shall be dismissed from the service or suffer such other punishment as a court-martial may direct. [41 Stat. L. 800.]

ART. 56. FALSE MUSTER.—Any officer who knowingly makes a false muster of man or animal, or who signs or directs or allows the signing of any muster roll knowing the same to contain a false muster or false statement as to the absence or pay of an officer or soldier, or who wrongfully takes money or other consideration on mustering in a regiment, company, or other organization, or on signing muster rolls, or who knowingly musters as an officer or soldier a person who is not such officer or soldier, shall be dismissed from the service and suffer such other punishment as a court-martial may direct. [41 Stat. L. 800.]

ART. 57. FALSE RETURNS—OMISSION TO RENDER RETURNS.—Every officer whose duty it is to render to the War Department or other superior authority a return of the state of the troops under his command, or of the arms, ammuni-

tion, clothing, funds, or other property thereunto belonging, who knowingly makes a false return thereof shall be dismissed from the service and suffer such other punishment as a court-martial may direct. And any officer who, through neglect or design, omits to render such return shall be punished as a court-martial may direct. [41 Stat. L. 800.]

B. DESERTION; ABSENCE WITHOUT LEAVE.

ART. 58. DESERTION.—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct. [41 Stat. L. 800.]

ART. 59. ADVISING OR AIDING ANOTHER TO DESERT.—Any person subject to military law who advises or persuades or knowingly assists another to desert the service of the United States shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct. [41 Stat. L. 800.]

ART. 60. ENTERTAINING A DESERTER.—Any officer who, after having discovered that a soldier in his command is a deserter from the military or naval service or from the Marine Corps, retains such deserter in his command without informing superior authority or the commander of the organization to which the deserter belongs, shall be punished as a court-martial may direct. [41 Stat. L. 800.]

ART. 61. ABSENCE WITHOUT LEAVE.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct. [41 Stat. L. 801.]

C. DISRESPECT; INSUBORDINATION; MUTINY.

ART. 62. DISRESPECT TOWARD THE PRESIDENT, VICE PRESIDENT, CONGRESS, SECRETARY OF WAR, GOVERNORS, LEGISLATURES.—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct. [41 Stat. L. 801.]

ART. 63. DISRESPECT TOWARD SUPERIOR OFFICER.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct. [41 Stat. L. 801.]

ART. 64. ASSAULTING OR WILLFULLY DISOBEYING SUPERIOR OFFICER.—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being

in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct. [41 Stat. L. 801.]

ART. 65. INSUBORDINATE CONDUCT TOWARD NONCOMMISSIONED OFFICER.—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a noncommissioned officer while in the execution of his office, or uses threatening or insulting language, or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct. [41 Stat. L. 801.]

ART. 66. MUTINY OR SEDITION.—Any person subject to military law who attempts to create or who begins, excites, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard, or other command shall suffer death or such other punishment as a court-martial may direct. [41 Stat. L. 801.]

ART. 67. FAILURE TO SUPPRESS MUTINY OR SEDITION.—Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer shall suffer death or such other punishment as a court-martial may direct. [41 Stat. L. 801.]

ART. 68. QUARRELS; FRAYS; DISORDERS.—All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks, Quartermaster Corps, and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And who-soever, being so ordered, refuses to obey such officer, nurse, band leader, warrant officer, field clerk, or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court-martial may direct. [41 Stat. L. 801.]

D. ARREST; CONFINEMENT.

ART. 69. ARREST OR CONFINEMENT.—Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct. [41 Stat. L. 802.]

ART. 70. CHARGES; ACTION UPON.—Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him. [41 Stat. L. 802.]

ART. 71. REFUSAL TO RECEIVE AND KEEP PRISONERS.—No provost marshal or commander of a guard shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States, provided the officer committing shall, at the time, deliver an account in writing, signed by himself, of the crime or offense charged against the prisoner. Any officer or soldier so refusing shall be punished as a court-martial may direct. [41 Stat. L. 802.]

ART. 72. REPORT OF PRISONERS RECEIVED.—Every commander of a guard to whose charge a prisoner is committed shall, within twenty-four hours after such confinement, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the name of the officer committing him; and if he fails to make such report, he shall be punished as a court-martial may direct. [41 Stat. L. 803.]

ART. 73. RELEASING PRISONER WITHOUT PROPER AUTHORITY.—Any person subject to military law who, without proper authority, releases any prisoner duly committed to his charge, or who through neglect or design suffers any prisoner

so committed to escape, shall be punished as a court-martial may direct. [41 Stat. L. 803.]

ART. 74. DELIVERY OF OFFENDERS TO CIVIL AUTHORITIES.—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall be dismissed from the service or suffer such other punishment as a court-martial may direct.

When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence. [41 Stat. L. 803.]

E. WAR OFFENSES.

ART. 75. MISBEHAVIOR BEFORE THE ENEMY.—Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, or by any means whatsoever occasions false alarms in camp, garrison, or quarters, shall suffer death or such other punishment as a court-martial may direct. [41 Stat. L. 803.]

ART. 76. SUBORDINATES COMPELLING COMMANDER TO SURRENDER.—Any person subject to military law who compels or attempts to compel any commander of any garrison, fort, post, camp, guard, or other command, to give it up to the enemy or to abandon it shall be punishable with death or such other punishment as a court-martial may direct. [41 Stat. L. 803.]

ART. 77. IMPROPER USE OF COUNTERSIGN.—Any person subject to military law who makes known the parole or countersign to any person not entitled to receive it according to the rules and discipline of war, or gives a parole or countersign different from that which he received, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct. [41 Stat. L. 803.]

ART. 78. FORCING A SAFEGUARD.—Any person subject to military law who, in time of war, forces a safeguard shall suffer death or such other punishment as a court-martial may direct. [41 Stat. L. 803.]

ART. 79. CAPTURED PROPERTY TO BE SECURED FOR PUBLIC SERVICE.—All public property taken from the enemy is the property of the United States and shall be secured for the service of the United States, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct. [41 Stat. L. 804.]

ART. 80. DEALING IN CAPTURED OR ABANDONED PROPERTY.—Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit or advantage to himself or to any other person directly or indirectly connected with himself, or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial, military commission, or other military tribunal may adjudge, or by any or all of said penalties. [41 Stat. L. 804.]

ART. 81. RELIEVING, CORRESPONDING WITH, OR AIDING THE ENEMY.—Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct. [41 Stat. L. 804.]

ART. 82. SPIES.—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death. [41 Stat. L. 804.]

F. MISCELLANEOUS CRIMES AND OFFENSES.

ART. 83. MILITARY PROPERTY.—WILLFUL OR NEGLIGENT LOSS, DAMAGE, OR WRONGFUL DISPOSITION.—Any person subject to military law who willfully, or through neglect, suffers to be lost, spoiled, damaged, or wrongfully disposed of, any military property belonging to the United States shall make good the loss or damage and suffer such punishment as a court-martial may direct. [41 Stat. L. 804.]

ART. 84. WASTE OR UNLAWFUL DISPOSITION OF MILITARY PROPERTY ISSUED TO SOLDIERS.—Any soldier who sells or wrongfully disposes of or willfully or through neglect injures or loses any horse, arms, ammunition, accouterments, equipment, clothing, or other property issued for use in the military service, shall be punished as a court-martial may direct. [41 Stat. L. 804.]

ART. 85. DRUNK ON DUTY.—Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty shall be punished as a court-martial may direct. [41 Stat. L. 804.]

ART. 86. MISBEHAVIOR OF SENTINEL.—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct. [41 Stat. L. 804.]

ART. 87. PERSONAL INTEREST IN SALE OF PROVISIONS.—Any officer commanding in any garrison, fort, barracks, camp, or other place where troops of the United States may be serving who, for his private advantage, lays any duty or imposition upon or is interested in the sale of any victuals or other necessities of life brought into such garrison, fort, barracks, camp, or other place for the use of the troops, shall be dismissed from the service and suffer such other punishment as a court-martial may direct. [41 Stat. L. 804.]

ART. 88. INTIMIDATION OF PERSONS BRINGING PROVISIONS.—Any person subject to military law who abuses, intimidates, does violence to, or wrongfully interferes with any person bringing provisions, supplies, or other necessities to the camp, garrison, or quarters of the forces of the United States shall suffer such punishment as a court-martial may direct. [41 Stat. L. 805.]

ART. 89. GOOD ORDER TO BE MAINTAINED AND WRONGS REDRESSED.—All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless by order of his commanding officer), or commits any kind of depredation or riot, shall be punished as a court-martial may direct. Any commanding officer who, upon complaint made to him, refuses or omits to see reparation made to the party injured, in so far as the offender's pay shall go toward such reparation, as provided for in article 105, shall be dismissed from the service, or otherwise punished, as a court-martial may direct. [41 Stat. L. 805.]

ART. 90. PROVOKING SPEECHES OR GESTURES.—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct. [41 Stat. L. 805.]

ART. 91. DUELING.—Any person subject to military law who fights or promotes or is concerned in or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall, if an officer, be dismissed from the service or suffer such other punishment as a court-martial may direct; and if any other person subject to military law, shall suffer such punishment as a court-martial may direct. [41 Stat. L. 805.]

ART. 92. MURDER — RAPE.—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace. [41 Stat. L. 805.]

ART. 93. VARIOUS CRIMES.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument or other thing, or assault with intent to do bodily harm shall be punished as a court-martial may direct. [41 Stat. L. 805.]

ART. 94. FRAUDS AGAINST THE GOVERNMENT.—Any person subject to military law who makes or causes to be made any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or against any officer thereof, makes or uses, or procures, or advises the making or use of, any writing or other paper knowing the same to contain any false or fraudulent statements; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, makes or procures, or advises the making of, any oath to any fact or to any writing or other paper knowing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against the United States or any officer thereof, forges or counterfeits, or procures, or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures, or advises the use of any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody, or control of any money or other property of the United States, furnished or intended for the military service thereof, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount thereof less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the military service thereof, makes or delivers to any person such writing, without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States; or

Who steals, embezzles, knowingly and willfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money, or other property of the United States furnished or intended for the military service thereof; or

Who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, or other person who is a part of or employed in said forces or service, any ordnance, arms, equipment, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same;

Shall, on conviction thereof, be punished by a fine or imprisonment, or by such other punishment as a court-martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid while in the military service of the United States, receives his discharge or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not received such discharge nor been dismissed. And if any officer, being guilty, while in the military service of the United States, of embezzlement of ration savings, post exchange, company, or other like funds, or of embezzlement of money or other property intrusted to his charge by an enlisted man or men, receives his discharge, or is dismissed, or is dropped from the rolls, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial in the same manner and to the same extent as if he had not been so discharged, dismissed, or dropped from the rolls. [41 Stat. L. 805.]

ART. 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service. [41 Stat. L. 806.]

ART. 96. GENERAL ARTICLE.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court. [41 Stat. L. 806.]

IV. COURTS OF INQUIRY.

ART. 97. WHEN AND BY WHOM ORDERED.—A court of inquiry to examine into the nature of any transaction of or accusation or imputation against any officer or soldier may be ordered by the President or by any commanding officer; but a court of inquiry shall not be ordered by any commanding officer except upon the request of the officer or soldier whose conduct is to be inquired into. [41 Stat. L. 807.]

ART. 98. COMPOSITION.—A court of inquiry shall consist of three or more officers. For each court of inquiry the authority appointing the court shall appoint a recorder. [41 Stat. L. 807.]

ART. 99. CHALLENGES.—Members of a court of inquiry may be challenged by the party whose conduct is to be inquired into, but only for cause stated to the court. The court shall determine the relevancy and validity of any challenge, and shall not receive a challenge to more than one member at a time. The party whose conduct is being inquired into shall have the right to be represented before the court by counsel of his own selection, if such counsel be reasonably available. [41 Stat. L. 807.]

ART. 100. OATH OF MEMBERS AND RECORDERS.—The recorder of a court of inquiry shall administer to the members the following oath: "You, A. B.,

do swear (or affirm) that you will well and truly examine and inquire, according to the evidence, into the matter now before you without partiality, favor, affection, prejudice, or hope of reward. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear (or affirm) that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."

In case of affirmation the closing sentence of adjuration will be omitted. [41 Stat. L. 807.]

ART. 101. POWERS; PROCEDURE.—A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts-martial and the trial judge advocate thereof. Such witnesses shall take the same oath or affirmation that is taken by witnesses before courts-martial. A reporter or an interpreter for a court of inquiry shall, before entering upon his duties, take the oath or affirmation required of a reporter or an interpreter for a court-martial. The party whose conduct is being inquired into or his counsel, if any, shall be permitted to examine and cross-examine witnesses so as fully to investigate the circumstances in question. [41 Stat. L. 807.]

ART. 102. OPINION ON MERITS OF CASE.—A court of inquiry shall not give an opinion on the merits of the case inquired into unless specially ordered to do so. [41 Stat. L. 807.]

ART. 103. RECORD OF PROCEEDINGS—HOW AUTHENTICATED.—Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signature of the president and the recorder thereof, and be forwarded to the convening authority. In case the record can not be authenticated by the recorder, by reason of his death, disability, or absence, it shall be signed by the president and by one other member of the court. [41 Stat. L. 807.]

V. MISCELLANEOUS PROVISIONS.

ART. 104. DISCIPLINARY POWERS OF COMMANDING OFFICERS.—Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command may, for minor offenses impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges for not exceeding one week, extra fatigue for not exceeding one week, restriction to certain specified limits for not exceeding one week, and hard labor without confinement for not exceeding one week, but shall not include forfeiture of pay or confinement under guard; except that in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of this article also impose upon an officer of his command below the grade of major a forfeiture of not more than one-half of such officer's monthly pay for one month. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in the meantime be required to

undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty. [41 Stat. L. 808.]

ART. 105. INJURIES TO PROPERTY — REDRESS OF.— Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board. [41 Stat. L. 808.]

ART. 106. ARREST OF DESERTERS BY CIVIL OFFICIALS.— It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States. [41 Stat. L. 808.]

ART. 107. SOLDIERS TO MAKE GOOD TIME LOST.— Every soldier who in an existing or subsequent enlistment deserts the service of the United States or without proper authority absents himself from his organization, station, or duty for more than one day, or who is confined for more than one day under sentence, or while awaiting trial and disposition of his case, if the trial results in conviction, or through the intemperate use of drugs or alcoholic liquor, or through disease or injury the result of his own misconduct, renders himself unable for more than one day to perform duty, shall be liable to serve, after his return to a full-duty status, for such period as shall, with the time he may have served prior to such desertion, unauthorized absence, confinement, or inability to perform duty, amount to the full term of that part of his enlistment period which he is required to serve with his organization before being furloughed to the Army reserve. [41 Stat. L. 809.]

ART. 108. SOLDIERS — SEPARATION FROM THE SERVICE.—No enlisted man, lawfully inducted into the military service of the United States, shall be discharged from said service without a certificate of discharge, signed by a field officer of the regiment or other organization to which the enlisted man belongs or by the commanding officer when no such field officer is present; and no enlisted man shall be discharged from said service before his term of service has expired, except by order of the President, the Secretary of War, the commanding officer of a department, or by sentence of a general court-martial. [41 Stat. L. 809.]

ART. 109. OATH OF ENLISTMENT.—At the time of his enlistment every soldier shall take the following oath or affirmation: "I, ———, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War." This oath or affirmation may be taken before any officer. [41 Stat. L. 809.]

ART. 110. CERTAIN ARTICLES TO BE READ AND EXPLAINED.—Articles 1, 2, and 29, 54 to 96, inclusive, and 104 to 109, inclusive, shall be read and explained to every soldier at the time of his enlistment or muster in, or within six days thereafter, and shall be read and explained once every six months to the soldiers of every garrison, regiment, or company in the service of the United States. [41 Stat. L. 809.]

ART. 111. COPY OF RECORD OF TRIAL.—Every person tried by a general court-martial shall, on demand therefor, made by himself or by any person in his behalf, be entitled to a copy of the record of the trial. [41 Stat. L. 809.]

ART. 112. EFFECTS OF DECEASED PERSONS — DISPOSITION OF.—In case of the death of any person subject to military law the commanding officer of the place of command will permit the legal representative or widow of the deceased, if present, to take possession of all his effects then in camp or quarters; and if no legal representative or widow be present, the commanding officer shall direct a summary court to secure all such effects, and said summary court shall have authority to collect and receive any debts due decedent's estate by local debtors and to pay the undisputed local creditors of decedent in so far as any money belonging to the deceased which may come into said summary court's possession under this article will permit, taking receipts therefor for file with said court's final report upon its transactions to the War Department; and as soon as practicable after the collection of such effects said summary court shall transmit such effects and any money collected, through the Quartermaster Department, at Government expense, to the widow or legal representative of the deceased, if such be found by said court, or to the son, daughter, father, provided the father has not abandoned the support of his family, mother, brother, sister, or the next of kin in the order named, if such be found by said court, or the beneficiary named in the will of the deceased, if such be found by said court, and said court shall thereupon make to the War Department a full report of its transactions; but if there be none of the persons hereinabove named, or such persons or their addresses are not known to or readily ascertainable by said court, and the said court shall so find, said summary court shall have authority to convert into

cash, by public or private sale, not earlier than thirty days after the death of the deceased, all effects of deceased except sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes; and as soon as practicable after converting such effects into cash said summary court shall deposit with the proper officer, to be designated in regulations, any cash belonging to decedent's estate, and shall transmit a receipt for such deposits, any will or other papers of value belonging to the deceased, any sabers, insignia, decorations, medals, watches, trinkets, manuscripts, and other articles valuable chiefly as keepsakes, together with an inventory of the effects secured by said summary court, and a full account of its transactions, to the War Department for transmission to the Auditor for the War Department for action as authorized by law in the settlement of accounts of deceased officers and enlisted men of the Army.

The provisions of this article shall be applicable to inmates of the United States Soldiers' Home who die in any United States military hospital outside of the District of Columbia where sent from the home for treatment. [41 Stat. L. 809.]

ART. 113. INQUESTS.—When at any post, fort, camp, or other place garrisoned by the military forces of the United States and under the exclusive jurisdiction of the United States, any person shall have been found dead under circumstances which appear to require investigation, the commanding officer will designate and direct a summary court-martial to investigate the circumstances attending the death; and, for this purpose, such summary court-martial shall have power to summon witnesses and examine them upon oath or affirmation. He shall promptly transmit to the post or other commander a report of his investigation and of his findings as to the cause of the death. [41 Stat. L. 810.]

ART. 114. AUTHORITY TO ADMINISTER OATHS.—Any judge advocate or acting judge advocate, the president of a general or special court-martial, any summary court-martial, the trial judge advocate or any assistant trial judge advocate of a general or special court-martial, the president or the recorder of a court of inquiry or of a military board, any officer designated to take a deposition, any officer detailed to conduct an investigation, and the adjutant of any command shall have power to administer oaths for the purposes of the administration of military justice and for other purposes of military administration; and in foreign places where the Army may be serving shall have the general powers of a notary public or of a consul of the United States in the administration of oaths, the execution and acknowledgment of legal instruments, the attestation of documents, and all other forms of notarial acts to be executed by persons subject to military law. [41 Stat. L. 810.]

ART. 115. APPOINTMENT OF REPORTERS AND INTERPRETERS.—Under such regulations as the Secretary of War may from time to time prescribe, the president of a court-martial or military commission or a court of inquiry shall have power to appoint a reporter, who shall record the proceedings of and testimony taken before such court or commission and may set down the same, in the first instance, in shorthand. Under like regulations the president of a court-martial or military commission, or court of inquiry, or a summary court, may appoint an interpreter, who shall interpret for the court or commission. [41 Stat. L. 810.]

ART. 116. POWERS OF ASSISTANT TRIAL JUDGE ADVOCATE AND OF ASSISTANT DEFENSE COUNSEL.—An assistant trial judge advocate of a general court-martial shall be competent to perform any duty devolved by law, regulation, or the custom of the service upon the trial judge advocate of the court. An assistant defense counsel shall be competent likewise to perform any duty devolved by law, regulation, or the custom of the service upon counsel for the accused. [41 Stat. L. 811.]

ART. 117. REMOVAL OF CIVIL SUITS.—When any civil or criminal prosecution is commenced in any court of a State against any officer, soldier, or other person in the military service of the United States on account of any act done under color of his office or status, or in respect to which he claims any right, title, or authority under any law of the United States respecting the military forces thereof, or under the law of war, such suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court of the United States in the district where the same is pending in the manner prescribed in section 33 of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, and the cause shall thereupon be entered on the docket of said district court and shall proceed therein as if the cause had been originally commenced in said district court and the same proceedings had been taken in such suit or prosecution in said district court as shall have been had therein in said State court prior to its removal, and said district court shall have full power to hear and determine said cause. [41 Stat. L. 811.]

ART. 118. OFFICERS, SEPARATION FROM SERVICE.—No officer shall be discharged or dismissed from the service except by order of the President or by sentence of a general court-martial; and in time of peace no officer shall be dismissed except in pursuance of the sentence of a general court-martial or in mitigation thereof; but the President may at any time drop from the rolls of the Army any officer who has been absent from duty three months without leave or who has been absent in confinement in a prison or penitentiary for three months after final conviction by a court of competent jurisdiction. [41 Stat. L. 811.]

ART. 119. RANK AND PRECEDENCE AMONG REGULARS, MILITIA, AND VOLUNTEERS.—That in time of war or public danger, when two or more officers of the same grade are on duty in the same field, department, or command, or of organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. [41 Stat. L. 811.]

ART. 120. COMMAND WHEN DIFFERENT CORPS OR COMMANDS HAPPEN TO JOIN.—When different corps or commands of the military forces of the United States happen to join or do duty together, the officer highest in rank of the line of the Regular Army, Marine Corps, forces drafted or called into the service of the United States, or Volunteers, there on duty, shall, subject to the provisions of the last preceding article, command the whole and give orders for what is needful in the service, unless otherwise directed by the President. [41 Stat. L. 811.]

ART. 121. COMPLAINTS OF WRONGS.—Any officer or soldier who believes himself wronged by his commanding officer, and, upon due application to such commander, is refused redress, may complain to the general commanding in the locality where the officer against whom the complaint is made is stationed. The

general shall examine into said complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, transmit to the Department of War a true statement of such complaint, with the proceedings had thereon. [41 Stat. L. 811.]

SEC. 2. [Provisions of Chapter II, when in effect.] That the provisions of Chapter II of this Act shall take effect and be in force eight months after the approval of this Act: *Provided*, That articles 2, 23, and 45 shall take effect immediately. [41 Stat. L. 812.]

SEC. 3. [Liabilities incurred prior to taking effect of Chapter II.] That all offenses committed and all penalties, forfeitures, fines, or liabilities incurred prior to the taking effect of Chapter II of this Act, under any law embraced in or modified, changed, or repealed by Chapter II of this Act, may be prosecuted, punished, and enforced in the same manner and with the same effect as if this Act had not been passed. [41 Stat. L. 812.]

SEC. 4. [R. S. sec. 1342 repealed.] That section 1342 of the Revised Statutes of the United States be, and the same is hereby, repealed, and all laws and parts of laws in so far as they are inconsistent with this Act are hereby repealed. [41 Stat. L. 812.]

SEC. 8. [Protection of uniform—sec. 125 of Act of June 3, 1916, amended—Secretary of Navy.] That section 125 of the Act entitled “An Act for making further and more effectual provisions for the national defense, and for other purposes,” approved June 3, 1916, shall hereafter be in full force and effect as originally enacted, notwithstanding anything contained in the Act entitled “An Act permitting any person who has served in the United States Army, Navy, or Marine Corps in the present war to retain his uniform and personal equipment and to wear the same under certain conditions,” approved February 28, 1918 [1919?]: *Provided*, That the words “or the Secretary of the Navy” shall be inserted immediately after the words “the Secretary of War” wherever those words appear in section 125 of the Act approved June 3, 1916, hereinbefore referred to. [41 Stat. L. 836.]

This is from the Naval Appropriation Act of June 4, 1920, ch. 228.

For Act of June 3, 1916, § 125, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1075.

For Act of Feb. 28, 1919, mentioned in the text, see 1919 Supp. Fed. Stat. Ann. 370.

An Act Making appropriations for the support of the Army for the fiscal year ending June 30, 1921, and for other purposes.

[Act of June 5, 1920, ch. 240, 41 Stat. L. 948.]

* * * [Sale of surplus supplies, etc., to state or foreign government.] That the Secretary of War be, and he is hereby, authorized, in his discretion, to sell to any State or foreign Government with which the United States is at peace at the time of the passage of this Act, upon such terms as he may deem expedient, any matériel, supplies, or equipment pertaining to the Military Establishment, except foodstuffs, as, or may hereafter be found to be surplus, which are not needed for military purposes and for which there is no adequate domestic market. [41 Stat. L. 949.]

* * * **[Army Air Service and Naval Aviation—control of operations.]** That hereafter the Army Air Service shall control all aerial operations from land bases, and Naval Aviation shall have control of all aerial operations attached to a fleet, including shore stations whose maintenance is necessary for operation connected with the fleet, for construction and experimentation and for the training of personnel. [41 Stat. L. 954.]

* * * **[Quartermaster Corps—field clerks, etc.—assignments.]** For commutation of quarters and of heat and light for field clerks, Quartermaster Corps, \$100,000: *Provided*, That said clerks, messengers, and laborers shall be employed and assigned by the Secretary of War to the offices and positions in which they are to serve. [41 Stat. L. 955.]

* * * **[Clerks, etc., of tactical divisions, etc.—assignment to duty in bureau of War Department.]** That no clerk, messenger, or laborer at headquarters of tactical divisions, military departments, brigades, service schools, and office of the Chief of Staff shall be assigned to duty in any bureau of the War Department. [41 Stat. L. 956.]

* * * **[Army Mine Planter Service—warrant officers—increase of salary.]** That, commencing January 1, 1920, warrant officers, Army Mine Planter Service, shall be paid, in addition to all pay and allowances now authorized by law, an increase at the rate of \$240 per annum: *Provided*, That this increase shall remain effective until the close of the fiscal year ending June 30, 1922, unless sooner amended or repealed. [41 Stat. L. 956.]

* * * **[Army transports—transportation of Porto Rican Government employees, etc.]** That hereafter, when, in the opinion of the Secretary of War, accommodations are available, transportation on Army transports may be provided for members and employees of the Porto Rican Government and their families without expense to the United States. [41 Stat. L. 960.]

* * * **[Army transports—transportation of civilians—receipts.]** That in the joint discretion of the Secretary of War and chairman of the Shipping Board, and when space is available, civilian passengers and shipments of commercial cargo may be transported on Army transports in the trans-Atlantic service, at such times as space is not available on commercial lines, at rates not less than those charged by commercial steamship companies, between the same ports, for the same class of accommodations, the receipts from which shall be covered into the Treasury of the United States to the credit of miscellaneous receipts. [41 Stat. L. 960.]

* * * **[Motor vehicles—purchase for experimental purposes.]** That none of the funds appropriated or made available under this Act or any of the unexpended balances of any other Act shall be used for the purchase of motor-propelled passenger or freight carrying vehicles for the Army except those that are purchased solely for experimental purposes. [41 Stat. L. 961.]

* * * **[Riding horses—donations of animals for breeding—prizes.]** That the Secretary of War may, in his discretion, and under such rules and regulations as he may prescribe, accept donations of animals for breeding and donations of money for other property to be used as prizes or awards at agricultural fairs, horse shows, and similar exhibitions, in order to encourage the breeding of riding horses suitable for Army purposes. [41 Stat. L. 962.]

* * * **[Vocational training — detail of officers, etc., as instructors.]** That whenever possible officers, warrant officers, noncommissioned officers, or other enlisted men shall be detailed as instructors in vocational training in the most important trades in lieu of civilian instructors. [41 Stat. L. 966.]

* * * **[Vocational training — farm products — increase in live stock — sale.]** That farm products and the increase in live stock (including fowls) which accrue as incidental to vocational training in agriculture and animal husbandry, may be sold under such regulations as the Secretary of War may prescribe and the proceeds of such sales shall be deposited in the Treasury of the United States to the credit of miscellaneous receipts. [41 Stat. L. 966.]

* * * **[Civilian rifle teams — traveling expenses to national matches.]** That hereafter members of civilian rifle teams may, in the discretion of the Secretary of War, be paid, as commutation of traveling expenses at the rate of 5 cents per mile for the shortest usually traveled route from their homes to national matches, when authorized to participate therein by the Secretary of War and for the return travel thereto: *Provided further*, That the payment of travel pay for the return journey may be made in advance of the actual performance of travel. [41 Stat. L. 966.]

* * * **[Reserve Officers' Training Corps — traveling allowances to summer camps — uniforms — Act of June 3, 1916, sec. 48, amended.]** That so much of section 48 of the Act of June 3, 1916, entitled "An Act for making further and more effectual provisions for the national defense, and for other purposes," as relates to the transportation of members of the Reserve Officers' Training Corps attending summer camps be, and the same is hereby amended so as to provide that such members of the Reserve Officers' Training Corps shall be paid as traveling allowances 5 cents per mile for the distance by the shortest usually traveled route from the places from which they are authorized to proceed to the camp and for the return travel thereto: *Provided further*, That the payment of travel pay for the return journey may be made in advance of the actual performance of travel: *Provided further*, That the Secretary of War may, in his discretion and under such regulations as he may prescribe, permit such institutions to furnish their own uniforms and receive as commutation therefor the sum allotted by the Secretary of War to such institutions for uniforms. [41 Stat. L. 966.]

For Act of June 3, 1916, § 48, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 1024.

* * * **[Motor ambulances — selection of types — purchase without advertisement.]** That the Secretary of War may, in his discretion, select types and makes of motor ambulances for the Army and authorize their purchase without regard to the laws prescribing advertisement for proposals for supplies and materials for the Army. [41 Stat. L. 967.]

Identical provisions appear in the Act of July 11, 1919, ch. 8, see 1919 Supp. Fed. Stat. Ann. 376, and in the Act of July 9, 1918, see 1918 Supp. Fed. Stat. Ann. 885.

* * * **[Topographic and other surveys — maps — assistance from governmental mapping agencies.]** For the execution of topographic and other surveys, the securing of such extra topographic data as may be required, and the preparation and printing of maps required for military purposes, to be imme-

diately available and remain available until December 31, 1921, \$100,000: *Provided*, That the Secretary of War is authorized to secure the assistance, wherever practicable, of the United States Geological Survey, the Coast and Geodetic Survey, or other mapping agencies of the Government in this work and to allot funds therefor to them from this appropriation. [41 Stat. L. 970.]

* * * **[Mexican border medals and ribbons — issuance.]** That the Mexican border medal and ribbon issued to National Guard officers and enlisted men under the provisions of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1919," approved July 9, 1918, shall be issued to National Guard officers and enlisted men who at the same time served as such in the field under the call of the National Guard to such Mexican border service but were stationed for service at points other than on the Mexican border. [41 Stat. L. 973.]

For the Act of July 9, 1918, mentioned in the text, see 1918 Supp. Fed. Stat. Ann. 887.

[Mexican border medals and ribbons — issuance — men dishonorably discharged.] That such medals shall not be issued to men who have subsequent to such service been dishonorably discharged from the service or deserted. [41 Stat. L. 973.]

* * * **[National Guard — federal pay.]** That members of the National Guard who have or shall become entitled for a continuous period of less than one month to Federal pay at the rates fixed for the Regular Army, whether by virtue of a call by the President, of attendance at school or maneuver, or of any other cause, and whose accounts have not yet been settled, shall receive such pay for each day of such period; and the thirty-first day of a calendar month shall not be excluded from the computation. [41 Stat. L. 973.]

* * * **[National Guard — issuance of clothing, etc., by Secretary of War.]** That the Secretary of War is hereby directed to issue from surplus stores and matériel now on hand and purchased for the United States Army such articles of clothing and equipment and Field Artillery matériel and ammunition as may be needed by the National Guard organized under the provisions of the Act entitled "An Act for making further and more effectual provisions for the national defense, and for other purposes," approved June 3, 1916. This issue shall be made without charge against militia appropriations. [41 Stat. L. 973.]

For the Act of June 3, 1916, mentioned in the text, see 9 Fed. Stat. Ann. (2d ed.) 925 et seq.

* * * **[Advances to disbursing officers — use.]** That the Secretary of War be, and he hereby is, authorized to issue his requisitions for advances to disbursing officers and agents of the Army, under an "Army account of advances," not to exceed the total appropriation for the Army, the amount so advanced to be exclusively used to pay, upon proper vouchers, obligations lawfully payable under the respective appropriations. [41 Stat. L. 975.]

[Advances to disbursing officers — charge to appropriations.] That the amount so advanced be charged to the proper appropriations and returned to "Army account of advances" by pay and counterwarrant. The said charge, however, to particular appropriations shall be limited to the amount appropriated to each. [41 Stat. L. 975.]

[Advances to disbursing officers — audit.] That the Auditor for the War Department shall declare the sums due from the several special appropriations upon complete vouchers, as heretofore, according to law; and he shall adjust the said liabilities with the "Army account of advances." [41 Stat. L. 975.]

[Advances to disbursing officers — transfer of sums available for disbursement.] That any balances of existing Army appropriations now available for withdrawal from the Treasury, together with any unexpended balances now charged to disbursing officers or agents of the Army which, under existing law, are available for disbursement, shall at such time as may be designated by the Secretary of War, be transferred on the books of the Treasury Department to "Army account of advances" and shall be disbursed and accounted for as such. [41 Stat. L. 975.]

* * * **[Government-owned establishments — orders for material — payment.]** That all orders or contracts for the manufacture of material pertaining to approved projects heretofore or hereafter placed with Government-owned establishments shall be considered as obligations in the same manner as provided for similar orders placed with commercial manufacturers, and the appropriations shall remain available for the payment of the obligations so created as in the case of contracts or orders with commercial manufacturers. [41 Stat. L. 975.]

* * * **[Wounded or disabled soldiers, sailors or marines — furlough certificates — transportation.]** The Secretary of War and the Secretary of the Navy, under such regulations and restrictions as they may provide, are hereby authorized to issue to all wounded and otherwise disabled soldiers, sailors, or marines under treatment in any Army, Navy, or other hospital, who are given furloughs at any time, a furlough certificate, which certificate shall be signed by the commanding officer at such hospital. This furlough certificate when presented by such furloughed soldier, sailor, or marine to the agent of any railroad or steamship company over whose lines said soldier, sailor, or marine may travel to and from his home during the furlough period shall entitle said soldier, sailor, or marine to purchase a ticket from the point of departure to point of destination and return at the rate of 1 cent per mile, and on presentation of such certificate on which such ticket has been issued the railroad or steamship company issuing such ticket shall be entitled to receive from the Treasury of the United States the difference between the amount paid for such ticket at the rate of 1 cent per mile and the regular scheduled rate for such ticket. The sum of \$250,000, or so much thereof as may be necessary, is hereby appropriated, out of any funds in the Treasury not otherwise appropriated, for the purpose of carrying out the provisions of this paragraph. [41 Stat. L. 975.]

[Social intercourse between officers and enlisted men — prevention by order — penalty for issuance.] *Provided*, That no part of the funds herein appropriated shall be expended in payment of the salary of any officer of the Army of the United States who shall issue or cause to be issued any order, written or verbal, preventing social intercourse between officers and enlisted men of said Army while not on military duty when such order was not authorized by law or general Executive order: *Provided further*, That this limitation shall not apply to an officer who shall have acted in obedience to the mandates of his superior. [41 Stat. L. 976.]

[Discharged soldiers, sailors and marines receiving treatment from Public Health Service — purchase of army stores.] That hereafter honorably discharged officers and enlisted men of the Army, Navy, or Marine Corps who are being cared for and are receiving medical treatment from the Public Health Service shall, while undergoing such care and treatment, be permitted to purchase subsistence stores and articles of other authorized supplies, except articles of the uniform, from the Army, Navy, and Marine Corps at the same price as charged the officers and enlisted men of the Army, Navy, and Marine Corps. [41 Stat. L. 976.]

* * * [Loan of rifles and accessories to organization of war veterans — sale of ammunition — Act of Feb. 10, 1920, amended.] That the Act entitled "An Act authorizing the Secretary of War to loan Army rifles to posts of the American Legion," approved February 10, 1920, be, and the same is hereby, amended to read as follows:

"That the Secretary of War is hereby authorized, under rules, limitations, and regulations to be prescribed by him, to loan obsolete or condemned Army rifles, slings, and cartridge belts to posts or camps of organizations composed of honorably discharged soldiers, sailors, or marines, for use by them in connection with the funeral ceremonies of deceased soldiers, sailors, and marines, and for other post ceremonial purposes; and to sell such posts and camps blank ammunition in suitable amounts for said rifles at cost price, plus cost of packing and transportation: *Provided, however,* That not to exceed ten such rifles shall be issued to any one post or camp." [41 Stat. L. 976.]

For the Act of Feb. 10, 1920, amended by the text, see *supra*, this title, p. 288.

* * * [Emergency commissioned personnel — number — discharge — officers of regular army.] That the President is authorized to retain temporarily in service, under their present commissions, or to discharge and recommission temporarily in lower grades, such emergency officers as he may deem necessary; but the total number of officers on active duty, exclusive of retired officers and disabled emergency officers undergoing treatment for physical reconstruction, shall at no time exceed seventeen thousand eight hundred and twenty-three. Any emergency officer may be discharged when his services are no longer required, and all such officers shall be discharged not later than December 31, 1920. All officers of the Regular Army holding commissions granted for the period of the existing emergency, in whatever grade, shall be discharged therefrom not later than June 30, 1920. [41 Stat. L. 977.]

Sec. 8. [Surplus supplies and equipment pertaining to military establishment — transfer to Chief of Engineers.] That the Secretary of War be, and he is hereby, authorized and empowered, in his discretion, to transfer, free of charge, to the Chief of Engineers, United States Army, for use in the execution, under his direction, of any civil work or works authorized by Congress, such material, supplies, instruments, vehicles, machinery, or other equipment pertaining to the Military Establishment as are or may hereafter be found to be surplus and no longer required for military purposes. [41 Stat. L. 1015.]

This is from the Rivers and Harbors Appropriation Act of June 5, 1920, ch. 252.

* * * **[Transportation from Europe of wives of soldiers.]** The Secretary of War is authorized to pay for the transportation from Europe to the United States of the wives of soldiers who became such while the soldiers were in Europe. The payment therefor shall be made from funds appropriated for the transportation of the Army and its supplies and at the per capita rates agreed upon for the transportation of the troops. *[41 Stat. L. 1026.]*

This is from the Deficiency Appropriation Act of June 5, 1920, ch. 253.

An Act Authorizing the enlistment of non-English speaking citizens and aliens.

[Act of June 14, 1920, ch. 286, 41 Stat. L. 1077.]

[Enlistments — non-English speaking citizens and aliens—repeal of provision in Act of Aug. 1, 1894.] That so much of the Act of Congress entitled “An Act to regulate enlistments in the Army of the United States,” approved August 1, 1894, as provides that “in time of peace no person (except an Indian) who can not speak, read, and write the English language” be, and the same is hereby repealed. *[41 Stat. L. 1077.]*

For Act of Aug. 1, 1894, a portion of which is here repealed, see 9 Fed. Stat. Ann. (2d ed.) 1032.

WAR FINANCE CORPORATION

See CORPORATIONS

WAR RISK INSURANCE

Sec CIVIL SERVICE; HOSPITALS AND ASYLUMS; WAR DEPARTMENT AND MILITARY ESTABLISHMENT

WATERS

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CROSS-REFERENCES

See also *INDIANS; SHIPPING AND NAVIGATION*

An Act For furnishing water supply for miscellaneous purposes in connection with reclamation projects.

[*Act of Feb. 25, 1920, ch. 86, 41 Stat. L. 451.*]

[**Reclamation projects—furnishing water supply for other purposes than irrigation.**] That the Secretary of the Interior in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: *Provided*, That the approval of such contract by the water users' association or associations shall have first been obtained: *Provided*, That no such contract shall be entered into except upon a showing that there is no other practicable source of water supply for the purpose: *Provided, further*, That no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator: *Provided, further*, That the moneys derived from such contracts shall be covered into the reclamation fund and be placed to the credit of the project from which such water is supplied. [41 Stat. L. 451.]

[**SEC. 1.**] * * * [**Reclamation service—traveling expenses—automobiles and motor cycles—mileage.**] Whenever, during the fiscal year ending June 30, 1921, the Director of the Reclamation Service shall find that the expenses of travel can be reduced thereby, he may, in lieu of actual traveling expenses, under such regulations as he may prescribe, authorize the payment of not to exceed 3 cents per mile for a motor cycle or 7 cents per mile for an automobile, used for necessary travel on official business. [41 Stat. L. 915.]

This is from the Sundry Civil Appropriation Act of June 5, 1920, ch. 235.

An Act To create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes.

[*Act of June 10, 1920, ch. 285, 41 Stat. L. 1063.*]

[SEC. 1.] **[Federal Power Commission — creation — membership — quorum — seal.]** That a commission is hereby created and established, to be known as the Federal Power Commission (hereinafter referred to as the commission), which shall be composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. Two members of the commission shall constitute a quorum for the transaction of business, and the commission shall have an official seal, which shall be judicially noticed. The President shall designate the chairman of the commission. [41 Stat. L. 1063.]

SEC. 2. **[Executive secretary — engineer officer — work of commission — performance by Departments of War, Interior and Agriculture — expenses.]** That the commission shall appoint an executive secretary, who shall receive a salary of \$5,000 a year, and prescribe his duties, and the commission may request the President of the United States to detail an officer from the United States Engineer Corps to serve the commission as engineer officer, his duties to be prescribed by the commission.

The work of the commission shall be performed by and through the Departments of War, Interior, and Agriculture and their engineering, technical, clerical, and other personnel except as may be otherwise provided by law.

All the expenses of the commission, including rent in the District of Columbia, all necessary expenses for transportation and subsistence, including, in the discretion of the commission, a per diem of not exceeding \$4 in lieu of subsistence incurred by its employees under its orders in making any investigation, or conducting field work, or upon official business outside of the District of Columbia and away from their designated points of duty, shall be allowed and paid on the presentation of itemized vouchers therefor approved by a member or officer of the commission duly authorized for that purpose; and in order to defray the expenses made necessary by the provisions of this Act there is hereby authorized to be appropriated such sums as Congress may hereafter determine, and the sum of \$100,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, available until expended, to be paid out upon warrants drawn on the Secretary of the Treasury upon order of the commission. [41 Stat. L. 1063.]

SEC. 3. **[Words used in Act defined.]** That the words defined in this section shall have the following meanings for the purposes of this Act, to wit:

“Public lands” means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public-land laws. It shall not include “reservations,” as hereinafter defined.

“Reservations” means national monuments, national parks, national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public-

land laws; also lands and interests in lands acquired and held for any public purpose.

“Corporation” means a corporation organized under the laws of any State or of the United States empowered to develop, transmit, distribute, sell, lease, or utilize power in addition to such other powers as it may possess, and authorized to transact in the State or States in which its project is located all business necessary to effect the purposes of a license under this Act. It shall not include “municipalities” as hereinafter defined.

“State” means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

“Municipality” means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.

“Navigable waters” means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids; together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.

“Municipal purposes” means and includes all purposes within municipal powers as defined by the constitution or laws of the State or by the charter of the municipality.

“Government dam” means a dam or other work, constructed or owned by the United States for Government purposes, with or without contribution from others.

“Project” means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water rights, rights of way, ditches, dams, reservoirs, lands, or interest in lands, the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.

“Project works” means the physical structures of a project.

“Net investment” in a project means the actual legitimate original cost thereof as defined and interpreted in the “classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission,” plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or

similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, in so far as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall in so far as applicable be published and promulgated as a part of the rules and regulations of the commission. [41 Stat. L. 1063.]

SEC. 4. [Powers of commission — Licenses to improve navigation or develop water power — preliminary permits.] That the commission is hereby authorized and empowered —

(a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development costs, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the commission may deem necessary or useful for the purposes of this Act.

In order to aid the commission in determining the net investment of a licensee in any project, the licensee shall, upon oath, within a reasonable period of time, to be fixed by the commission, after the construction of the original project or any addition thereto or betterment thereof, file with the commission, in such detail as the commission may require, a statement in duplicate showing the actual legitimate cost of construction of such project, addition, or betterment, and the price paid for water rights, rights of way, lands, or interest in lands. The commission shall deposit one of said statements with the Secretary of the Treasury. The licensee shall grant to the commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto.

(b) To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the commission, to furnish such records, papers, and information in their possession as may be requested by the commission, and temporarily to detail to the commission such officers or experts as may be necessary in such investigations.

(c) To make public from time to time the information secured hereunder, and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The commission, on or before the first Monday in December of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this Act, and in each case the parties thereto, the terms prescribed, and the moneys received, if any, on account thereof.

(d) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State, or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs,

power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of War. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further*, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to the passage of this Act: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (e) of this section, notice shall be given and published as required by the proviso of said subsection.

(e) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application for eight weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

(f) To prescribe rules and regulations for the establishment of a system of accounts and for the maintenance thereof by licensees hereunder; to examine all books and accounts of such licensees at any time; to require them to submit at such time or times as the commission may require statements and reports, including full information as to assets and liabilities, capitalization, net investment and reduction thereof, gross receipts, interest due and paid, depreciation and other reserves, cost of project, cost of maintenance and operation of the project, cost of renewals and replacements of the project works, and as to depreciation of the project works and as to production, transmission, use and sale of power; also to require any licensee to make adequate provision for currently determining said costs and other facts. All such statements and reports shall be made upon oath, unless otherwise specified, and in such form and on such blanks as the commission may require. Any person who, for the

purpose of deceiving, makes or causes to be made any false entry in the books or the accounts of such licensee, and any person who, for the purpose of deceiving, makes or causes to be made any false statement or report in response to a request or order or direction from the commission for the statements and report herein referred to shall, upon conviction, be fined not more than \$2,000 or imprisoned not more than five years, or both.

(g) To hold hearings and to order testimony to be taken by deposition at any designated place in connection with the application for any permit or license, or the regulation of rates, service, or securities, or the making of an investigation, as provided in this Act; and to require by subpoena, signed by any member of the commission, the attendance and testimony of witnesses and the production of documentary evidence from any place in the United States, and in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Any member, expert, or examiner of the commission may, when duly designated by the commission for such purposes, administer oaths and affirmations, examine witnesses and receive evidence. Depositions may be taken before any person designated by the commission or by its executive secretary and empowered to administer oaths, shall be reduced to writing by such person or under his direction, and subscribed by the deponent. Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(h) To perform any and all acts, to make such rules and regulations, and to issue such orders not inconsistent with this Act as may be necessary and proper for the purpose of carrying out the provisions of this Act. [41 Stat. L. 1065.]

SEC. 5. [Preliminary permits — purpose — scope.] That each preliminary permit issued under this Act shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained and a license issued. Such permits shall not be transferable, and may be canceled by order of the commission upon failure of permittees to comply with the conditions thereof. [41 Stat. L. 1067.]

SEC. 6. [Licenses — conditions of issuance — revocation, alteration and surrender.] That licenses under this Act shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the commission shall prescribe in conformity with this Act, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the commission after ninety days' public notice. [41 Stat. L. 1067.]

SEC. 7. [Preference in issuing licenses or permits — states and municipalities — project by United States.] That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall within a reasonable time to be fixed by the commission be made equally well adapted, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

That whenever, in the judgment of the commission, the development of any project should be undertaken by the United States itself, the commission shall not approve any application for such project by any citizen, association, corporation, State, or municipality, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the project as it may deem necessary, and shall submit its findings to Congress with such recommendations as it may deem appropriate concerning the construction of such project or completion of any project upon any Government dam by the United States.

The commission is hereby authorized and directed to investigate and, on or before the 1st day of January, 1921, report to Congress the cost and, in detail, the economic value of the power plant outlined in project numbered 3, House Document numbered 1400, Sixty-second Congress, third session, in view of existing conditions, utilizing such study as may heretofore have been made by any department of the Government; also in connection with such project to submit plans and estimates of cost necessary to secure an increased and adequate water supply for the District of Columbia. For this purpose the sum of \$25,000, or so much thereof as may be necessary, is hereby appropriated. [41 Stat. L. 1067.]

SEC. 8. [Transfer of licenses — conditions — what are "voluntary transfers."] That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission; and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section. [41 Stat. L. 1068.]

SEC. 9. [Applicants for licenses — evidence submitted to commission.] That each applicant for a license hereunder shall submit to the commission —

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(c) Such additional information as the commission may require. [41 Stat. L. 1068.]

SEC. 10. [Licenses — conditions of issuance.] That all licenses issued under this Act shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water-power development, and of other beneficial public uses; and if necessary in order to secure such scheme the commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

(b) That except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works constructed hereunder of a capacity in excess of one hundred horsepower without the prior approval of the commission; and any emergency alteration or addition so made shall thereafter be subject to such modification and change as the commission may direct.

(c) That the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the commission may from time to time prescribe for the protection of life, health, and property. Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor.

(d) That after the first twenty years of operation out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual, legitimate investment of a licensee in any project or projects under license the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license.

(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the use, occupancy, and enjoyment of its lands or other property; and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive profits or for the expropriation thereof to themselves, or until the period of amortization as

herein provided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require: *Provided*, That when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the commission shall fix a reasonable annual charge for the use thereof, and such charges may be readjusted at the end of twenty years after the beginning of operations and at periods of not less than ten years thereafter in a manner to be described in each license: *Provided*, That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation licenses therefor shall be issued without charge; and that licenses for the development, transmission, or distribution of power for domestic, mining, or other beneficial use in projects of not more than one hundred horsepower capacity may be issued without charge, except on tribal lands within Indian reservations; but in no case shall a license be issued free of charge for the development and utilization of power created by any Government dam and that the amount charged therefor in any license shall be such as determined by the commission.

(f) That whenever any licensee hereunder is directly benefited by the construction work of another licensee, a permittee, or of the United States of a storage reservoir or other headwater improvement, the commission shall require as a condition of the license that the licensee so benefited shall reimburse the owner of such reservoir or other improvements for such part of the annual charges for interest, maintenance, and depreciation thereon as the commission may deem equitable. The proportion of such charges to be paid by any licensee shall be determined by the commission.

Whenever such reservoir or other improvement is constructed by the United States the commission shall assess similar charges against any licensee directly benefited thereby, and any amount so assessed shall be paid into the Treasury of the United States, to be reserved and appropriated as a part of the special fund for headwater improvements as provided in section 17 hereof.

(g) Such other conditions not inconsistent with the provisions of this Act as the commission may require.

(h) That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

(i) In issuing licenses for a minor part only of a complete project, or for a complete project of not more than one hundred horsepower capacity, the commission may in its discretion waive such conditions, provisions, and requirements of this Act, except the license period of fifty years, as it may deem to be to the public interest to waive under the circumstances: *Provided*, That the provisions hereof shall not apply to lands within Indian reservations. [41 Stat. L. 1068.]

SEC. 11. [Project works along or in navigable waters—conditions in licenses.] That if the dam or other project works are to be constructed across, along, or in any of the navigable waters of the United States, the commission

may, in so far as it deems the same reasonably necessary to promote the present and future needs of navigation and consistent with a reasonable investment cost to the licensee, include in the license any one or more of the following provisions or requirements:

(a) That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes, in accordance with plans and specifications approved by the Chief of Engineers and the Secretary of War and made part of such license.

(b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its rights of way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete such navigation facilities.

(c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States. [41 Stat. L. 1070.]

SEC. 12. [Locks or other navigation structures — projects involving navigable waters.] That whenever application is filed for a project hereunder involving navigable waters of the United States, and the commission shall find upon investigation that the needs of navigation require the construction of a lock or locks or other navigation structures, and that such structures can not, consistent with a reasonable investment cost to the applicant, be provided in the manner specified in section 11, subsection (a) hereof, the commission may grant the application with the provision to be expressed in the license that the licensee will install the necessary navigation structures if the Government fails to make provision therefor within a time to be fixed in the license and cause a report upon such project to be prepared, with estimates of cost of the power development and of the navigation structures, and shall submit such report to Congress with such recommendations as it deems appropriate concerning the participation of the United States in the cost of construction of such navigation structures. [41 Stat. L. 1070.]

SEC. 13. [Construction of project works — limitation of time for construction.] That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of

any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license; or as extended by the commission, then the Attorney General, upon the request of the commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof. [41 Stat. L. 1071.]

SEC. 14. [Authority of United States to take over projects — compensation — condemnation.] That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by agreement between the commission and the licensee, and in case they can not agree, by proceedings in equity instituted by the United States in the district court of the United States in the district within which any such property may be located: *Provided*, That such net investment shall not include or be affected by the value of any lands, rights of way or other property of the United States licensed by the commission under this Act, by the license, or by good will, going value, or prospective revenues: *Provided further*, That the values allowed for water rights, rights of way, lands, or interest in lands shall not be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved. [41 Stat. L. 1071.]

SEC. 15. [New licenses and renewals.] That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects

covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. [41 Stat. L. 1072.]

SEC. 16. [Temporary use of projects by United States when safety of nation involved — compensation.] That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee. [41 Stat. L. 1072.]

SEC. 17. [Proceeds from Indian reservation — charges arising from licenses — disposition.] That all proceeds from any Indian reservation shall be placed to the credit of the Indians of such reservation. All other charges arising from licenses hereunder shall be paid into the Treasury of the United States, subject to the following distribution: Twelve and one-half per centum thereof is hereby appropriated to be paid into the Treasury of the United States and credited to "Miscellaneous receipts"; 50 per centum of the charges arising from licenses hereunder for the occupancy and use of public lands, national monuments, national forests, and national parks shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress known as the Reclamation Act, approved June 17, 1902; and 37½ per centum of the charges arising from licenses hereunder for the occupancy and use of national forests, national parks, public lands, and national monuments, from development within the boundaries of any State shall be paid by the Secretary of the Treasury to such State; and 50 per centum of the charges arising from all other licenses hereunder is hereby reserved and appropriated as a special fund in the Treasury to be expended under the direction of the Secretary of War in the maintenance and operation of dams and other navigation structures owned by the United States or in the construction, maintenance, or operation of head-water or other improvements of navigable waters of the United States. [41 Stat. L. 1072.]

SEC. 18. [Operation of navigation facilities — rules and regulations.] That the operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this Act, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of War. Such rules and regulations may include the maintenance and operation by such licensee at its own expense of such lights and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of Commerce; and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 25 hereof. [41 Stat. L. 1073.]

SEC. 19. [Corporations furnishing power for sale or use in public service — regulation by state.] That as a condition of the license, every licensee hereunder which is a public-service corporation, or a person, association, or corporation owning or operating any project and developing, transmitting, or distributing power for sale or use in public service, shall abide by such reasonable regulation of the services to be rendered to customers or consumers of power, and of rates and charges of payment therefor, as may from time to time be prescribed by any duly constituted agency of the State in which the service is rendered or the rate charged. That in case of the development, transmission, or distribution, or use in public service of power by any licensee hereunder or by its customer engaged in public service within a State which has not authorized and empowered a commission or other agency or agencies within said State to regulate and control the services to be rendered by such licensee or by its customer engaged in public service, or the rates and charges of payment therefor, or the amount or character of securities to be issued by any of said parties, it is agreed as a condition of such license that jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a commission or other authority for such regulation and control: *Provided*, That the jurisdiction of the commission shall cease and determine as to each specific matter of regulation and control prescribed in this section as soon as the State shall have provided a commission or other authority for the regulation and control of that specific matter. [41 Stat. L. 1073.]

SEC. 20. [Power sold in interstate or foreign commerce — regulation of rates and service rendered.] That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such

parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act. [41 Stat. L. 1073.]

For Act of Feb. 4, 1887, see 4 Fed. Stat. Ann. (2d ed.) 337 et seq.

SEC. 21. [Condemnation proceedings.] That when any licensee can not acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000. [41 Stat. L. 1074.]

SEC. 22. [Contracts for the sale and delivery of power — public interest requiring extension of time beyond license period.] That whenever the public interest requires or justifies the execution by the licensee of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval

of the commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, or if sold or delivered in a State which has no such public-service commission, then upon the approval of the commission, and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts. [41 Stat. L. 1074.]

SEC. 23. [Permits, rights of way, etc., heretofore granted — provisions of this Act as affecting — projects already constructed — licenses — valuation — projects in nonnavigable waters.] That the provisions of this Act shall not be construed as affecting any permit or valid existing right of way heretofore granted, or as confirming or otherwise affecting any claim, or as affecting any authority heretofore given pursuant to law, but any person, association, corporation, State, or municipality, holding or possessing such permit, right of way, or authority may apply for a license hereunder, and upon such application the commission may issue to any such applicant a license in accordance with the provisions of this Act, and in such case the provisions of this Act shall apply to such applicant as a licensee hereunder: *Provided*, That when application is made for a license under this section for a project or projects already constructed, the fair value of said project or projects, determined as provided in this section, shall for the purposes of this Act and of said license be deemed to be the amount to be allowed as the net investment of the applicant in such project or projects as of the date of such license, or as of the date of such determination, if license has not been issued. Such fair value may, in the discretion of the commission, be determined by mutual agreement between the commission and the applicant or, in case they can not agree, jurisdiction is hereby conferred upon the district court of the United States in the district within which such project or projects may be located, upon the application of either party, to hear and determine the amount of such fair value.

That any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce between foreign nations and among the several States, may in their discretion file declaration of such intention with the commission, whereupon the commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not proceed with such construction until it shall have applied for and shall have received a license under the provisions of this Act. If the commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws. [41 Stat. L. 1075.]

SEC. 24. [Public lands included in proposed projects — reservation from entry, etc.] That any lands of the United States included in any proposed project under the provisions of this Act shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by

Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the commission, for the purposes of this Act, which right shall be expressly reserved in every patent issued for such lands; and no claim or right to compensation shall accrue from the occupation or use of any of said lands for said purposes. The United States or any licensee for any such lands hereunder may enter thereupon for the purposes of this Act, upon payment of any damages to crops, buildings, or other improvements caused thereby to the owner thereof, or upon giving a good and sufficient bond to the United States for the use and benefit of the owner to secure the payment of such damages as may be determined and fixed in an action brought upon the bond in a court of competent jurisdiction, said bond to be in the form prescribed by the commission: *Provided*, That locations, entries, selections, or filings heretofore made for lands reserved as water-power sites or in connection with water-power development or electrical transmission may proceed to approval or patent under and subject to the limitations and conditions in this section contained. [41 Stat. L. 1075.]

SEC. 25. [Offenses — violation of provisions of Act, contracts, etc.] That any licensee, or any person, who shall willfully fail or who shall refuse to comply with any of the provisions of this Act, or with any of the conditions made a part of any license issued hereunder, or with any subpoena of the commission, or with any regulation or lawful order of the commission, or of the Secretary of War, or of the Secretary of Commerce as to fishways, issued or made in accordance with the provisions of this Act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall, in the discretion of the court, be punished by a fine of not exceeding \$1,000, in addition to other penalties herein prescribed or provided by law; and every month any such licensee or any such person shall remain in default after written notice from the commission, or from the Secretary of War, or from the Secretary of Commerce, shall be deemed a new and separate offense punishable as aforesaid. [41 Stat. L. 1076.]

SEC. 26. [Actions in equity by Attorney General — jurisdiction and procedure — revocation of licenses — sale of property, etc.] That the Attorney General may, on request of the commission or of the Secretary of War, institute proceedings in equity in the district court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder. The district courts shall have jurisdiction over all of the above-mentioned proceedings and shall have power to issue and execute all necessary process and to make and

enforce all writs, orders, and decrees to compel compliance with the lawful orders and regulations of the commission and of the Secretary of War, and to compel the performance of any condition imposed under the provisions of this Act. In the event a decree revoking a license is entered, the court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same, and to make and enforce such further orders and decrees as equity and justice may require. At such sale or sales the vendee shall take the rights and privileges belonging to the licensee and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of section 14 hereof at the termination of the license. [41 Stat. L. 1076.]

SEC. 27. [State laws relating to water as affected by this Act.] That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein. [41 Stat. L. 1077.]

SEC. 28. [Amendment of Act — reservation of right — effect of amendment on licenses.] That the right to alter, amend, or repeal this Act is hereby expressly reserved; but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder. [41 Stat. L. 1077.]

SEC. 29. [Repeal of inconsistent statutory provisions — sec. 18 of Act of Aug. 8, 1917, repealed.] That all Acts or parts of Acts inconsistent with this Act are hereby repealed: *Provided*, That nothing herein contained shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights of way to the city and county of San Francisco, in the State of California: *Provided further*, That section 18 of an Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, approved August 8, 1917, is hereby repealed. [41 Stat. L. 1077.]

For sec. 18 of Act of Aug. 8, 1917, here expressly repealed, see 1918 Supp. Fed. Stat. Ann. 775.

SEC. 30. [Title of Act — "The Federal Water Power Act."] That the short title of this Act shall be "The Federal Water Power Act." [41 Stat. L. 1077.]

WEATHER BUREAU

See PUBLIC PRINTING

WEIGHTS AND MEASURES

Act of March 23, 1920, ch. 106, 383.

National Screw Thread Commission — Extension of Term, 383.

Act of May 29, 1920, ch. 214 (Legislative, Executive and Judicial Appropriation Act), 383.

Sec. 1. National Bureau of Standards — Investigations Made for Governmental Departments — Funds Available, 383.

Joint Resolution Extending the term of the National Screw Thread Commission for a period of two years from March 21, 1920.

[Act of March 23, 1920, ch. 106, 41 Stat. L. 536.]

[National Screw Thread Commission — extension of term.] That the term of the National Screw Thread Commission, created by an Act approved July 18, 1918, as amended by an Act approved March 3, 1919, be, and the same is hereby, extended for an additional period of two years from March 21, 1920. *[41 Stat. L. 536.]*

For Act of July 18, 1918, as amended by Act of March 3, 1919, and here extended as to time, see 1919 Supp. Fed. Stat. Ann. 395.

[Sec. 1.] * * * **[National Bureau of Standards — investigations made for governmental departments — funds available.]** During the fiscal year 1921, the head of any department or independent establishment of the Government having funds available for scientific investigations and requiring cooperative work by the Bureau of Standards on scientific investigations within the scope of the functions of that Bureau and which it is unable to perform within the limits of its appropriations, may, with the approval of the Secretary of Commerce, transfer to the Bureau of Standards such sums as may be necessary to carry on such investigations. The Secretary of the Treasury shall transfer on the books of the Treasury Department any sums which may be authorized hereunder and such amounts shall be placed to the credit of the Bureau of Standards for the performance of work for the department or establishment from which the transfer is made. *[41 Stat. L. 683.]*

This is from the Legislative, Executive and Judicial Appropriation Act of May 29, 1920, ch. 214.

WEST POINT

See MILITARY ACADEMY

WOMAN SUFFRAGE

Constitutional Amendment granting suffrage to women, see Index.

WOMEN'S BUREAU

See LABOR DEPARTMENT

YOSEMITE NATIONAL PARK

See PUBLIC PARKS

SUPPLEMENTAL NOTES TO STATUTES

Throughout these Notes references to 1st ed. Fed. Stat. Ann. and Supplements hereto are indicated in []. A complete table of these references, numerically arranged, appears among the tables at the beginning of this volume.

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AGRICULTURE

1918 Supp., p. 25, sec. 12.

Loan secured by first mortgage as affected by state law creating potentiality of encumbrances for seed grain and feed.—Under the provisions of the Federal Farm Loan Act, a federal land bank has authority to make a loan secured by a first mortgage on farm land in North Dakota, if at the date when the mortgage is executed there is no other actual lien or encumbrance then in existence, notwithstanding the Seed and Feed Bonding Act of North Dakota creates as to all farm lands in the state a potentiality of encumbrances for seed grain and feed which may displace the lien of a first mortgage. It clearly lies within the discretion of the Farm Loan Board, however, to refuse to approve such classes of first liens on farm lands as it may deem undesirable security for loans by reason of the potentiality of accrual of liens under the statute in question or otherwise. (1918) 31 Op. Atty.-Gen. 605, wherein it was said:

"The effect of the statute in question is in substance to make it possible for any owner of farm land in North Dakota at any time after giving a first mortgage to bring into existence by his voluntary action a lien which by virtue of the statute will take precedence over the mortgage which he has previously executed. In other words, the statute creates as to all farm lands in the state a potentiality of encumbrance which may displace the lien of a first mortgage. Such a potentiality, however, is not uncommon in the legislation of the various states of the Union. Thus in Oklahoma (section 7606 of the Revised Laws of Oklahoma, 1910) provision is made whereby any owner of real estate in any county in which a permanent highway is proposed to be constructed may contribute a sum which by his written agreement may be divided into ten annual instalments and assessed on his real estate annually and collected in the same manner as taxes; and it is provided that after the filing of the pledge of contribution and its acceptance by the board of county commissioners 'the same shall become and be a lien upon said property with all the effect of any tax that may be levied against the same;' so also in Florida (section 2208 of the Compiled Laws of Florida, 1914) persons loaning money or advancing goods or merchandise to aid another in the business of planting, farming, timber getting, etc., acquire a lien on the crops, products, and lumber produced 'through the assistance of said loan or advances,' which lien is a 'statutory lien of prior dignity to all encumbrances' excepting laborers' and landlords' liens. In both of these instances the Act which brings the lien into being may be a voluntary act of the mortgagor, performed subsequent to the

execution by him of a first mortgage. I am of opinion that such a potentiality does not prevent a first mortgage from being a 'first lien' within the meaning of the Federal Farm Loan Act, if at the date when the mortgage is executed there is no other actual lien or encumbrance then in existence. If, therefore, at the time when the mortgage on North Dakota farm lands is executed, the lien shall not have actually accrued under the terms of the statute, and if there is no other existing encumbrance, such mortgage would, in my opinion, constitute a 'first lien' when made, notwithstanding the possibility of its subsequent displacement, in case the landowner should subsequently act in such manner as to give rise to the lien provided for by the statute. Being such a 'first lien,' the federal land bank would have authority to make a loan to the person who tenders such mortgage as security."

Validity of contract pertaining to sale of farm loan bonds.—A contract between the Federal Farm Loan Board and certain investment houses, in stipulating that all issues of bonds of the federal land banks for a period of six months from June 1, 1917, should bear interest at the rate of $4\frac{1}{2}$ per cent, was not in conflict with the second subsection of this section, which provides that farm land mortgages shall carry "a charge on the loan at a rate not exceeding the interest rate in the last series of farm loan bonds issued by the land bank making the loan." So the provision of a contract to the effect that certain bonds issued by the federal land banks and not disposed of to investment houses should be sold by the issuing banks at the fixed price of $101\frac{1}{8}$ was within the purview of the powers conferred by the Federal Farm Loan Act. (1917) 31 Op. Att.-Gen. 122.

1918 Supp., p. 28, sec. 14.

Loans to corporations.—Joint-stock land banks are not permitted to make loans either through national farm loan associations or through agents except to natural persons and cannot therefore lend to corporations. (1919) 31 Op. Atty.-Gen. 494, wherein it was said:

"It results from the facts that loans by federal land banks through national farm loan associations can be made only to members of such associations and that corporations cannot become such members, that federal land banks cannot loan to corporations through national farm loan associations. Federal land banks are authorized to loan otherwise than through national farm loan associations only under the circumstances indicated by section 15, which provides that loans may be made through agents when it shall appear that national farm loan organi-

zations are not likely, because of peculiar local conditions, to be formed in any given locality. But in the second paragraph of section 15 it is provided that loans made through agents 'shall be subject to the same conditions and restrictions as if the same were made through national farm loan associations.' I see no reason for interpreting the words 'conditions and restrictions' so as to exclude from their meaning the limitation running deeply into the structure and intention of the statute upon the character of the person to whom loans may be made. I come more quickly to this conclusion, because the provisions authorizing loans through agents were designed to meet special situations in which, because of peculiar local conditions, the normal method of making loans through national farm loan associations was impractical, and not to supply an ordinary alternative to that method of extending credit."

1918 Supp., p. 33, sec. 21.

Certificate signed by Farm Loan Commissioner.—Under the provision of this section which requires every farm loan bond to contain a certificate signed by the Farm Loan Commissioner, the certificate may be signed by an engraved facsimile signature of the Farm Loan Commissioner. (1917) 31 Op. Atty-Gen. 146, wherein it was said:

"The requirement of the act is met if the signature of the Farm Loan Commissioner be written, stamped or engraved on the bond under circumstances which make it his own conscious and deliberate act. If he were accustomed to sign his name by a stamp rather than with pen and ink there can be no question that he might authorize this stamp to be affixed in his presence by another person in his behalf. Upon the same principle of physical agency he may authorize the Director of the Bureau of Engraving and Printing from time to time to affix his signature by engraving to certificates upon bonds identified by number or other description, so that the act of the director would be in effect the act of the commissioner himself. It is enough that the signature shall have been affixed by direction of the Farm Loan Commissioner; that he shall have adopted it as his own; and that he shall have satisfied himself before

the bonds have finally issued that the certificate so signed is true in point of fact."

1918 Supp., p. 36, sec. 26.

Constitutionality of provision relating to first mortgage and farm loan bonds.—That portion of this section which exempts first mortgages executed to federal land banks and farm loan bonds from state, municipal, and local taxation, is constitutional. (1917) 31 Op. Atty-Gen. 103, wherein it was said:

"The question, therefore, is whether a state tax upon the bonds and first mortgages contemplated by the Federal Farm Loan Act is a tax upon the operations of the system created by the act so that such a tax may hamper it in its efficient and successful operation; or, looking at it more narrowly, whether the above question is of sufficient doubt to make the declaration of Congress that such a tax would hamper the operations of the system conclusive upon the courts. I do not deem it necessary to analyze the act in detail. It is sufficient to say that the mortgages and farm loan bonds are of the very essence of the system created by it. The original capital of the federal land bank is to be loaned, through the agency of national farm loan associations, to bona fide cultivators of the soil on first mortgages on farm lands. When a sufficient amount in such mortgages has accumulated, they are to be turned over to a 'registrar' appointed by the farm loan board, and, with the approval of that board, farm loan bonds are issued by the land bank and sold. With the proceeds further loans are made on mortgages, which mortgages in their turn become the basis for an additional issue of bonds. This continuous flow and reflow of mortgages and bonds constitute the prime function of the whole system.

"A tax upon these bonds and mortgages would, therefore, be a tax upon the most important operations of the system, and might hamper it to so great an extent as to render it unsuccessful. In other words, it might be found impossible to raise capital by means of the bonds, and it might be found impossible to loan money on the mortgages at the reasonable rate of interest desired, if these two fundamental instrumentalities were taxed by the states. At any rate, Congress might well think so, and its declaration upon the subject is conclusive."

ALASKA

Vol. I, p. 301, sec. 2. [First ed., vol. X, p. 27.]

Mandamus to compel approval of application for patent.—The refusal of the Secretary of the Interior and the Commissioner of the General Land Office to approve and pass to patent applications for certain Alaska coal claims will not be controlled by mandamus, where such action was taken after a painstaking consideration and review of the evidence, and a determination of its probative strength, the deduction being that what was done was for prospecting purposes merely, and did not satisfy the statutory requirements, which contemplated, they decided, as the basis of a valid location, the opening and developing of a producing mine. *Alaska Smokeless Coal Co. v. Lane*, (1919) 250 U. S. 549, 40 S. Ct. 33, 64 U. S. (L. ed.) —, *affirming* (1917) 46 App. Cas. (D. C.) 443.

Vol. I, p. 325. [*Act of March 3, 1903.*] [First ed., vol. I, p. 25.]

Entry of soldier as limited to one hundred and sixty acres.—The prohibition in this act extending the homestead laws to Alaska, that not more than 160 acres of land shall be entered in a single body by means of soldiers' additional homestead rights, may not be evaded by a mere resort to two entries by the same person for two tracts separately surveyed, but contiguous to the extent of having a common boundary one-half mile in length, each containing 160 acres or less. *U. S. v. Poland*, (1920) 251 U. S. 221, 40 S. Ct. 127, 64 U. S. (L. ed.) — (*reversing* (C. C. A. 9th Cir. 1916) 231 Fed. 810, 145 C. C. A. 630), wherein the court said:

"In approaching the consideration of the provision whose meaning and purpose are in question it is well to recall what soldiers' additional homestead rights are and what use could be made of them outside Alaska when the provision was adopted. They are rights to enter and acquire unappropriated non-mineral public land without settlement, residence, improvement, or cultivation, and without payment of any purchase price. They are not personal to the original beneficiaries, but are transferable at will, and the number that may be assigned to the same person is not limited. A single right is always for less, and generally much less, than one hundred and sixty acres, but rights aggregating many times that number of acres may be and often are held by a single assignee. When the provision was adopted there were almost no restrictions upon the use of such rights outside of Alaska. Indeed, the only restriction of any moment was one, uniformly respected, preventing the inclusion of more than one hundred and sixty acres in a single entry. But the number of such entries that might be made by the same person

was not restricted, nor was there any limitation upon the amount of land in a single body that might be entered in that way. Thus an assignee having rights aggregating six hundred and forty acres could use them in entering that amount of land in a compact body one mile square, if only he did so through four entries of one hundred and sixty acres each. And, if he had rights the aggregate of which was sufficient, he could in a like way enter a body of land three miles square or even an entire township. See R. S. secs. 2289, 2304, 2306 [8 Fed. Stat. Ann. (2d ed.) 543, 586, 588]; *Webster v. Luther*, 163 U. S. 331, 16 Sup. Ct. 963, 41 L. Ed. 179; *Diamond Coal Co. v. United States*, 233 U. S. 236, 243, 34 Sup. Ct. 507, 58 L. Ed. 936; *Robinson v. Lundrigan*, 227 U. S. 173, 178, 179, 33 Sup. Ct. 255, 57 L. Ed. 468; 3 Land Dec. 472; *Edgar Boice*, 29 Land Dec. 599, and *Edgar O'Keefe*, Id. 643; 30 Land Dec. 285; 31 Land Dec. 441; 32 Land Dec. 418; *Ole B. Olsen*, 33 Land Dec. 225; 45 Land Dec. 236, par. 3; General Circular of 1904, pp. 11, 26-28.

"With this understanding of the circumstances in which the provision was incorporated into the Act of 1903 extending the homestead laws to Alaska, we think the meaning and purpose of the provision are manifest. It is in form a proviso and says 'no more than one hundred and sixty acres shall be entered in any single body' by means of soldiers' additional homestead rights. A purpose to prevent the use of these rights in entering a large acreage in a single body hardly could be more plainly expressed. There is nothing in the provision indicating that it is concerned merely with what may be taken by a single entry; and to construe it in that way would make it practically useless, for a large acreage in a single body still could be taken by merely resorting to two or more entries. Besides, the amount of land that could be taken by a single entry had long been limited to one hundred and sixty acres, and of course to say that no greater amount should be taken in a single body by a single entry would add nothing to that limitation. But the provision does not speak of a single entry but only of the amount that may be 'entered in any single body,' and if it is to have any real effect it must be construed according to the natural import of its words; that is to say, as limiting the amount of land in a compact or single body that may be entered by means of soldiers' additional homestead rights, whether the entering be by one or several entries. We conclude therefore that the provision, while leaving one who holds several rights free to exercise all of them and to make as many entries as his rights will sustain, prohibits him from using them to enter and acquire more than one hundred and sixty acres in a compact or single body."

Vol. I, p. 336, sec. 1. [First ed., 1916 Supp., p. 7.]

Authority of President to direct purchase of stock and bonds of privately owned railroad.—The President had plenary authority to direct the Secretary of the Interior to execute a contract for the purchase of all the certificates of stock and all the first mortgage bonds issued by the Alaska Northern Railway Co., such purchase being, in effect, an acquisition of said railroad line within the meaning of this Act. (1915) 31 Op. Atty.-Gen. 597.

Action against United States for malicious prosecution.—A suit for malicious prosecution may not be maintained against a railroad which has been purchased by the United States under the provisions of this Act, for the United States cannot be sued for a tort, nor can a judgment creditor in such an action interfere with its property by seizing it on execution. *Ballaine v. Alaska Northern R. Co.*, (C. C. A. 9th Cir. 1919) 259 Fed. 183, 170 C. C. A. 251, 8 A. L. R. 990.

1918 Supp., p. 51, sec. 1. [*Intoxicating liquors, etc.*]

Seizure of liquors en route from Alaska to California.—In *Northern Commercial Co. v. Brennenman*, (C. C. A. 9th Cir. 1919) 259

Fed. 514, 171 C. C. A. 10, intoxicating liquors en route from Alaska to California after January 1, 1918, but which were still in Alaska, were held to be liable to seizure by government officers under the provisions of this Act. The court said:

"As has been shown, by its first section it is expressly declared, among other things, that on and after the 1st day of January, 1918, it shall be unlawful for any person, company, or corporation, his, its, or their agents, etc., to have in his, its, or their possession in Alaska any intoxicating liquor, or to transport or otherwise dispose of the same, except under conditions not here applicable, and by section 14 that it shall be unlawful for any person to ship, transport, deliver, receive, or have in his possession any such liquor (with certain exceptions also inapplicable to the present case), with the further provision in section 23 that no property right of any kind shall exist in alcoholic liquors or beverages illegally received, possessed, or stored, as provided in and by that act, and that in all such cases such liquors are forfeited to the United States and subject to seizure and destruction.

"In view of those clear and unmistakable provisions of the statute, we are unable to sustain the contention of the appellant that the court was in error in sustaining the demurrer to the complaint."

ALIENS

Vol. I, p. 364, sec. 4067. [First ed., vol. I, p. 435.]

Review on habeas corpus.—The authority of the President under this section to promulgate regulations by proclamation or public act is plenary and not reviewable, but where no hearing is provided for after the arrest of a person alleged to be an alien enemy, the question whether he is such may be reviewed on habeas corpus. *Ex p. Gilroy*, (S. D. N. Y. 1919) 257 Fed. 110.

Burden of proof.—A person arrested under this section as an alien has the burden of showing that he is under illegal restraint, and, on habeas corpus, he must satisfy the court that he is not a native, citizen, denizen, or subject of the hostile nation or government. *Ex p. Risse*, (S. D. N. Y. 1919) 257 Fed. 102; *Ex p. Gilroy*, (S. D. N. Y. 1919) 257 Fed. 110.

Decision of draft board regarding citizenship as binding on reviewing court.—The decision of a local board under the Selective Service Law (see vol. IX, p. 1136) that a registrant is an American citizen, is an adjudication binding on the court on a review of the action of the executive authorities under this section in so far as the same facts

are before it as were before the local board. *Ex p. Gilroy*, (S. D. N. Y. 1919) 257 Fed. 110, wherein it was said:

"With all the facts, therefore, before the local and district boards, those responsible bodies decided, in effect, upon the assumption of Alexander's citizenship, that there was nothing which he had done to forfeit that citizenship. We, therefore, have the unusual situation of a man being inducted into the army because he is a citizen of the United States, serving therein so as to gain an honorable discharge, and then being arrested and detained because he is an alien enemy, and one of the grounds for detention being that he had so acted in his relation to a foreign enemy government as to lose his American citizenship, and that ground having been definitely rejected by the executive authorities charged by statute, *inter alia*, with the duty of determining this very point.

"Whether the determination of the local and district boards is in the first place an adjudication, and, secondly, a binding adjudication, is a novel question. Under section 4067, the executive is empowered to apprehend and detain alien enemies. Under the Selective Service Law the executive, in raising an army from civil life, is empowered

to appoint boards, who must determine, among other things, whether a person is or is not an alien enemy.

"In so far as concerns the relation of the United States to an individual as to citizenship status for war purposes, I am of opinion that the decision of the local board, affirmed by the district board, is an adjudication. In so far as the same facts are before the local board as are before the court on a

review of the action of the executive authorities under section 4067, I am of opinion that the adjudication is binding. Of course, there are no parties, but the determination is the same in both cases, and, although by different agencies of the executive, it is upon the same question; i. e., whether a person has shown that he is not an alien enemy subject or citizen."

ANIMALS

Vol. I, p. 377, sec. 1. [First ed., 1909 Supp., p. 43.]

Connecting carrier.—In *U. S. v. Cleveland, etc., R. Co.*, (N. D. Ohio 1920) 202 Fed. 775, it appeared that the defendant as to three shipments merely permitted a section of its track to be used, and in two cases merely switched the shipment over its line from the New York Central Railroad Company's line to the Union Stockyards, with which the New York Central had a contract to feed, water, and rest cattle in compliance with this law. In holding that such facts constituted a good defense to a prosecution for a violation of this section, the court said: "The defendant, as well as the Stockyards Company, was an agency availed of by the New York Central Railroad Company to comply with the law. Its lines did not form any part of the line of road over which the cattle were to be conveyed from one state to another. If the failure of the Stockyards Company to perform the labor of unloading the stock with due promptness is a matter of importance, this failure must be imputed, not to the defendant, but to the New York Central, whose agency it was, and on which the duty rests to comply with the law."

Violation of Act as negligence.—Violation of the Act is evidence of negligence in an action by the shipper for damages to a shipment of mules and horses which ate off each other's manes and tails in transit, being kept forty hours without food. *Hines v. Morgan*, (Ark. 1920) 218 S. W. 672.

Vol. I, p. 386, sec. 2. [First ed., 1909 Supp., p. 44.]

Nature of duty.—The duty imposed by this section is a unitary one, and a shipper by partially feeding, without governmental inspection, cattle at other times and places than at the end of the 28-hour transit, cannot relieve the railroad from the duty of providing proper feed at the rest pens at that time. Hence, where the railroad pursuant to this duty furnishes feed to the cattle in the rest pens, the shipper is liable therefor. It may not, however, recover for such por-

tion of the feed as it placed in the cars for the cattle instead of in the rest pens. *Pennsylvania R. Co. v. Swift*, (C. C. A. 3d Cir. 1919) 258 Fed. 289, 169 C. C. A. 305. Regarding the nature of the duty imposed by this section, the court said:

"The law gives the owner and shipper of cattle the option of performing the statutory duty of feeding his cattle in transit, but if he does not assume that statutory duty the act compels the railroad to perform it. Manifestly, the statute does not contemplate a divided, dual duty, but a single, unitary one, which the owner primarily has the right to perform; or, if he does not assume the duty, the railroad must. To hold the duty was a divisible one would result, not only in neglect of the cattle, but in the absence of that governmental inspection of the cattle in transit which safeguards them from unnecessary suffering. From this it follows that if the duty is a unitary one, if the shipper does not assume that duty in its entirety, and if it is cast on the railroad, the shipper cannot hamper the railroad with conditions, or by any voluntary part performance on its part add to or detract from the railroad's obligation to perform the statutory duty in its entirety. Now, the statute compels the railroad, after a transit of 28 hours, to unload the cattle 'in a humane manner, into properly equipped pens for rest, water, and feeding, for . . . at least five consecutive hours,' and that 'the animals so unloaded shall be properly fed and watered during such rest.' In carrying out that statutory requirement, the railroad has provided at Pittsburgh, at the terminus of a run which is approximately 28 hours from the great cattle shipping point of Chicago, suitable pens, with facilities for rest, water, and feed. The government has its inspectors at Pittsburgh, to see that the provisions of the law are complied with, and, as we have noted, the unquestioned fact is that a 250-pound feed given at Pittsburgh would comply with the statute and fit the cattle for the next long-hour run of the journey east. The railroad having thus provided water, food, and rest facilities at Pittsburgh, and the proper amount of food for the cattle at that point being 250 pounds, and the cattle owner not

having exercised his primary right of assuming the duty in its entirety, it inevitably follows, in our judgment, that no voluntary act of the shipper in partially feeding, without governmental inspection, the cattle at other times and places can lessen the duty of the railroad to provide proper food at the rest pens at the end of the 28-hour transit. It follows, therefore, that when Swift & Co., who had volunteered to place 150 pounds of food in the cars before the cattle started from

Chicago, sought to prevent the railroad from furnishing more than 100 pounds of food to the cattle at the end of the 28-hour run in Pittsburgh, this was an unwarranted effort to prevent the railroad from performing its full statutory unitary duty at Pittsburgh."

Effect of statute on contracts limiting liability of carrier.—To the same effect as the original annotation see *New York Cent. R. Co. v. Sturtevant, etc., Beef, etc., Co.*, (Mass. 1920) 127 N. E. 509.

ARTICLES FOR THE GOVERNMENT OF THE NAVY

Vol. I, p. 418, sec. 1624. [First ed., vol. I, p. 418.]

Discharge from naval service as preventing trial by court-martial.—A person discharged from the naval service before proceedings are instituted against him for violations of the Articles for the Government of the Navy, excepting Article 14, cannot thereafter be brought to trial before a court-martial for such violations, though committed while he was in the service. (1919) 31 Op. Atty-Gen. 521.

Vol. I, p. 423, art. 8, par. thirteenth. [First ed., vol. I, p. 463.]

Receiving gold, silver or jewels as creating contract obligation.—The mere exercise by the commanding officer of a naval vessel of his discretion under this article to receive

gold, silver or jewels on board for the protection of private rights, does not create a contract obligation on the part of the United States, enforceable in the court of claims, to preserve and return the deposit when demanded; nor will such contract be implied from the provision of the Navy Regulations, sec. 1020, which but comprehensively recognizes that compensation due for services rendered as the result of the exercise of the discretion of the officer to permit the articles in question to be taken on board should be applied, not for the benefit of the United States in virtue of any contract relation with the subject, but for the benefit of the officers and men designated in the proportions stated in the regulations. *Cartas v. U. S.*, (1919) 250 U. S. 545, 40 S. Ct. 42, 64 U. S. (L. ed.) —, *affirming* (1913) 48 Ct. Cl. 161.

BAIL AND RECOGNIZANCES

Vol. I, p. 492, sec. 1020. [First ed., vol. I, p. 523.]

Discretion of the court.—The remission of the penalty of a forfeited recognizance is under the provisions of this section within the discretion of the trial judge. Hence, where defendants in a criminal prosecution fail to appear when called for trial, and the government is subjected to considerable expense by their failure, a finding by the trial judge that public justice required that the penalty of the forfeiture be enforced is within his discretion and will not be disturbed by an appellate court on a writ of error. *U. S. v. Fidelity, etc., Co.*, (C. C. A.

3d Cir. 1919) 258 Fed. 444, 169 C. C. A. 460.

Wilful default.—In *U. S. v. Jacobson*, (E. D. Pa. 1919) 257 Fed. 760, it appeared that the defendant was indicted for the offense of keeping a house of ill fame within one of the military districts; that she was financed in such undertaking by unknown parties, who provided her bail on her arrest, and that she failed to appear for trial, thereby causing the United States considerable expense. It was held that under the evidence her default must be regarded as wilful and that the forfeiture of the bail would not be remitted under this section.

BANKRUPTCY

Vol. I, p. 504. [First ed., 1912 Supp., p. 464.]

Suspension of state insolvency laws—*In general.*—To same effect as original annotation, see *In re Brinn*, (N. D. Ga. 1919) 262 Fed. 527.

What state laws are superseded.—"A statute in order to be such an insolvency law as is suspended by the federal Bankruptcy Law must provide for the discharge of the debtor." *Greene v. Rice*, (1919) 32 Idaho 504, 186 Pac. 249, holding further that an act is not an insolvency law because it contains a provision that in case of an attachment "any creditor of the defendant, who, within sixty days after the first posting and publication of such notice shall commence and prosecute to final judgment his action for his claim against the defendant, shall share pro rata with the attaching creditor in the proceeds of defendant's property where there is not sufficient to pay all judgments in full against him."

Raising question.—The contention that a state insolvency law is superseded by the federal Bankruptcy Act cannot be raised for the first time on a motion for a rehearing in the appellate court. *Driver v. Carey*, (Ark. 1920) 220 S. W. 667.

Vol. I, p. 511, sec. 1a (15). [First ed., 1912 Supp., p. 465.]

Inability to meet obligations.—A debtor is insolvent when the aggregate of his property shall not, at a fair valuation, be sufficient in amount to pay his debts (3 R. C. L. p. 275, § 98), and not when he is unable to meet his obligations as they mature in the ordinary course of business. *Schuetz v. Swank*, (1920) 265 Pa. St. 576, 109 Atl. 531.

Evidence of facts constituting insolvency.—"Direct and detailed evidence of the facts constituting insolvency is not essential. Owing to its nature, insolvency is not always susceptible of direct proof. It may, and in many cases must, be proved by the proof of other facts, from which the ultimate fact of insolvency may be presumed or inferred." *Rosenberg v. Semple*, (C. C. A. 3rd Cir. 1919) 257 Fed. 72, 168 C. C. A. 284.

Vol. I, p. 515, sec. 1a (23). [First ed., 1912 Supp., p. 515.]

Who are secured creditors.—Creditors who have furnished materials to a bankrupt and who have served attested accounts on the owners, have recorded their claims, and are also protected by surety bonds under the provisions of state statutes, are secured creditors within the meaning of this section. *In re Ferrand*, (E. D. La. 1920) 263 Fed. 906.

Vol. I, p. 516, sec. 2. [First ed., 1912 Supp., p. 469.]

Right to exercise original jurisdiction.—To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614, holding that the jurisdiction of the bankruptcy court is exclusive but that it does not extend to all suits, at law or in equity, affecting a bankrupt's estate.

Equitable jurisdiction.—To same effect as original annotation, see *Martin v. Oliver*, (C. C. A. 8th Cir. 1919) 260 Fed. 89, 171 C. C. A. 125; *In re De Ray*, (C. C. A. 6th Cir. 1919) 260 Fed. 732, 171 C. C. A. 470, holding that a bankruptcy court has jurisdiction to set aside an allowance for services and expenses of an attorney of a trustee, when it satisfactorily appears that the allowance was procured through fraud.

Under amendment of 1910.—A bill in equity by a trustee in bankruptcy to recover property conveyed in fraud of the Bankruptcy Act may be entertained by the district court, and since the amendment of the Bankruptcy Act by the Act of June 25, 1910 (1 Fed. Stat. Ann. (2d ed.) 504, note) the bankruptcy court has jurisdiction of a suit to recover a preference regardless of the amount involved or the citizenship of the parties. *Gooch v. Stone*, (C. C. A. 6th Cir. 1919) 257 Fed. 631, 168 C. C. A. 581.

The equity rules of the Supreme Court are not rules of court affecting the administrative work of bankruptcy. *In re Hughes*, (C. C. A. 2d Cir. 1919) 262 Fed. 500.

Election of directors of corporation to choose bankruptcy, instead of state, court for winding up of affairs.—The fact that the directors of a corporation choose a bankruptcy court in which to wind up its affairs in preference to having a state court appoint a receiver for it, is not a fraud, and does not warrant the bankruptcy court in refusing jurisdiction. *In re Dressler Producing Corp.*, (C. C. A. 2d Cir. 1919) 262 Fed. 257.

Vol. I, p. 521, sec. 2 (2). [First ed., 1912 Supp., p. 472.]

Jurisdiction of court.—Where a creditor submits his claims to the bankruptcy court and consents to a determination of their validity by the court, he is bound by its decision, and if ordered to repay money paid to him on the claims, he must do so. *Commercial Security Co. v. Holcombe*, (C. C. A. 5th Cir. 1920) 262 Fed. 657.

Vol. I, p. 522, sec. 2 (3). [First ed., 1912 Supp., p. 472.]

Receiver's powers and duties in general.—**Right to property consigned to bankrupt.**—

A receiver in bankruptcy has the right to take property consigned to the bankrupt from a carrier on its arrival at its destination, and such taking ends the right of stoppage in transitu by the consignor. *In re Arctic Stores*, (D. C. N. J. 1919) 258 Fed. 688, wherein it was said: "During the time intervening between the adjudication and the qualification of the appointed trustee, the title, while nominally in the name of the bankrupt, was in custodia legis, awaiting administration. The receiver from his appointment was not only the proper person, but the only person, until the appointment and qualification of the trustee, who could legally take possession of this pulp and the other property of the bankrupt. He might properly be held to be the 'legal successor in interest of the buyer,' within the meaning of the New Jersey Uniform Sale of Goods Act, sec. 70, and whose taking property from a carrier ends the transit under section 58 of that act. However, and regardless whether that be so, the receiver's conduct in thus taking the pulp must be treated as in the due administration of the bankruptcy law and on behalf of the trustee to be appointed."

"Upon such appointment the trustee's right to the possession of such pulp would relate back to the time the receiver took it over."

"To accept petitioner's contention that there was no one between the time of adjudication and the qualification of the trustee to do any act either on behalf of the bankrupt, who by the adjudication was shorn of all power to do anything in respect to the property but recently subject to its dominion, or of the trustee, who could not be appointed for at least 11 days, and might not be for several months, after the adjudication, is to hold that there is a hiatus in the administration of bankruptcy estates during which certain creditors might secure a preference over other creditors, a bare statement of which is sufficient to reject such contention."

"That the receiver in bankruptcy has the right to take property from a carrier on its arrival at its destination, and that such taking ends the right of stoppage in transitu, has been held by the following cases: *In re Allen* (D. C. M. D. Pa.) 178 Fed. 979, 24 Am. Bankr. Rep. 574; *In re White* (D. C. M. D. Pa.) 205 Fed. 393, 29 Am. Bankr. Rep. 358. This was also the view of District Judge Chatfield in *Re Darlington Co.* (D. C. E. D. N. Y.) 163 Fed. 385, 20 Am. Bankr. Rep. 800. In this connection see also *Conyers v. Ennis*, 6 Fed. Cas. No. 3,149, and *Millard v. Webster*, 54 Conn. 415, 8 Atl. 470."

"From the foregoing it follows that whether the right of stoppage in transitu be held to have ended on the arrival of the car at its billed destination, or upon the removal of its contents by the receiver, the petitioner's claim that it is exclusively entitled to the proceeds of the sale of the pulp must

be denied, as its notice to stop delivery was not given until after the last of these two acts had taken place."

Vacation of order appointing receiver on application of state receiver.—Where directors of a corporation, notwithstanding the issuance of an injunction by a state court enjoining them from exercising any of the privileges and franchises of the corporation and appointing a receiver, file a voluntary petition in bankruptcy in behalf of the corporation, and the referee in bankruptcy also appoints a receiver, and it is represented that the appointment of the federal receiver is contrary to the general practice of the federal courts in the district of his appointment, the receiver appointed by the state court will be directed to apply to the judges of the federal court to vacate the order appointing the receiver, and will be directed until such application can be made to retain control of the assets. *Cavagnaro v. Indian Tire, etc., Co.*, (1919) 90 N. J. Eq. 532, 107 Atl. 643.

Vol. I, p. 529, sec. 2 (7). [First ed., 1912 Supp., p. 476.]

Recovery of concealed property after bankrupt's discharge.—Where a bankrupt's estate is closed without a final meeting of his creditors on ten days' notice as required by sections 55f and 58 of the Bankruptcy Act, such closing is void and the estate remains open. Accordingly, where after the bankrupt's discharge it is discovered that he has concealed assets from his trustee, the latter may recover them, although because of lapse of time the court has no longer power to revoke the discharge and criminal prosecution against the bankrupt for such concealment is barred. *In re Levy*, (E. D. Pa. 1919) 261 Fed. 432, wherein the court said:

"The question whether the trustee should have leave to file an amended petition before the referee depends upon whether, the estate never having been technically closed, the referee, after the bankrupt's discharge, has jurisdiction in a summary proceeding to make an order upon the bankrupt or upon the Standard Jobbing Company to pay over the sums in their possession or control belonging to the bankrupt estate, for it would be of no avail otherwise to proceed further."

"It must be determined therefore whether the discharge of the bankrupt has any other effect than that included within the definition of section 1, or that declared by section 17 of the Bankruptcy Act. The definition in section 1 (12) is:

"'Discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act."

"Section 17, as amended March 2, 1917 (39 Stat. L. 999, c. 1) provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as are therein mentioned. Nowhere in the Bankruptcy Act is there any express

limitation upon the power of the court to make and enforce an order upon a bankrupt to pay over money or to turn over other assets which are in his possession or control, while the estate remains open.

"For fraudulent concealment of assets from the trustee before discharge, he is subject to the penalty of refusal of his discharge and, after discharge, to revocation of the discharge if applied for within one year (section 15). This period had elapsed before the petition to reopen the estate was filed and presumably before the trustee had knowledge of the alleged concealment.

"Section 29b (1) prescribes punishment by imprisonment for concealing while a bankrupt or after his discharge from his trustee any of the property belonging to his estate in bankruptcy subject to the limitation in paragraph (d), by which criminal proceedings are barred.

"Does the fact that the bankrupt has been discharged from his debts, and that the court has no longer power to revoke the discharge, and that criminal prosecution is barred, exempt him from the jurisdiction of the court through summary proceedings to order him to pay over money in his possession or within his control which is part of his estate in bankruptcy?

"On adjudication, title to the bankrupt's property became vested in the trustee (sections 21e, 70), with actual or constructive possession, and placed in the custody of the bankruptcy court, and the court may put the trustee in actual possession, where possession is withheld by the bankrupt or one not claiming adversely to him. This proposition is decisively settled in *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. In that case the order was made against Nugent upon the ground that the property was in his possession as the bankrupt's agent. If the bankrupt had already been discharged, could Nugent have pleaded the discharge as a bar to the jurisdiction of the court to compel him to surrender property the title to which was by law vested in, and which was in constructive possession of, the trustee, and in the custody of the bankruptcy court? Manifestly not, unless title in the trustee lapses upon the discharge of the bankrupt. If title continues in the trustee, then, while the estate is still open, jurisdiction of the court to cause the estates of bankrupts to be collected, and to determine controversies relating thereto (section 2 [7]), is not to be rendered nugatory through the concealment by the bankrupt of his property, even though he be successful in continuing its concealment until by limitation of law he is freed of indebtedness to creditors and immune from criminal prosecution. He does not hold concealed property as a debt from which his discharge has freed him, but holds it without right against the trustee having title not divested by the bankrupt's discharge."

Petition for payment of concealed assets.

—A petition by a trustee in bankruptcy for an order compelling the bankrupt to pay to him a certain amount of money alleged to have been concealed, is insufficient when unsupported by any averment or proof of possession or control of the money by the bankrupt. *In re Levy*, (E. D. Pa. 1919) 259 Fed. 316.

Vol. I, p. 531, sec. 2 (8). [First ed., 1912 Supp., p. 476.]

Reopening of estate—Notice to bankrupt.—Where an order allowing the reopening of a bankrupt estate is limited to distribution purposes, it in no way affects the bankrupt and may be made without notice to him. *In re Levy*, (E. D. Pa. 1919) 259 Fed. 314.

Similarly, a restraining order issued with an order to reopen a bankrupt estate may be made without notice to the bankrupt, where it is apparent that he has no interest in assets of the estate alleged to be unadministered. *In re Levy*, (E. D. Pa. 1919) 259 Fed. 314. In this case, in denying a motion to vacate the restraining order, the court said: "The only possible interest, however, which a bankrupt would have in unadministered assets, is by virtue of his claim to his exemption, or to deny the assets in question to be the assets of the bankrupt estate, by setting up that the assets are property acquired by the bankrupt after his discharge, or for some other reason. No ground for the vacation or modification of the restraining order is advanced, except that it was made without notice to the bankrupt. The averment of the truth of this fact is itself denied. We need make no findings upon this point, however, as on the face of the proceeding the bankrupt has no interest in the assets of the bankruptcy estate. On the face of the proceedings the property to be affected belongs to the estate, and not only does the bankrupt not aver an interest, but it is asserted in the answer, the facts set up in which are admitted for the purposes of this argument, that he has specifically withdrawn from and repudiated all claims to an ownership interest."

Who may apply for reopening.—Creditors of a bankrupt, who have proved claims against his estate, may apply for a reopening of it on the ground that unadministered assets of the estate have been discovered. *In re Levy*, (E. D. Pa. 1919) 259 Fed. 314. In denying a motion to vacate the order permitting the reopening, the court said: "The finding upon which the order was predicated was that unadministered assets of the estate had come to light. The petition to vacate is made on behalf of the bankrupt. He was granted his discharge. The prayer of his petition is based upon the averments that the order was made without notice to him, and that it was made upon

the petition of persons not creditors of the estate. The latter averment is in turn based upon the distinction that, although they were at one time creditors of the bankrupt, having not only provable but proved claims, yet as the bankrupt had been granted his discharge he had ceased to be a debtor, and *ex vi termini* they had ceased to be creditors. It is, of course, not denied that they have an interest in the assets of the bankrupt estate, but the distinction made is fortified by the further distinction that they have such interest *qua* owners, but not *qua* creditors. The latter distinction may be accepted without in any way carrying the consequence of a denial of the right of such creditors to apply for the reopening of the case. The attempt to distinguish between the status of a creditor before and after discharge may be met with the comment that they are creditors, within the meaning of and as defined in the bankruptcy statute, and with the further comment that the distinction sought to be made is for present purposes of no practical value."

Procedure on reopening.—Where a bankrupt estate is reopened because of an alleged concealment of assets of the estate by the bankrupt, and the matter is referred to a referee, the power of the referee is confined to such procedure as will enable the trustee to collect and distribute unadministered assets. This includes authority to proceed by plenary suit but not by summary order upon the bankrupt. *In re Levy*, (E. D. Pa. 1919) 259 Fed. 314.

Vol. I, p. 535, sec. 2 (13). [First ed., 1912 Supp., p. 479.]

Violation of restraining order as contempt.—Where after the filing of a petition in bankruptcy, the bankruptcy court issues an order restraining the sale of certain property of the bankrupt under an execution on a judgment by a state court, a sale of such property thereafter is a contempt, although the property has been set aside to the bankrupt as exempt and in the judgment he has waived his right to exemption. *In re Braun*, (M. D. Pa. 1919) 259 Fed. 309.

Vol. I, p. 535, sec. 2 (15). [First ed., 1912 Supp., p. 479.]

Power to vacate orders.—To same effect as original annotation, see *In re De Ray*, (C. C. A. 6th Cir. 1919) 260 Fed. 732, 171 C. C. A. 470, holding that an order allowing a claim for compensation to the attorney of a trustee in bankruptcy might be vacated before the closing of the estate.

Vol. I, p. 538, sec. 2 (20). [First ed., 1912 Supp., p. 480.]

Bill to enjoin creditors not appearing in bankruptcy proceedings from suing in an-

other court for fraudulent representations.—A decree in bankruptcy proceedings which confirmed a composition agreement by a bankrupt partnership, and provided that one of the partners, who asserted that he was but a special partner, should be released, upon compliance with the terms of such composition, from any further liability to the receiver of the estate, and dismissed petitions to have him declared liable as a general partner, only determines against everyone that his property shall not be administered in the bankruptcy proceedings, and does not give ancillary jurisdiction to the bankruptcy court of a bill to enjoin creditors who did not appear in the bankruptcy proceedings, assent to the composition, or attempt to prove a claim, from bringing suit against him in another Federal district court, based on grounds of fraudulent representations believed to be true until after such decree, although such suit can only be maintained on the theory that he is liable as a general partner. *Poll v. McCabe*, (1919) 250 U. S. 573, 40 S. Ct. 43, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 2d Cir. 1919) 256 Fed. 512, 168 C. C. A. 18.

Vol. I, p. 541, sec. 3a (1). [First ed., 1912 Supp., p. 481.]

Absence of fraudulent intention—Transfer of exempt property.—Fraudulent intent cannot be predicated upon a transfer by a bankrupt of exempt property. *Marine Nat. Bank v. Swigart*, (C. C. A. 6th Cir. 1920) 262 Fed. 854.

Vol. I, p. 544, sec. 3a (2). [First ed., 1912 Supp., p. 483.]

Preferences in general.—To same effect as original annotation, see *In re Jones*, (N. D. N. Y. 1919) 259 Fed. 927.

Payment as preference—Payment of claims of stockholder.—Where the owner of the entire capital stock of a corporation transfers all of its assets to himself in payment of his claims against it, leaving other debts of the corporation unpaid, the transfer is a preference and is an act of bankruptcy within the meaning of this section. *Boston West Africa Trading Co. v. Quaker City Morocco Co.*, (C. C. A. 1st Cir. 1919) 261 Fed. 665, *affirming* (D. C. Mass. 1919) 255 Fed. 924.

Necessity of intent to prefer—Intent is that of debtor.—To same effect as original annotation, see *In re Jones*, (N. D. N. Y. 1919) 259 Fed. 927, wherein it was said: "It is immaterial in this proceeding whether or not the bank and Mrs. Bard knew Jones was insolvent, or whether they had reasonable cause to believe he was insolvent, and that his transactions would result in a preference. If Jones knew he was insolvent, and if he intended to prefer Mrs. Bard, he committed an act of bankruptcy."

Vol. I, p. 555, sec. 3a (4). [First ed., 1912 Supp., p. 488.]

II. APPOINTMENT OF RECEIVER OR TRUSTEE (p. 558)

The word "applied," as used in this section, does not mean "consented." Accordingly, where a bankrupt did not apply for the appointment of a receiver but merely consented to the application of his creditors for such an appointment, which was not made, he cannot be regarded as having committed an act of bankruptcy in violation of this paragraph. *In re Big Pine Line, etc., Co.*, (S. D. Cal. 1919) 257 Fed. 141. The court said: "The petitioning creditors desire the court to hold that the word 'applied' means applied for or consented to the appointment of a receiver. The alleged bankrupt here did nothing in that case but consent to the appointment of a receiver. If Congress meant that if a person consented to the appointment of a receiver, it should be made an act of bankruptcy, it might easily have so stated. The cases relied upon by the creditors are cases wherein the application for a receiver was made on behalf of the bankrupt, or where the bankrupt actually petitioned for the appointment of a receiver."

What constitutes application for receiver.

— The fact that a corporation in its answer to a bill of complaint asking for the appointment of a receiver, admits the allegations in the bill and joins in the application for the appointment of a receiver, is not tantamount to an application for a receiver under this section, where the allegations in the bill show that the corporation is solvent and that the application is made for the purpose of averting insolvency. *In re Connecticut Brass, etc., Corp.*, (D. C. Conn. 1919) 257 Fed. 445, wherein, on motion to dismiss an involuntary petition in bankruptcy against a corporation based on the above fact, the court said:

"The argument of the petitioning creditors against the motion resolved itself into the proposition that, as the alleged bankrupt had joined in the application for the appointment of the receivers, and had admitted in its answer the allegations of the bill of complaint, such conduct is tantamount to applying for a receiver under the Bankruptcy Act, and numerous cases are cited to support this proposition.

"A further reason advanced against the granting of the motion is based on the claim that the allegations set forth in the involuntary petition, and quoted *supra*, are sufficient to bring the petitioners within the meaning of the Bankruptcy Act. We will dispose of these contentions in their order.

"In support of the first proposition counsel cite and rely upon the following cases: *In re Spalding*, 139 Fed. 244, 71 C. C. A. 370; *In re Pickens Mfg. Co.* (D. C.) 158 Fed. 894; *In re Maplecroft Mills* (D. C.) 218 Fed. 659; *Exploration Mercantile Co. v.*

Pacific Hardware & Steel Co., 177 Fed. 825, 101 C. C. A. 39; *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.* (D. C.) 206 Fed. 813.

"An examination of all of these cases shows that the decisions there reached were based upon an allegation of insolvency, or it appeared that the person or corporation was insolvent, and for that reason joined in the application for the appointment of a receiver. None of the cases cited are cases involving an equitable receivership, where it appears on the face of the bill that the assets are in excess of liabilities. The cases cited and relied upon in support of the petitioning creditors' argument are not apposite to the case at bar.

"Here we have an equitable receivership, which is intended to avert insolvency. The allegations in the bill show, not insolvency, but solvency. It would be going too far to say that a solvent corporation, at least solvent so far as the record shows, committed an act of bankruptcy by applying for the appointment of a receiver, or joining in an application for the appointment of a receiver, simply because it had not the ready cash to meet all its obligations and immediate demands as they mature in the ordinary course of business, and because creditors were threatening attachments.

"The authorities are too clear and conclusive to discuss the question further, as the differentiation between the two sets of facts—i. e., solvency and insolvency—is so emphasized as to make it clear to him who reads. *In re Douglas Coal & Coke Co.* (D. C.) 131 Fed. 769; *In re Wm. S. Butler & Co.*, 207 Fed. 705, 125 C. C. A. 223.

"The law governing this situation is settled. Nowhere is it more clearly stated than by Judge Hazel in *Re Edward Ellsworth Co.* (D. C.) 173 Fed. 699. On page 700 he said: 'The inquiry presented is whether the corporation proceeded against, by admitting the material allegations of the bill in the equity action and joining in the application for the appointment of receivers, can be held in a legal sense to have applied therefor pursuant to section 3a, subd. 4, of the Bankruptcy Act, . . . as amended by Act February 5, 1903, ch. 487, § 2, 32 Stat. L. 797. . . . 'If the company, while insolvent, had voluntarily brought an action to wind up its affairs for the benefit of its creditors, and had applied for the appointment of receivers to take charge of its property, the superior right of the bankruptcy court could not safely be questioned; but the interposition of an answer in an action brought by a contract creditor, admitting therein the truth of the allegations of the bill and joining in the prayer for relief, is not believed to be the equivalent of the term "being insolvent, applied for a receiver or trustee for its property." In the equity action the complainants applied for receivers on the ground that the Edward Ellsworth Company was unable to pay its debts as they matured, and

that it would be to the advantage of creditors and stockholders to have its affairs wound up. Nowhere in the bill is it asserted that the corporation is insolvent, as that term is defined by section 1, subdivision 15, of the Bankruptcy Act. In fact the bill contains an affirmative allegation that the defendant is solvent. Such averments, together with the admission by the corporation of their truth and its consent to the appointment of receivers of its property, undoubtedly vested the Circuit Court, in view of the diversity of citizenship of the parties, with power and authority to act in the premises. *In re Metropolitan Railway Receivership*, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. ed. 403.

"The second question raises a question simply of pleading. To allege that a corporation is insolvent is to plead a conclusion. Facts must be pleaded, not conclusions."

Insolvency essential—In general.—To same effect as original annotation, see *In re Connecticut Brass, etc., Corp.*, (D. C. Conn. 1919) 257 Fed. 445.

Vol. I, p. 561, sec. 3a (5). [First ed., 1912 Supp., p. 491.]

In general—Insolvency unnecessary.—To same effect as original annotation, see *In re Dressler Producing Corp.*, (C. C. A. 2d Cir. 1919) 262 Fed. 257, wherein it was said:

"A solvent corporation, as a person, may have its property distributed among its creditors in the manner provided by the Bankruptcy Act. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. ed. 1113. The claim of the appellants, that at the time the directors admitted that the company was insolvent, and unable to meet its obligations as they matured and arose, they were without authority to so act, and that, therefore, such a consent is of no value in the bankruptcy proceedings, is without force, and is not a reason why the motion to dismiss the petition should be granted. If there is a question whether a fraud has been perpetrated, and the authority of the board of directors to sign the consent, which was filed in the voluntary proceedings in bankruptcy, is questioned, it is left open for trial by the order sought to be revised.

"We are of the opinion that the action of the board of directors here was justified upon the affidavits presented, and that the District Judge correctly disposed of the question presented in the court below. *Matter of United Grocery Co.* (D. C.) 239 Fed. 1016; *Matter of Cohn* (D. C.) 220 Fed. 956."

Admission by corporation.—A letter by the clerk of a corporation to the corporation's creditors advising them that the only course open to them to secure payment of their claims is to bring involuntary proceedings in bankruptcy and that, if such proceedings are brought, the company will admit its insolvency, and its willingness

to be adjudged bankrupt on that ground, is not such an unqualified admission of insolvency as is required by this section. Nor does the fact that the stockholders of the corporation subsequently ratify the action of the directors in authorizing the clerk to write such letter, make it an "unqualified admission." *In re Standard Shipyard Co.*, (D. C. Me. 1920) 262 Fed. 522.

Vol. I, p. 568, sec. 4a. [First ed., 1912 Supp., p. 495.]

Necessity of insolvency.—"It has frequently been held that a creditor cannot intervene to oppose an adjudication under an ordinary voluntary petition in bankruptcy on the ground that the would-be bankrupt is insolvent. The act does not require that the bankrupt should be insolvent. A solvent person may have his property distributed among his creditors in the manner provided by statute, if he so desires. *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 22 Sup. Ct. 857, 46 L. ed. 1113, 8 Am. B. R. 1; *In re Jehu* (D. C. Iowa) 2 Am. B. R. 498, 94 Fed. 638; *In re Ives* (C. C. A. 6th Cir.) 7 Am. B. R. 692, 113 Fed. 911, 51 C. C. A. 541; *In re Carleton* (D. C. Mass.) 8 Am. B. R. 270, 115 Fed. 246; *Collier on Bankruptcy*, pp. 141, 840, 856.

"I am aware in the *Carleton Case*, *supra*, Judge Lowell states that in the District Court of Massachusetts, in an unreported case, it was held that a creditor may have an adjudication set aside, if the whole proceeding is a fraud on the act, and an abuse of process. Neither the facts nor the reasoning in that case are disclosed, so it is impossible to say how the rule was applied, or what embarrassment to a particular creditor occasioned by a voluntary bankruptcy proceeding was deemed sufficient to require a court to set aside an adjudication.

"If an insolvent person owing more than one debt files a voluntary petition after his property has been attached by one of his creditors, the latter undoubtedly is embarrassed, for otherwise he might have collected his claim in full; still it would be impossible to regard the proceeding as a fraud on the act. An unworthy motive for the exercise of a legal right is not sufficient to extinguish the right." *In re Pyatt*, (D. C. Nev. 1918) 257 Fed. 362.

"Any person, except a municipal, railroad, insurance, or banking corporation, is entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt. If such a person owes debts, however small, he may file a petition. It is not necessary for him to allege or prove insolvency; and, furthermore, his petition cannot be opposed by his creditors." *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

Corporations.—A public service corporation is included within the provisions of this section, and if actually bankrupt, its right to secure the benefits of the Bankruptcy Act is

not impaired or defeated because it is exercised at the instance of another corporation which holds the majority of its stock. *Holland v. Holland City Gas Co.*, (C. C. A. 6th Cir. 1919) 257 Fed. 679, 188 C. C. A. 629.

Power of directors when corporation in hands of receiver.—After the issuance of an injunction by a state court enjoining a corporation, its directors and officers, from exercising any of its privileges and franchises, directors who meet and pass a resolution authorizing the filing of a voluntary petition in bankruptcy, and officers who execute such a petition are guilty of contempt. Moreover a state receiver appointed on the awarding of the injunction will be directed to appear in the federal court and move to strike from the files the petition in bankruptcy upon the ground that those purporting to act as directors had no power to act as such, and that their acts are in no respect binding on the corporation, and, the acts, the resolution, and proceedings being in violation of the order of a court of competent jurisdiction, they must be considered as void. *Cavagnario v. Indian Tire, etc., Co.*, (1919) 90 N. J. Eq. 532, 107 Atl. 643, wherein it was further held that the receiver might appear and not submit in any other particular to the jurisdiction of the federal court.

Vol. I, p. 569, sec. 4b. [First ed., 1912 Supp., p. 495.]

I. GENERALLY (p. 569)

Computation of indebtedness.—In computing the total indebtedness of an alleged bankrupt in order to determine whether he owes debts amounting to not less than \$1,000, claims paid by preferential or fraudulent transfers should be counted. *Boston West Africa Trading Co. v. Quaker City Morocco Co.*, (C. C. A. 1st Cir. 1919) 261 Fed. 665, *affirming* (D. C. Mass. 1919) 255 Fed. 924. Regarding this question, the court said:

"The appellant's counsel has addressed to us an elaborate argument, asking us to overturn the established practice of nearly 20 years—that in computing the total indebtedness in order to determine whether the alleged bankrupt owes debts amounting to not less than \$1,000, claims paid by preferential or fraudulent transfers shall be counted. It would require extraordinary reasons to justify us at this late day in attempting to change what has so long been regarded as the accepted interpretation of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544)."

"We are not at all impressed with the soundness of the contention. If sustained, it would open a wide door to fraud. We regard it as inconsistent with the general principles of equality which underlie the whole Bankruptcy Act. The question was carefully considered by Judge Dodge in the *Massachusetts District Court* in the case of *In re Jacobson* (D. C.) 181 Fed. 870. We

are satisfied with that decision and with the reasoning upon which it is based. See, also, 7 *Corpus Juris*, 67, 68, § 96; *In re Norcross*, 1 Am. Bankr. Rep. 644; *In re Cain*, 2 Am. Bankr. Rep. 379; *In re Tirre* (D. C.) 95 Fed. 425; *In re McMurtrey* (D. C.) 142 Fed. 853."

Vol. I, p. 587, sec. 5f. [First ed., 1912 Supp., p. 506.]

Partnership tort.—Where a tort is done in the course of partnership business, for the benefit of the firm and without benefit to the partners as individuals, and the firm and partners are put into bankruptcy, the tort claim is not provable against the partners. *Schall v. Camors*, (1920) 251 U. S. 239, 40 S. Ct. 135, 64 U. S. (L. ed.) — (*affirming* (C. C. A. 5th Cir. 1918) 250 Fed. 6, 162 C. C. A. 178) wherein the court said:

"It is insisted by petitioners, further, that because the proofs of the individual claims establish the responsibility of each partner for the frauds, they are liable in solido not only as partners, but individually, and that, irrespective of whether the claims are provable in tort for the fraud, they are provable and were properly proved both against the individual partners and against the firm as claims in quasi contract or equitable debt. But as the basis of a liability of this character is the unjust enrichment of the debtor, and as the facts show that no benefit accrued to the individuals as a result of the frauds beyond that which accrued to the firm, the logical result of the argument is that out of one enrichment there may arise three separate and independent indebtednesses. Doubtless it would be conceded that a single satisfaction would discharge all of the claims; but we are dealing with a situation where by reason of insolvency it is not to be presumed that claims will be satisfied in full; and, as already pointed out, the effect of sustaining the right to double proof would be to give petitioners not only a right to share in the partnership assets on equal terms with other partnership creditors, but a participation in the individual assets on equal terms with other individual creditors and in preference to other partnership creditors. Section 5 of the Bankruptcy Act (30 Stat. 547, 548) establishes on a firm basis the respective equities of the individual and firm creditors. Hence the distinction between individual and firm debts is a matter of substance, and must depend upon the essential character of the transactions out of which they arise. And since in this case the tort was done in the course of the partnership business, for the benefit of the firm and without benefit to the partners as individuals, no legal or equitable claim as against the individuals that might be deemed to arise out of it, by waiver of the tort or otherwise, can displace the equities of other creditors, recognized in the Bankruptcy Act, and put petitioners in a position of equality with others who actually

were creditors of the individual partners, and of preference over other firm creditors. *Reynolds v. New York Trust Co.*, 188 Fed. 611, 619, 620, 110 C. C. A. 409, 39 L. R. A. (N. S.) 391."

Creditors of individual partners.—"Where a bankrupt is a copartnership, the members or some of the members of which are themselves partnerships, the creditors of such a constituent firm are entitled to have their debts first paid out of its assets before the creditors of the bankrupt copartnership may participate therein, precisely as the individual creditors of an ordinary copartnership have the first claim upon his assets." *Reidsville Bank v. Burton*, (C. C. A. 4th Cir. 1919) 259 Fed. 218, 170 C. C. A. 286.

Vol. I, p. 590, sec. 5g. [First ed., 1912 Supp., p. 507.]

Notes—Firm notes signed or indorsed by partners.—Every creditor who holds a note of a bankrupt firm upon which an individual member has, as joint maker, surety, or indorser, made himself individually liable, is entitled to prove his claim both against the partnership and the individual estate. *Reidsville Bank v. Burton*, (C. C. A. 4th Cir. 1919) 259 Fed. 218, 170 C. C. A. 286.

Vol. I, p. 591, sec. 5h. [First ed., 1912 Supp., p. 508.]

Right of unadjudicated partner.—The bankruptcy of a partner does not deprive the other partner of implied power to convey the firm real estate in settlement of the firm's business or to dispose of his own interest. *Denny v. Lee*, (Tex. 1920) 221 S. W. 947.

Vol. I, p. 592, sec. 6a. [First ed., 1912 Supp., p. 508.]

III. Matters affecting right to exemption.

IV. Recognition of state and federal exemption laws.

III. MATTERS AFFECTING RIGHT TO EXEMPTION (p. 596)

Breach of agreement with creditor.—In *Peyton v. Farmers' Nat. Bank*, (C. C. A. 5th Cir. 1919) 261 Fed. 326, it was held that the bankrupt was entitled to exemption of an automobile as a family carriage under Art. 3785 Texas Rev. Stat., as against the contention of an objecting creditor that the automobile had been bought with funds procured by the bankrupt from the sale of grain, which had been mortgaged by the bankrupt to the objecting creditor and the proceeds of the sale of which the bankrupt had agreed to pay to the objecting creditor. The court said:

"The bankrupt was entitled to have it set aside to him as exempt, unless the trustee in bankruptcy could assert the objecting creditor's claim. That claim was neither a trans-

fer under section 70e of the act nor a lien obtained by legal proceedings, or at all, under section 67 of the act. It was therefore not vested in the trustee, and, being the right of the individual creditor alone, it could not interfere with the right of the bankrupt to have the automobile declared exempt from administration in the bankrupt court. The jurisdiction of the bankrupt court terminated when the automobile was set aside to the bankrupt. The right of the individual objecting creditor to follow the proceeds of the sale of the grain into the automobile would have to be asserted in the state court; the bankrupt's discharge having been stayed for that purpose. *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. ed. 1061. The case of *Parlin & Orendorff Implement Co. v. Moulden*, 228 Fed. 111, 142 C. C. A. 517, L. R. A. 1917B, 130, was one in which the agreement of the bankrupt was with all his creditors, and not one alone, and so inured to the trustee."

IV. RECOGNITION OF STATE AND FEDERAL EXEMPTION LAWS (p. 601)

"Exemptions which are prescribed by the state laws."—The bankruptcy court will follow the jurisprudence of the state in which it is administering, upon the matter of exemptions. Hence, where under the state law a debtor's exemptions may be charged with property that he conceals or withholds from his creditors at the time of a levy against him, the bankruptcy court will follow that rule in determining the bankrupt's exemptions. *Libby v. Beverly*, (C. C. A. 5th Cir. 1920) 263 Fed. 63. Commenting on the purpose of the rule, the court said:

"The purpose of the rule is not to punish the bankrupt for committing fraud or for making preferential transfers, but it rests upon the theory that the unaccounted for assets are still in the possession of the bankrupt at the time of the filing of his petition, and should have been surrendered to his trustee for the benefit of his creditors, and that, if the bankrupt fails to make such surrender, he may be made to do so by the bankrupt court. To avoid circuity, his failure to surrender will be treated as a forced selection of the assets concealed or unaccounted for, as a part of his exemptions. This principle justifies the action of the District Court with reference to the moneys wholly unaccounted for. The amount of \$300 paid his wife, shortly before bankruptcy, is in a different attitude. It is conceded that it was paid to liquidate a just debt owing by the bankrupt to his wife. It was an unlawful preference under the Bankruptcy Law, having been made within four months of the filing of the petition, and while the bankrupt was insolvent. That alone would not justify a charge against the bankrupt's exemption in equal amount. The case of *Florida Loan, etc., Co. v. Crabb*, 45 Fla. 306, 33 So. 523, holds that the concealment or removal beyond the

reach of his creditors of a part of his personal property by a debtor in an attachment as a preliminary to claiming his constitutional exemptions will, where the property remains so concealed, be treated as a selection pro tanto by the debtor of his exemptions."

State law adopted—*Florida*.—*Libby v. Beverly*, (C. C. A. 5th Cir. 1920) 263 Fed. 63.

Homestead exemptions—*Texas*.—To the same effect as first paragraph of original annotation, see *Peyton v. Farmers' Nat. Bank*, (C. C. A. 5th Cir. 1919) 261 Fed. 326, wherein it appeared that a house and lot claimed by the bankrupt, as a living homestead, was purchased by him immediately before the filing of his petition in bankruptcy, the deed having been executed two days before that event. The court said:

"The bankrupt, at the time of the purchase, had other property which was suitable for his homestead, and was therefore called upon to indicate his selection. No preparatory steps to occupy the purchased premises were taken by him before bankruptcy. The attitude of the case is therefore that of one claiming a homestead without occupancy or tangible preparation to that end, and without having declared his intention to occupy the premises as a home. The authorities are against the sufficiency of such a showing for a homestead exemption. *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292; *Murphy v. Lewis* (Tex. Civ. App.) 198 S. W. 1062; *Blackwell v. Lasseter* (Tex. Civ. App.) 203 S. W. 620; *Markum v. Markum* (Tex. Civ. App.) 210 S. W. 841; *Barnes v. White*, 53 Tex. 628. In the case of *Gardner v. Douglass*, 64 Tex. 76, relied upon by petitioner, there was a showing of a declaration of intention, and a subsequent occupancy of the premises as a home, both of which are lacking in this case."

The bankrupt also claimed exemption of a building in which he was conducting his business on the ground that it was a business homestead, and of the machinery therein as tools and apparatus of his trade. Regarding these claims, the court said:

"The District Court allowed the building in which the bankrupt was conducting his mill business to him as a business homestead, but denied the bankrupt's exemptions in the machinery and accessories claimed by him as exempt because a part of it, or as tools and apparatus of his trade. The bankrupt was a miller, and conducted his business as a miller in a building on ground leased to him by the Cotton Belt Railroad Company. The District Court held that the building, though it was not realty, in view of the tenure by which it was held, was a business homestead as personalty. It further held that, being personalty, it did not carry its contents, though they were fixtures, as a part of it, and as exempt with it. The District Court relied upon the case of *Cullers v. Henry & James*, 66 Tex. 494, 1 S. W. 314,

as controlling, and it seems to us to be so. In that case a ginhouse, which was built on leased land, was allowed the debtor as a business homestead, though it was held to be personalty. . . . In the same case the Supreme Court said with reference to the claim that the machinery was exempt as tools of trade under article 2395, Revised Statutes of Texas: 'The proposition that the mill and gin machinery are exempt as tools of trade cannot be seriously insisted upon. That it was urged that they were part of the homestead ought to be a sufficient answer to a claim so diametrically opposite. No authority has been cited which has gone far enough to embrace as tools of trade this kind of property, and the analogies and reason of the law do not persuade us to pioneer such extreme doctrine.' . . . In the case at bar the mill machinery was propelled by an electric motor. The reason for the distinction and for the exclusion of machinery attached to a business homestead from the benefit of the exemption laws, because the business homestead consisted of personalty, may not be obvious; but we are bound by the decisions of the Supreme Court of Texas which construe the exemption provisions of its constitution and statute. The appurtenances of the mill, which were on the mill lot, but not contained in the mill building, are likewise to be excluded from the benefit of the business homestead."

Vol. I, p. 612, sec. 7a (8). [First ed., 1912 Supp., p. 520.]

I. Schedule of assets.

II. Schedule of creditors and liabilities.

I. SCHEDULE OF ASSETS (p. 612)

Interest as beneficiary under will of living person.—An interest of a bankrupt as beneficiary under the will of his mother who was still alive at the time of the bankruptcy proceedings, need not be included in his schedule of assets. *In re Seal*, (E. D. N. Y. 1919) 261 Fed. 112.

II. SCHEDULE OF CREDITORS AND LIABILITIES (p. 614)

Duty to schedule creditors and liabilities—*Assignee of claim against bankrupt.*—Where a claim against a bankrupt was assigned by the creditor to a third person previous to the filing of the schedule and the bankrupt was not notified of the assignment, such assignee cannot complain because the claim was not scheduled. *Morency v. Landry*, (N. H. 1919) 108 Atl. 855.

Vol. I, p. 618, sec. 7a (9). [First ed., 1912 Supp., p. 524.]

Subsequent use of evidence—*A deposition made by a bankrupt pursuant to this section should not be offered in evidence in a subsequent criminal prosecution against him for defrauding a national bank, but it may be*

excluded only if objection to its introduction is made by him. *Bain v. U. S.*, (C. C. A. 6th Cir. 1920) 262 Fed. 864.

The section does not exempt a bankrupt from prosecution for perjury committed on his examination. *State v. Frasier*, (1919) 94 Ore. 90, 180 Pac. 520, 184 Pac. 848.

Vol. I, p. 630, sec. 11a. [First ed., 1912 Supp., p. 531.]

- I. In general.
- II. Discretion as to granting stays.
- III. Stay as dependent on dischargeability of debt.
- IV. Stay of proceedings on valid liens.
- V. Where state court has complete jurisdiction.

I. IN GENERAL (p. 630)

Stays after discharge.—This section only applies to staying suits against a bankrupt prior to his discharge. Hence, after he has been discharged, a bankruptcy court will not issue an order under this section restraining further action in supplementary proceedings in a state court to discover property of the bankrupt so as to render it liable to execution under a judgment against him in the state court for breach of promise to marry. *In re Madden*, (D. C. N. J. 1919) 257 Fed. 581.

Bankruptcy as ground of removal.—A person who is involved in litigation in which the decision has been, or is likely to be, adverse, cannot cause the suits against him to be removed to a federal court and there tried anew by filing a voluntary petition in bankruptcy. *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

II. DISCRETION AS TO GRANTING STAYS
(p. 631)

Stay discretionary.—To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

Stay after adjudication.—"During the interval which elapses after petition filed and before adjudication or dismissal, the application to stay must be granted. The language is mandatory. After adjudication, whether a stay shall be granted is discretionary with the court. In the present case no application for a stay was made until long after the adjudication. The bankrupt, Vadner, therefore, was not entitled to a stay as a matter of right." *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

Suits for the recovery of fraudulently or preferentially conveyed property do not come within the provisions of this section and cannot be stayed. *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

III. STAY AS DEPENDENT ON DISCHARGEABILITY OF DEBT (p. 632)

Stay of actions on dischargeable debts.—To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

Stay of actions on nondischargeable debts.—A bankruptcy court is powerless to enjoin a state court from punishing a bankrupt for refusing to obey the order of the latter court to pay alimony, or to relieve him from his obligation to pay instalments of alimony, since alimony is a nondischargeable debt. *In re Pyatt*, (D. C. Nev. 1918) 257 Fed. 362.

IV. STAY OF PROCEEDINGS ON VALID LIENS
(p. 635)

Stay denied.—To same effect as original annotation, see *In re Brinn*, (N. D. Ga. 1919) 262 Fed. 527, holding that the enforcement of a judgment of a state court rendered more than four months prior to the filing of the petition, would not be enjoined. The court said:

"In such cases the bankruptcy court will not ordinarily interfere by injunction, whether before or after actual levy, though in exceptional cases, such, for instance, as might authorize the interference of a court of equity where bankruptcy had not occurred, the bankruptcy court may properly intervene. The referee properly refused an injunction, if for no better reason than because the ground on which it was sought, to wit, that the judgments in question had been rendered within four months prior to the petition in bankruptcy, was not in fact true."

V. WHERE STATE COURT HAS COMPLETE JURISDICTION (p. 636)

Suit to replevy property not claimed by bankrupt's estate.—A court of bankruptcy is without jurisdiction to enjoin the prosecution in a state court of a suit to replevy certain bonds alleged to have been converted by the bankrupt, and as to which no claim of ownership is made by him. *In re Amy*, (C. C. A. 2d Cir. 1920) 263 Fed. 8.

Vol. I, p. 643, sec. 12a. [First ed., 1912 Supp., p. 540.]

Consent by corporation to offer of composition by its trustees.—In *In re O'Gara Coal Co.*, (C. C. A. 7th Cir. 1919) 260 Fed. 742, 171 C. C. A. 480, it was contended that a corporation adjudicated a bankrupt had no authority to elect officers and directors nor to consent to a reorganization and composition offered by its creditors, while its affairs were being conducted in the bankruptcy court. The court, in overruling this contention, said:

"The provisions in the Bankruptcy Act providing for a composition clearly indicate that the Congress did not intend to deny to corporations the right to protect their own interest, including the right to elect directors. To give the bankrupt companies the right to propose compositions is inconsistent with a denial of the right of stockholders and directors to maintain the corporate existence and to take action necessary to the submission of such proposals."

Vol. I, p. 645, sec. 12b. [First ed., 1912 Supp., p. 541.]

Deposit—Return on failure to confirm.—Where money deposited by the bankrupts is borrowed by them for the purpose of composition, and there is no evidence of bad faith or intentional delay on their part, the money should be returned to them if the composition is not confirmed. *In re Morris*, (D. C. Mass. 1919) 258 Fed. 712.

Costs.—"Costs" as used in this section embrace statutory fees and such other expenses as have been incurred in the case. They do not include a loss to creditors caused by delay in converting the assets into cash. *In re Morris*, (D. C. Mass. 1919) 258 Fed. 712.

Vol. I, p. 651, sec. 12e. [First ed., 1912 Supp., p. 545.]

Effect of confirmation.—To same effect as original annotation, see *American Imp. Co. v. Lilienthal*, (Cal. App. 1919) 184 Pac. 692.

A composition is not alone a contract between the bankrupt and his unsecured creditors, but also, on its confirmation, a judgment of the court having definite legal results. Such confirmation adjudicates that it is for the best interest of the unsecured creditors, whether assenting majority or dissenting minority, that the percentage offered be accepted. By this adjudication unsecured creditors are bound, and the bankrupt is discharged thereby from their claims. Hence, although a creditor may have his claim reinstated if it has been unauthorizedly withdrawn, yet if he omits to do so, he cannot escape the effect of the confirmation. *Cobb v. Livonia First Nat. Bank*, (N. D. Ga. 1920) 263 Fed. 1000.

A composition proceeding as provided by the Bankruptcy Act, and as ordinarily put into effect by the payment into court of the sum of money necessary to meet the claims of all creditors on the basis of agreement, has, upon confirmation by the court, the effect of restoring the bankrupt to his estate, free from the claims of creditors, and restores to him his right of action upon choses in action. A composition is in a sense a substitute for bankruptcy proceedings, and in a composition the creditor gets, not his share of the bankrupt's estate, but what he bargained for, and has no right to claim more. *Cumberland Glass Co. v. De Witt*, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042.

An agreement of composition, entered into by a number of creditors, each acting on the faith of the engagement of the others, will, in the absence of the statute, be binding upon them all; for each has the undertaking of the others as a consideration for his own engagement; and the creditor who breaks the agreement perpetrates a fraud upon those who adhere to it. 1 *Smith's Lead. Cas.* (9th ed.) pp. 612, 623, 629. The effect of the Bankruptcy Act in this regard is

to treat all creditors as a class and to enforce the will of the majority upon the minority. In other respects the right of contract remains unimpaired. *Merchants' Bank v. Zadek*, (Ala. 1919) 84 So. 715.

Necessity of order of discharge.—"It does not seem to be necessary at all that there shall be any order of discharge after an order confirming the composition, for the order of confirmation operates effectually to discharge the bankrupt from his debts other than those not affected by a discharge." *Oilfields Syndicate v. American Imp. Co.*, (C. C. A. 9th Cir. 1919) 260 Fed. 905.

Liens remaining unaffected.—Where there has been a composition, and an order of confirmation, the bankrupt takes back his property in the same condition that it was in when the bankruptcy was initiated, and liens which would be valid and unassailable in the ordinary course of bankruptcy proceedings are protected in composition arrangements and are not discharged or affected. Hence, a judgment lien acquired more than four months prior to the filing of an involuntary petition in bankruptcy remains unaffected on the confirmation of a composition offered by a bankrupt. *Oilfields Syndicate v. American Imp. Co.*, (C. C. A. 9th Cir. 1919) 260 Fed. 905. In passing upon this question the court said:

"Section 67c of the Bankruptcy Act provides in substance that a lien created by statute, including an attachment by mesne process which was begun against a person within four months before the filing of a petition in bankruptcy against such person, shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that the lien was obtained while defendant was insolvent or if its existence and enforcement will work a preference; or (2) the party to be benefited thereby had reasonable cause to believe defendant was insolvent and contemplated bankruptcy; or (3) such lien was sought and allowed in fraud of the provisions of the Bankruptcy Act; or if the dissolution of the lien would militate against the interest of the estate of such person, the lien shall not be dissolved, but the trustee, for the benefit of the estate, shall be subrogated to the rights of the holder of the lien and empowered to perfect and enforce the same as the holder might have done had not bankruptcy proceedings intervened. Section 67, subdivision 'f,' provides that all judgments or other liens obtained through legal proceedings against a person who is insolvent, or at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the judgment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall order that the right under the judgment or levy or lien shall be preserved, and thereupon the same

may be passed to the trustee to be preserved by him for the benefit of the estate, provided nothing in the section shall operate to destroy or impair the title obtained by such levy, judgment, or other lien of a bona fide purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry.

"In behalf of the appellant two theories are advanced: one, that if the provisions of subdivisions e and f apply to compositions, inasmuch as there has been no adjudication in the present case, the lien of the judgment was wiped out as an incident of the judgment by the satisfaction by the composition; another, that the lien of the judgment was extinguished by the satisfaction and discharge of the judgment by the composition under the sections of the act having to do with compositions, without regard to the question of adjudication. If either of these contentions is well founded, then the lien and judgment which were obtained and duly recorded more than four months prior to the filing of the petition in bankruptcy are discharged. A result in general would be that in a case where a bankrupt has availed himself of the composition statute, and has compounded with his creditors, and has obtained approval of the composition, but against whom there has been no adjudication in bankruptcy, a judgment creditor with a lien more than four months old, and who has not participated in the bankruptcy proceedings, has never filed a claim, and never received a dividend from the composition, occupies a position with respect to the right to preserve the lien of a judgment less favorable than he would have had if there had been an adjudication and discharge of the bankrupt from his debts.

"We cannot believe that such is the true construction of the act. Section 17 of the Bankruptcy Act, as amended, provides that a discharge in bankruptcy shall release the bankrupt from all of his provable debts, except such as are due for taxes, liabilities for obtaining property by false pretenses, and for debts that have not been duly scheduled in time for proof and allowance, unless the creditor had notice of the bankruptcy proceedings. Section 63 provides that debts of the bankrupt may be proved and allowed against his estate which are: (1) 'A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not,' etc.; (2) debts founded upon open account or upon contract; (3) debts founded upon provable debts reduced to judgment after the filing of the petition and before consideration of the bankrupt's application for a discharge.

"In *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, the Supreme Court, after quoting section 67f of the act, said: 'In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy or a judgment, or an

attachment, or otherwise, that is invalidated, and that, where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditors' bill would be entirely immaterial.'

"And the court, in sustaining this view, referred to section 63a and to section 17, saying that they would be wholly unnecessary if section 67f were to be taken literally. *First Nat. Bank v. Staake*, 202 U. S. 141, 148, 26 Sup. Ct. 580, 50 L. Ed. 967; *Globe Bank v. Martin*, 236 U. S. 288, 35 Sup. Ct. 577, 59 L. Ed. 583. . . .

"The appellant would draw a distinction between the discharge of an indebtedness, and its consequent effect upon a lien acquired in judicial proceedings by a discharge of the bankrupt after an adjudication in bankruptcy, where there has been no composition, and a discharge of the indebtedness by settlement pursuant to a composition. But, it being well settled that where a lien has been obtained through judicial proceedings prior to the four months period, the lien is not dissolved by the adjudication, and that an order of confirmation shall discharge the bankrupt from his debts other than those not affected by a discharge, the bankrupt who has made the composition finds that as to liens which were existing beyond the four months period he is in no better position than if there had been an adjudication in bankruptcy. In either case the effect is not to discharge the liens acquired. In either event the lien is intact. *Metcalf v. Barker*, *supra*. Personal liability on the judgment is discharged, but nothing more. 3 R. C. L. § 119; 7 C. J. § 311."

So while a composition releases a bankrupt from personal liability for a judgment debt it does not destroy the lien of the judgment on lands to which the lien attached more than four months prior to the filing of the petition. *American Imp. Co. v. Lilienthal*, (Cal. App. 1919) 184 Pac. 692.

Confirmation as concluding creditor from attacking conveyance as fraudulent.—A deed executed by a bankrupt may not be attacked as a fraud on creditors after the confirmation of a composition, where it appears that at the time of the confirmation the deed was recorded and its validity was not attacked in the composition proceedings. In such case the right of general creditors to attack it for fraud was, by the court's judgment, substituted by their right to receive payment of a certain percentage of their debts from the composition fund. The same rule applies to an attack by a credi-

tor holding a judgment against the bankrupt prior to the confirmation. *Cobb v. Livonia First Nat. Bank*, (N. D. Ga. 1920) 263 Fed. 1000.

Dismissal on confirmation.—To same effect as original annotation, see *In re Bickmore Shoe Co.*, (N. D. Ga. 1920) 263 Fed. 926.

Reinvesting property rights.—The effect of a composition "is to supersede the bankruptcy proceedings, and reinvest the bankrupt with all his property free from the claims of his creditors. . . . While the bankrupt is reinvested with all his property by the composition its effect in that regard is no more than to place it back in his hands as it was before the insolvency proceedings were instituted. Strictly speaking, no adjudication of bankruptcy having been made, defendant was never divested of his property." *American Imp. Co. v. Lillienthal*, (Cal. App. 1919) 184 Pac. 692.

Action for accounting by creditors against trustee under composition agreement.—A trustee in a composition agreement may be required to account to the creditors where he has failed to carry out the terms of the agreement and has wrongfully disposed of the debtor's property. *Merchants' Bank v. Zadek*, (Ala. 1919) 84 So. 715.

Vol. I, p. 652, sec. 13a. [First ed., 1912 Supp., p. 546.]

Composition set aside for fraud—Overvaluation of assets.—Where under the provisions of a composition agreement, a bankrupt surrenders all his assets, the fact that he overvalued them does not constitute fraud justifying a vacation of the composition. *In re Kass*, (E. D. N. Y. 1916) 263 Fed. 138.

Representations by a receiver regarding the value of the assets of the bankrupt's estate do not bind the bankrupt or his estate, nor do they form a basis for vacating a composition on the ground of fraud. *In re Kass*, (E. D. N. Y. 1916) 263 Fed. 138.

Laches as barring vacation of composition.—In *In re Kass*, (E. D. N. Y. 1916) 263 Fed. 138, it was held that a creditor was barred by laches from vacating a composition on the ground of fraud, where it appeared that he did not file his petition until thirteen months after the acceptance of the composition and did not aver in the petition when he discovered the alleged fraud.

Vol. I, p. 653, sec. 14a. [First ed., 1912 Supp., p. 547.]

To whom application must be made.—Under this section an application by a bankrupt for a discharge must be made to the judge of the court of bankruptcy in which the proceedings were commenced. *In re Hughes*, (C. C. A. 2d Cir. 1919) 262 Fed. 500.

Extension allowed because of unavoidable delay—Bankrupt's attorney in military

service.—The fact that the bankrupt's attorney entered military service and that the attorney who subsequently represented him overlooked the requirement of this section regarding the time within which an application for discharge must be filed, is not a sufficient excuse for failure to file such application. In such a case the provisions of the Soldiers and Sailors' Civil Relief Act (1918 Supp. Fed. Stat. Ann. 810) do not apply. *In re Weldon*, (N. D. Ia. 1920) 262 Fed. 828.

Debts dischargeable in second bankruptcy proceeding.—In *Monk v. Horn*, (C. C. A. 5th Cir. 1920) 262 Fed. 121, "the appellee was adjudged bankrupt on January 25, 1917, on a voluntary petition filed by him in a proceeding in which no application for a discharge was filed, and which was closed prior to January 25, 1919, when he filed in the same court another voluntary petition, under which he was again adjudged bankrupt. In 1914 the appellant recovered a judgment against the bankrupt, which was a provable debt against the estate of the bankrupt in each of the bankruptcy proceedings. He objected to the granting of an application for discharge made by the bankrupt in the second proceeding, in so far as that application sought a discharge from the debt evidenced by the judgment mentioned, and prayed that that debt be excluded from the operation of any discharge that might be granted under the application therefor. The court ordered a discharge, from the operation of which the debt owing by the bankrupt to the appellant was not excluded.

"This court has decided that, under the provision of section 14 of the Bankruptcy Act prescribing the time within which an application for a discharge may be made, a bankrupt, after the expiration of 18 months from adjudication, is not entitled, in a second proceeding, to a discharge from debts provable in the first. *In re Bacon*, 193 Fed. 34, 113 C. C. A. 358; *Bacon v. Buffalo Cold Storage Co.*, 225 U. S. 701, 32 Sup. Ct. 836, 56 L. Ed. 1264. It appears from the opinion rendered by the district judge in the instant case that the ruling just referred to was not followed, because it was considered to be inconsistent with the ruling of the Supreme Court in the case of *Bluthenthal v. Jones*, 208 U. S. 64, 28 Sup. Ct. 192, 52 L. Ed. 390. What was decided in the last-cited case was that a debt was not excluded from the operation of a discharge by the fact that in a former proceeding, on the same creditor's objection, a discharge was refused, where that creditor, though notified of the second proceeding and that his same debt was scheduled therein, did not participate in any way in that proceeding. The ground of that decision was that the creditor lost the benefit, in the second proceeding, of the refusal of a discharge in the first proceeding, by failing to plead

it or bring it to the attention of the court in the later proceeding.

"It was not decided in that case that the creditor did not have a valid ground of objection to the granting of the discharge applied for in the second proceeding. It was decided that the creditor's debt was not excluded from the operation of a discharge which was granted without objection from him. The question of the sufficiency of an objection to an application for a discharge, because it was not made within the time prescribed by section 14 of the Bankruptcy Act, was not involved in that case. Nothing said in the opinion rendered in that case indicates that the court had that question in mind. We do not think that the decision in that case is in conflict with the above referred to decision of this court.

"We are of the opinion that the ruling in the case of *In re Bacon*, supra, was correct. Subdivision a of section 14 of the Bankruptcy Act creates a limitation in favor of creditors having debts provable against an estate in bankruptcy. Subdivision b of that section prescribes the grounds on which an application for discharge may be refused. There is nothing to indicate that the latter provision was intended to control or supersede the former one. The former provision fixes a period of time beyond which a creditor affected by the bankruptcy is not required to remain prepared to prove the existence of a ground of objection to a discharge of the bankrupt. It well may be inferred that it was contemplated that an application for a discharge from any debt affected by an adjudication of bankruptcy should be made within the stated period, whether made in the first proceeding in which such debt was provable, or in a subsequent proceeding.

"The provision has the effect of preventing a bankrupt from withholding for an unreasonable length of time from creditors affected by the adjudication of bankruptcy the opportunity of proving the existence of a ground justifying a refusal of the discharge applied for. To give to a subsequent adjudication of bankruptcy the effect of enlarging the time within which a discharge from debts affected by a former adjudication could be applied for would amount to a destruction of the limitation created by the statute. The conclusion is that the court erred in overruling the appellant's motion to exclude his debt from the operation of the discharge applied for and granted."

Vol. I, p. 661, sec. 14b. [First ed., 1912 Supp., p. 549.]

I. Generally.

III. Hearing and proof.

I. GENERALLY (p. 662)

Construction.—The Bankruptcy Act, in so far as it relates to the discharge of the bank-

rupt, should be given a strict construction in his favor. *In re Rosenfeld*, (C. C. A. 2d Cir. 1919) 262 Fed. 876. The court said: "When an application for the discharge is presented it may be opposed by a party in interest. In this case it is opposed by one from whom it is claimed that the bankrupt obtained property upon a materially false statement. That the party opposing is in this case 'a party in interest' is of course conceded. The Bankruptcy Act is very liberal towards the bankrupt as to his discharge; and the act in so far as it relates to his discharge is to be given a strict construction in favor of the bankrupt. The purpose of the act is to release honest debtors from the burden of their debts."

III. HEARING AND PROOF (p. 670)

Specifications of objection must be proved—*In general.*—To same effect as original annotation, see *In re Gottlieb*, (C. C. A. 2d Cir. 1919) 262 Fed. 730, wherein it was said: "In matters of discharge every objecting creditor starts out with the burden of proving that which he alleges. *In re Miller*, 212 Fed. 920, 129 C. C. A. 440. But when a set of facts is shown which unexplained would lead a reasonable man to believe the allegations of the objector, the bankrupt must explain, and a deficit in assets far less than that demonstrably existing here has been held sufficient for that purpose in this court. *In re Loeb*, 232 Fed. 601, 146 C. C. A. 559; *In re Schultz*, 250 Fed. 103, 162 C. C. A. 275. Nor is any creditor called upon to prove the substance of his objection beyond a reasonable doubt; a fair preponderance is enough. *In re Garity*, 247 Fed. 311, 159 C. C. A. 404."

Fair preponderance of evidence required.—Specifications of objection by creditors must be proved by a fair preponderance of the evidence. *Thompson v. Lamb*, (C. C. A. 3d Cir. 1920) 263 Fed. 61.

Vol. I, p. 677, sec. 14b (1). [First ed., 1912 Supp., p. 557.]

"Offense punishable by imprisonment."—The fact that the bankrupts have committed an offense punishable by imprisonment under the law of a state, does not bar their discharge under this section, unless the offense is also similarly punishable under the Bankruptcy Law. *In re Oliner*, (C. C. A. 2d Cir. 1919) 262 Fed. 734.

Making false oath.—In *In re Kappes*, (E. D. N. Y. 1919) 258 Fed. 653, the discharge of a bankrupt was opposed on the ground that he had made a false oath in his schedules. The evidence was held to be insufficient to sustain the objections, and the referee's report recommending the granting of the discharge was confirmed.

Omissions and inaccuracies in schedules.—In *In re Jutkovitz*, (E. D. N. Y. 1919) 259 Fed. 915, it was held that where objections to a bankrupt's discharge had been made on the ground that he had failed to include

certain persons in the schedule of his creditors, releases from such persons were inadmissible in evidence on a hearing to determine his right to a discharge.

Vol. I, p. 683, sec. 14b (2). [First ed., 1912 Supp., p. 560.]

Intention to conceal.—To same effect as original annotation, see *Thompson v. Lamb*, (C. C. A. 3d Cir. 1920) 263 Fed. 61.

"Failed to keep books of account"—*Intention presumed.*—To same effect as original annotation, see *Thompson v. Lamb*, (C. C. A. 3d Cir. 1920) 263 Fed. 61, wherein it was said: "The bankrupt is without doubt charged with intending the natural and probable consequences of his acts and omissions. *In re Janavitz* (C. C. A. 3d), 219 Fed. 876, 135 C. C. A. 546; *In re Arnold* (D. C. N. J.) 228 Fed. 75. But the presumption on which this charge is based is rebuttable, either by evidence showing why the bankrupt did not keep more complete books and records or by evidence of the bankrupt's conduct and of the circumstances preceding and attending his bankruptcy. We think the presumption has been rebutted by the evidence in this case. While the bankrupt's lack of method in keeping books of account justified this inquiry into his purpose, we cannot find that it was pursued by him with intent to cover up his financial condition."

Fraud of partner.—On the bankruptcy of a partnership, where it appears that one of the partners omitted to make entries in the firm's books of account with intent to conceal its financial condition, he will be denied his discharge. But his acts will not be allowed to prejudice his partner's right to a discharge where it is shown that he was ill at the time the acts of concealment took place, that he did not participate therein and knew nothing of them. *In re Harrell*, (N. D. Ga. 1920) 263 Fed. 954.

Nonproduction of books of account does not establish by inference the fact that they have been destroyed or concealed. This is especially true where it is not shown that the bankrupt's failure to produce his books was attended by any inculpatory act or circumstance. *Thompson v. Lamb*, (C. C. A. 3d Cir. 1920) 263 Fed. 61.

Vol. I, p. 689, sec. 14b (3). [First ed., 1912 Supp., p. 560.]

False statement in writing—*Person to whom made.*—In order for a false statement to come within the provisions of this section it must have been made to the person from whom the credit was obtained. Accordingly, a false statement made by private bankers to a state comptroller, in order that he might permit them to continue in business, does not bar their discharge in bankruptcy. *In re Oliner*, (C. C. A. 2d Cir. 1919) 262 Fed. 734. In discussing the effect of such a state-

ment on the bankrupt's right to a discharge, the court said:

"Is the statement filed with the state comptroller within the terms of section 14, subd. (b), cl. 3, above set forth? That provision was considered in *Firestone v. Harvey*, 174 Fed. 574, 98 C. C. A. 420. The Circuit Court of Appeals for the Sixth Circuit, speaking through Judge Lurton, after quoting the language of subd. 3 of sec. 14b, said: 'This ground for denying a discharge was evidently leveled particularly at the practice of making false statements of one's financial condition by a buyer or borrower, for the purpose of obtaining from the person to whom such false statement is made, in writing, the articles or money desired "on credit." The false statement in writing which is enough to deny a discharge implies a statement knowingly false, or made recklessly, without an honest belief in its truth, and with a purpose to mislead or deceive, and thereby obtain from the persons to whom it is made property upon credit.'

"It was held in *In re Tanner* (D. C.) 192 Fed. 572, that the obtaining of a surety or indemnity bond by a bankrupt by means of a materially false statement is not the obtaining of 'property' on credit, within the meaning of the provision of the clause under consideration.

"The provision was also considered by this court in *In re Zoffer*, 211 Fed. 936, 128 C. C. A. 434. We held in that case, in an opinion written by Judge Lacombe, and concurred in by Judges Cox and Ward, that a false statement in writing, made by the bankrupt to the agent of a commercial agency, merely that the agency might fix a credit rating in its books, and not requested by any customer, is not ground for denial of a discharge. The court in its opinion quoted from the report of the judiciary committee of the Senate concerning the measure in which it was said: 'Any tendency to make the bankrupt act unduly harsh is to be avoided. It is a sufficient ground of opposition to discharge that the bankrupt has obtained property from a creditor by a materially false statement in writing, where that statement was specifically asked for by the creditor or by the creditor's representative. General statements to mercantile agencies, not specifically asked for by prospective creditors, ought not to be ground of opposition to discharge; it makes the provision too harsh, in the estimation of your committee.'

"We are unable to distinguish this case in principle from *In re Zoffer*. Neither the state comptroller nor the superintendent of banks, like the mercantile agency, obtained the report at the request of any depositor or prospective depositor. Neither of those officials was the representative of a creditor from whom any money or property was obtained.

"The obtaining of a license from the comptroller of the state of New York, or from the state superintendent of banking, is not the

obtaining of 'property' within the meaning of the clause under consideration. If it be said that moneys deposited with bankers thus licensed are obtained from depositors, on the faith of the statement filed either with the comptroller or the superintendent of banking, the answer is:

"(1) That there is no evidence that a single depositor ever knew or heard of the statement, or relied upon it.

"(2) That under the Bankruptcy Act the statement must be made to the person—in this case the depositors—from whom the credit was obtained."

Extension of credit on faith of statement.

—Where a bankrupt, in order to obtain a loan from a bank, signed a false financial statement prepared by the cashier of the bank, who had been the bankrupt's financial agent and who alone acted for the bank in granting the loan, and the bank accordingly extended credit to the bankrupt on its books, it was held that the bankrupt was guilty of making a materially false statement in writing for the purpose of obtaining credit, and should not be granted a discharge. *Bank of Commerce, etc. v. Matthews*, (C. C. A. 7th Cir. 1919) 257 Fed. 292, 168 C. C. A. 376.

So a false financial statement by a bankrupt to a bank, upon which he obtains a loan, is sufficient ground for refusing him his discharge. *Cleland v. Iowa Loan, etc., Co.*, (C. C. A. 8th Cir. 1919) 260 Fed. 653, 171 C. C. A. 417.

Obtaining money by false statements regarding security.—Where a bankrupt, in order to secure a loan of money, evidenced by his notes given at the time, gave the lender a written mortgage upon a described automobile, which he did not own, it was held that the transaction did not amount to obtaining the money on a materially false statement in writing within the meaning of this section, but that the bankrupt's discharge did not release the debt in view of the provisions of section 17a (2). *In re Hudson*, (S. D. Ala. 1920) 262 Fed. 778. The court said:

"The Bankruptcy Act was primarily written to cover ordinary mercantile dealings; so the words used in the act are to be given the construction and meaning ordinarily understood in mercantile dealings, and not the strict technical construction which they may be susceptible of. A loan upon given security is not ordinarily contemplated when merchants speak of obtaining money, goods, or property on credit. The fact that Congress used these words to denote the ordinary credit dealings between merchant and customer is indicated by the construction placed upon this subdivision by all the text-writers, such as Collier, Brandenburg, and Remington.

"In discussing this provision, they all treat it as a provision intended by Congress to deny a discharge where the money or goods were secured on some representation by the borrower, such as the statements ordi-

narily given to the mercantile agencies—a statement of facts made as a basis of credit between a customer and a merchant. None of these writers, so far as I have been able to ascertain, have considered that the provision written in subdivision 3 goes further than this and covers a special loan secured by collateral pledged or mortgage given at the time, which loan may have been obtained upon a false representation of fact.

"The fact that these writers have all so construed this provision, and have not conceived that it went far enough to include money or property obtained by false pretenses or false representations, is persuasive evidence that the language used by Congress was not intended to include such a state of facts, and is supported by the further fact that Congress wrote into the Bankruptcy Act, in section 17, the following:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as . . . (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation."

"It will be observed that the statement of facts in this case brings the parties directly under the first paragraph of subsection 2 of section 17. in that it was a liability or debt created by obtaining money by false pretenses or false representations, and hence the debt or liability so created would not be released by the discharge, even if granted. Congress would scarcely have provided that a debt or liability created by a given state of facts should be a ground for objecting to a discharge, and at the same time have excepted the debt so created from the discharge when granted. It is manifest that these two provisions, if so construed, would be inconsistent, because, if an obligation so created was excepted from the discharge when granted, it could hardly be a ground for objecting to the granting of the discharge, which would not cancel or release such debt or liability.

"Again, it is hardly conceivable that Congress would have grouped a number of classes of obligations or debts and excepted them from release by the discharge, and yet have provided that a debt or obligation so created in the manner specified by one of these classes only should be a bar to the release, and not have given the same effect to the debt created by the other enumerated classes. For instance, to construe it as contended by the objecting creditor, we would have a debt or obligation created by buying property under false pretenses or false representations, which would be a bar to any discharge; but, if the debt or obligation was created through willful or malicious injuries to the person or property of another, it would be merely

excepted from the operation of the discharge when granted, but would be no ground for objection to the granting of any discharge whatever. I cannot conceive that Congress intended to draw such distinctions between the two classes of debts enumerated.

"I am satisfied that what Congress intended to do was to except from the effect of the discharge one class of debts or obligations created by obtaining property under false pretenses or false representations, as these words are used in the various statutes of the various states, making this state of facts a crime, and that the words used in subsection 3 of section 14 were intended to be limited to such dealings between merchants or individuals, where a written statement of facts was made by the borrower as a basis of credit, as ordinarily understood in mercantile dealings, and that the language they have used, where given its ordinary meaning, does just what Congress intended.

"I therefore hold that, where the facts set up bring the parties under the provisions of subdivision 2 of section 17, the debt or obligation is not released by the discharge, and hence such facts present no ground for objecting to the granting of a discharge."

Intent—The word "false."—To same effect as original annotation, see *In re Rosenfeld*, (C. C. A. 2d Cir. 1919) 262 Fed. 876, holding that the unintentional omission of a debt from a financial statement on which the bankrupt obtained credit, did not make the statement false within the meaning of this section.

Omissions from statement.—The omission by a bankrupt from a financial statement of debts owing by him to certain of his relatives, does not make such statement "materially false" where it does not purport to contain all of his debts. *In re Rammage*, (S. D. Cal. 1919) 260 Fed. 893, wherein the court said:

"The statement prepared by the bankrupt did not, on its face, in any wise, by writing in the hand of the bankrupt or at all, purport to contain a complete and exhaustive account of his business with respect either to his assets or to his liabilities. It did contain a statement of certain things—merchandise on hand, etc., and certain other things; bills owing by him, etc. If there had been any statement in writing, made or signed by him, to the effect that the items given constituted all of his then present indebtedness, a situation would have occurred which would have justified a denial of his discharge; or if he had stated that he had \$6,000 of 'merchandise,' instead of \$4,500 worth, as was the fact, a similar result would have been reached. The statute requires, however, in order that discharge may be denied, that the bankrupt must have obtained property on credit 'upon a materially false statement in writing made by him.' The 'materially false statement' thus required is not to be found in writing, in the state-

ment of his business tendered by the bankrupt. There is nothing in the statement at all, as heretofore suggested, to the effect that the figures given were inclusive of all indebtedness, or that no other indebtedness was subsisting. In other words, there is no 'false' statement upon the face of the writing.

"It may be, although there is little justification for such conclusion, that the bankrupt intended to misrepresent the situation with respect to his total indebtedness, and intended wholly to conceal the debts owing to his family; but, whether that be the case or not, he has not violated the express language of the statute. He did not incorporate a 'false statement' into the writing made by him. He may not lawfully be denied a discharge because of mere implications or inferences arising out of his verbal expressions, or even out of the general situation. There must have been falsity evidenced in writing.

"This conclusion seems to be sustained by the well-considered opinion of the Circuit Court of Appeals of the Eighth Circuit in *International Harvester Co. v. Carlson*, 217 Fed. 736, 739, 133 C. C. A. 430."

Vol. I, p. 694, sec. 14b (4). [First ed., 1912 Supp., p. 562.]

Concealment, etc., of assets—In general.—To same effect as original annotation, see *In re Jutkovitz*, (E. D. N. Y. 1919) 259 Fed. 915, holding that the evidence was sufficient to establish a concealment by the bankrupt.

What constitutes concealment, removal, or destruction of property—Concealment of valueless property.—To same effect as original annotation, see *In re Hughes*, (C. C. A. 2d Cir. 1919) 262 Fed. 500.

Mingling funds deposited for transmission.—The fact that private bankers accept money for transmission to foreign countries with the knowledge that they are insolvent, and do not transmit it, but mingle it with their own funds and deposit it in their own names in another bank, does not constitute a concealment of assets within the meaning of this section. *In re Oliner*, (C. C. A. 2d Cir. 1919) 262 Fed. 734.

Intent—Intent alone insufficient.—To same effect as original annotation, see *In re Hughes*, (C. C. A. 2d Cir. 1919) 262 Fed. 500, holding that a transfer by the bankrupt to her husband of an interest which she believed she owned in certain real property, though made with intent to conceal, did not constitute a concealment within the meaning of this section, where it appeared that in reality she had no interest in the property. The court said:

"It follows that this bankrupt concealed nothing, because there was nothing to conceal; yet when she swore to her schedules she thought the property value existed. She had (we may assume) 'intent' as fully as if her intended act could either help her or

harm her creditors. She had the emotion of concealment, but all about nothing.

"It is a mistake, and a widespread one, to regard a discharge in bankruptcy as a reward of virtue, or its denial as a punishment for general moral turpitude. Discharge is a legal right attaching to the status of bankrupt, which right the statute requires the court to recognize, unless it be affirmatively shown that the applicant has done one or more of the acts enumerated specifically or by reference in section 14 of the statute. The mental operation of thinking property is owned, and desiring to conceal it, when in fact no such property exists, does not fall within any of the prohibitions of that section, which, when speaking of concealed or transferred property, always means something that is or ought to be (in common parlance) 'assets of the estate.'"

Vol. I, p. 701, sec. 14b (5). [First ed., 1912 Supp., p. 567.]

The six years is measured backward.—To same effect as second paragraph of original annotation, see *In re Rubin*, (D. C. N. J. 1919) 259 Fed. 607. In discussing the cases in the original annotation, the court said:

"The only question necessary for decision is whether the date of such application or the time of some later proceeding based thereon, controls. The bankrupt contends that the time of the actual determining of the application presents the date from which the six-year period is to be reckoned backward. He cites *In re Little* (C. C. A. 7) 137 Fed. 521, 70 C. C. A. 105, 13 Am. Bankr. Rep. 640; *In re Jordan* (D. C. E. D. Pa.) 142 Fed. 292, 15 Am. Bankr. Rep. 449; *In re Haase* (D. C.) 155 Fed. 553, 17 Am. Bankr. Rep. 528, affirmed 164 Fed. 1022, 90 C. C. A. 667, 21 Am. Bankr. Rep. 928. The judicial expressions contained in these cases relied upon by the bankrupt were held to be obiter in *In re Dunphy* (D. C.) 206 Fed. 680, 30 Am. Bankr. Rep. 760.

"In *In re Little*, *supra*, the question to be decided was whether a second petition in bankruptcy could be entertained within six years from the time of the petitioner's discharge in a voluntary bankruptcy. The decision was that the court's jurisdiction in bankruptcy existed, regardless of whether the bankrupt was entitled to his discharge or not. In the course of the opinion, Judge Jenkins said: 'The expression "within six years," as we think, measures the time between the first and second discharge, and not between the first discharge and the filing of the second petition in bankruptcy.' 137 Fed. 522, 13 Am. Bankr. Rep. 640.

"This is clearly obiter.

"In *In re Jordan*, *supra*, Judge McPherson referred to this language with approval and said: 'The section evidently has reference to the judge at the moment when he is about to enter a decree granting or refusing a discharge, and directs him to grant it, unless

(inter alia) within six years the bankrupt has been discharged in voluntary proceedings. As it seems to me, this can only mean six years before the time when the second decree is under consideration, and is about to be entered, and I should so hold, even without the authority and the reasoning of *In re Little*, 142 Fed. 293, 15 Am. Bankr. Rep. 449.'

"This, too, was obiter, as in that case the application for discharge was made more than six years after the earlier discharge was granted, and the objections thereto could have been overruled on the ground that the application for the discharge was made after the six years had expired.

"In *In re Haase*, *supra*, the time of making the application for a discharge is not stated, and it is impossible from the brief opinion to say whether the question there was as circumscribed as it is here. The syllabus indicates that 'the commencement of the second proceeding' was rejected as the date from which the six years was to be measured backward; but that Judge Hough agreed with Judges Jenkins and McPherson is manifest, for he said, with reference to clause 5 of section 14b: 'I cannot perceive how this language bears any construction other than that the six years is measured backward from the time of hearing.'

"This case was affirmed (per curiam in open court) without any written opinion.

"In *In re Dunphy*, *supra*, relied upon by the objecting creditor, Judge Hale treated all these quoted judicial expressions as dicta and held that 'The six years is measured backward from the date of the filing of the application for discharge, not from the hearing of the application by the court.' (Syllabus.)

"Collier (11th ed., p. 398) and Remington (vol. 3, p. 757) are to the same effect. In choosing between the date of filing the application for discharge and the date of the actual hearing thereof as the time which ends the six-year period, I think *In re Dunphy* presents the sounder view and is the more likely to reflect the legislative intention.

"A discharge does not necessarily follow the adjudication. Without a petition therefor, none will be granted. Only when such application is made is the judge directed to investigate and determine whether a discharge should be allowed, and a previous discharge within the six years, however brought to the judge's attention, works a denial of the pending application. By General Order 31 and Official Form No. 57 the applicant for a discharge, generally stated, is required to set forth that he has fully complied with all the requirements of the bankruptcy acts. This order and form were adopted and prescribed by the Supreme Court under section 30 of the Bankruptcy Act of 1898, before the passage of the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797), which later act inserted clause 5 in section 14b of said act.

"Complying with all the requirements of the bankruptcy acts," when asserted by an applicant for a discharge, since that amendment went into effect, may properly be construed to include a representation that he has not been granted a discharge within six years. Under such a representation the time of the expiration of the six-year period is necessarily confined to a date then definitely known, either the date of the application for the discharge, or an earlier one, say the filing of the petition in the pending bankruptcy proceedings. Such representation should not be held to relate to some future time incapable of being then fixed, and which for one reason or another might be carried beyond the six-year limit.

"Applying for a discharge is a separate proceeding, depending solely upon the initiative of the bankrupt, and no good reason appears why the court's judgment thereon, no matter when rendered, should be based on conditions which did not exist when that particular proceeding was begun. Much might be said in favor of taking the date when the petition in bankruptcy is filed as the one from which the six-year period is to be reckoned backward; but, as the time of making the present application for discharge is within such period, it is not necessary to consider the earlier date, and that question may well be left open until an answer thereto becomes essential."

Vol. I, p. 703, sec. 15a. [First ed., 1912 Supp., p. 568.]

Revocation of discharge—Fraud of bankrupt.—The fraud referred to in this section is fraud in the procurement of the discharge, and not fraud which, upon objection by the trustee or the creditors, would have prevented the bankrupt from receiving his discharge. *In re Weintrob*, (E. D. N. C. 1920) 263 Fed. 904.

Time of filing application to revoke.—To same effect as original annotation, see *In re Weintrob*, (E. D. N. C. 1920) 263 Fed. 904, wherein it was said: "Passing, however, the failure to allege or show fraud on the part of the bankrupt in procuring the discharge, the petitioners are confronted with what appears to be an insuperable obstacle to their application, in that more than two years elapsed between the date of the discharge and filing this petition, whereas the statute fixes one year as the time within which the application must be made. This is not a mere statute of limitation, but an essential prerequisite to the proceeding. The requirement that the applicant be not guilty of undue laches is an additional prerequisite to the right to ask the court to revoke the discharge, and does not dispense with the requirement that the application be made within one year after a discharge shall have been granted."

"Counsel call attention to cases in which the courts have reopened bankruptcy cases

more than one year after the discharge to enable the trustee to secure and administer property, either concealed or of which he had no knowledge. *In re Shaffer* (D. C.) 104 Fed. 982; *In re Pierson* (D. C.) 174 Fed. 160; *Traub v. Marshall Field Co.*, 182 Fed. 622; 105 C. C. A. 488. In these cases the application was not made to revoke a discharge, but to 'reopen the estate' for the purpose of bringing assets into its administration. This power is conferred by section 2(8), and no limitation is imposed upon the court in respect to the time within which it is to be exercised. This distinction is noted by the courts in the cases cited by counsel. In *In re Shaffer*, *supra*, Judge Purnell is careful to say that granting the order to reopen the estate did not affect the discharge, saying: 'The order discharging Shaffer therefrom stands. No act of his can affect it. More than a year having elapsed, no creditor can attack it. As far as the bankruptcy is concerned, therefore, these creditors are barred.'

"While, as said by counsel, the case is, as to the creditors, a hard one, the statute is the source from which the court derives its power to grant the order of revocation, and it may not disregard its positive limitations."

Effect of allegations in petition for revocation.—On a motion to dismiss, because of laches, a petition of a bankrupt's creditors for a revocation of his discharge, an averment in the petition that they had no notice or knowledge that the discharge had been granted until a short while before filing the petition, must be taken as true. *In re Weintrob*, (E. D. N. C. 1920) 263 Fed. 904.

Vol. I, p. 706, sec. 16a. [First ed., 1912 Supp., p. 569.]

Composition assented to by creditor as releasing surety.—In *Neslor v. Grove*, (1919) 90 N. J. Eq. 554, 107 Atl. 281, the facts showed that a corporation became bankrupt and a composition with creditors was approved by the bankruptcy court. Thereafter, a surety of the bankrupt corporation settled with the creditor to whom he became liable by the contract of suretyship by giving his note and indorsing over the note of another. It was held that the surety was not released by the composition. The court said: "We need not consider whether a composition assented to by the creditor would release the surety, or whether, like an ordinary discharge in bankruptcy, it would not alter the liability of the surety. Bankruptcy Act, § 16. Under similar statutes it has been held in other jurisdictions that a creditor who assents to a composition does not thereby discharge the surety. *Megrath v. Gray*, L. R. 9 C. P. 216, 43 L. J. (U. S.) C. P. 63, Lord Coleridge; *Ex parte Jacobs*, L. R. 10 Ch. 211, 44 L. J. Bkty. 34, Lord Justice James; *Simpson v. Henning*, L. R. 10 Q. B. 406, 44

L. J. Q. B. 143; Hill v. Trainer (1880) 49 Wis. 537, 5 N. W. 926.

"The point has not been decided under the Bankruptcy Act of 1898, but the reasoning of the cases cited is applicable. The question, however, is one of the construction of a federal statute, and would more properly be decided by a federal court, especially as it is not necessary for us to decide it now."

Form of judgment in action on bond against three obligors one of whom was a discharged bankrupt.—In *Wilcox v. Hersch*, (R. I. 1920) 110 Atl. 409, which was an action of debt on bond against three defendants one of whom in a special plea alleged a discharge in bankruptcy, it was held it was proper to enter judgment for plaintiffs in the penal sum of the bond against the defendants, with a perpetual stay of execution against the bankrupt defendant.

Vol. I, p. 708, sec. 17a. [First ed., 1912 Supp., p. 569.]

All provable debts released—*Debts due to nonresident creditors.*—Debts due to nonresident creditors when properly scheduled are discharged. *Morency v. Landry*, (N. H. 1919) 108 Atl. 855, wherein the court said:

"The Bankruptcy Act of July 1, 1898, provides that 'a discharge in bankruptcy shall release a bankrupt from all of his provable debts,' duly scheduled by the bankrupt, with the name of the creditor if known, with certain exceptions not material here. Section 17a. The act also refers in terms to the claims of those residing outside the United States, as entitled to share in the dividends declared. Section 65d. The plain conclusion from these provisions seems to be that debts due to nonresident creditors, when properly scheduled, are discharged, so far as Congress has the power to enact that such a result shall follow. That Congress has the power to so provide, as far as future proceedings in this country are concerned, has not been questioned, and is not open to doubt.

"But it is argued that, while Congress might enact such a law, it has not done so. The chief contention made in favor of this conclusion is that, prior to the enactment of the present statute, earlier bankruptcy acts containing provisions of similar purport had been construed as not affecting the right of the nonparticipating foreign creditor to thereafter maintain a suit in our courts.' Hence it is said that Congress intended to express a like purpose here.

"The claim that prior to 1898 similar provisions in earlier bankruptcy laws had been authoritatively construed favorably to the plaintiff's contention is not borne out by the cases cited. The question has never been passed upon by the Supreme Court of the United States. The case in that court which is relied upon (*Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606) raised questions as to the

constitutional limitation upon the power of the several states to enact insolvency laws. No question of the meaning of any national bankruptcy law or of the power of Congress to enact the same was involved, and the subject was not considered.

"*Phelps v. Borland*, 103 N. Y. 406, 9 N. E. 307, 57 Am. Rep. 755, deals with the effect to be given here to a discharge of a foreign debtor in his own country. It does not involve the question now under consideration, and the matter is not referred to in the opinion.

"In *Lizardi v. Cohen*, 3 Gill (Md.) 430, the question was whether a discharged bankrupt was a competent witness as to a London contract. It was held that the contract was not discharged, and that therefore the witness was interested and incompetent. The decision is put upon the ground stated by Judge Story (Conf. of Laws, § 342) 'that the discharge of a contract, by the law of a place where the contract was not made, or to be performed, will not be a discharge in any other country.' It does not discharge the obligation so as to make the debtor disinterested. He is still liable in the 'other country.' Whether the debt was discharged locally was a question not necessary to the decision, and not discussed.

"The only case cited holding that under the bankruptcy law of 1867 (Act Cong. March 2, 1867, c. 176, 14 Stat. 517) a discharge did not bar a subsequent suit here by a foreign creditor is *McDougall v. Page*, 55 Vt. 187, 45 Am. Rep. 602, decided in 1882. But it was admitted in the opinion that the holding was contrary to the decisions in other states, and that the question had not been passed upon by the Supreme Court of the United States. Add to this the facts that two judges dissented from the Vermont decision, and that in 1884 still another decision opposed to it was announced (*Moore v. Horton*, 32 Hun [N. Y.] 393), and it becomes evident that there was not, in 1898, any authoritative interpretation of the act of 1867, such as is now claimed. The matter had not been passed upon by the court of last resort, and the views of others were conflicting. So far as the authorities go, their weight is against rather than for the plaintiff upon the issue of how the earlier laws had been understood at the time the present law was enacted.

"The argument that a law making the discharge efficient locally as to a foreign creditor gives the domestic creditors undue advantages compels the foreign creditor to pursue his debtor into other lands, and undertakes to make a foreign discharge effective in another country where the creditor resides, is based upon a misconception of the effect of the discharge, so far as it relates to foreign creditors who do not participate in the bankruptcy proceedings. Such creditors are not thereby compelled to pursue their debtor into foreign lands. But

if they do so pursue him, they are bound by the limitation of remedy which applies to those resident there. Neither does the law undertake to make the discharge effective against the creditor in proceedings brought at his place of residence in Canada. It merely places him on an equality with our own citizens in proceedings in our courts. It is manifest that such a law is not so devoid of just principle that it is always to be inferred that there was no intent to enact it."

Discharge of individual bankrupt from firm debts.—Where a member of a firm files a petition in bankruptcy in his individual capacity and a creditor's claim against the firm is scheduled in his list of creditors and the creditor appears before the referee and examines the bankrupt and has full opportunity to prove the claim against the individual estate of the bankrupt but fails to do so, the debt if a provable one is discharged by a discharge in bankruptcy. *Gordon v. Texas Co.*, (1920) 109 Atl. 368, wherein the court said: "Since this was a provable debt against the plaintiff's individual estate, was it affected by his discharge 'from all debts which are made provable by the Bankruptcy Act against his estate'? In answer to this question we quote from the note to *Horner v. Hamner*, L. R. A. 1918E 471: 'It seems to follow from the fact that joint debts are provable in an individual proceeding that a discharge therein is effectual as to such claims, since the more recent Bankruptcy Acts provide that a discharge shall relieve a bankrupt from all of his provable debts.' After conceding that there has not been complete harmony among decided cases, the annotator concluded that 'the late cases, in the main, support the right of the individual bankrupt to a discharge from firm debts.'

"*In re Kaufman* (D. C.) 136 Fed. 262, a case decided in the District Court for the Eastern District of New York in 1905, and frequently cited with approval, presents facts and law peculiarly applicable to the case at bar. The bankrupt filed his individual petition, although previously he had been a member of a partnership. With his petition he filed a schedule of creditors, in which were individual creditors and creditors of the partnership. Notice was sent to all creditors whose names appeared in the schedule. A partnership creditor, although in receipt of notice, did not prove his claim against the individual estate of the bankrupt. The bankrupt was examined and in due time, upon his individual application, was discharged from all debts and claims which were made provable by the Bankruptcy Act against his estate, and which existed on the date of filing his individual petition.

The court held that the creditor above referred to was permitted, if he had any claim against the individual estate of Kaufman, growing out of partnership relations,

to prove such claim; and upon his failure to do so his right to collect from Kaufman a judgment against the partnership was foreclosed by the discharge of Kaufman as an individual. The court also declared that the creditor had full opportunity to prove his claim against the bankrupt as an individual, which he neglected to do, and in default thereof the creditor was 'debarred from thereafter claiming that the estate of the individual, or the individual himself, is liable for the payment' of the claim. The Circuit Court of Appeals for the Second Circuit cited the Kaufman Case in *In re Diamond*, 149 Fed. 407, 79 C. C. A. 227, and declared full concurrence in the reasoning and conclusion therein expressed.

"In *New York Inst. v. Crockett*, 117 App. Div. 269, 102 N. Y. Supp. 412, 17 Am. Bankr. Rep. 233, it was held that since partnership debts are provable against the individual estate of a bankrupt partner they are discharged by a complete, unlimited discharge of the bankrupt's provable debts, at least when the business has no assets, and the creditor has notice of the proceedings; and this although the debt was scheduled without any reference to the copartnership. To the same effect is the opinion in *Berry Bros. v. Sheehan*, 115 App. Div. 488, 101 N. Y. Supp. 371, 17 Am. Bankr. Rep. 322.

"In the case at bar, as we have seen, the Texas Company's claim was scheduled in the plaintiff's list of creditors. That company appeared before the referee in bankruptcy and examined the plaintiff. It had full opportunity to prove its claim against the individual estate of the plaintiff, and if it failed to do so, we must hold that under the decisions above cited it is debarred from any attempt now to collect its claim from the plaintiff individually or from the plaintiff's estate."

Revival of discharged debt — Moral obligation supporting new promise.—To same effect as original annotation, see *Cobb v. Livonia First Nat. Bank*, (N. D. Ga. 1920) 263 Fed. 1000, holding that a debt may be revived by a new promise after a composition.

Vol. I, p. 716, sec. 17a (2). [First ed., 1912 Supp., p. 573.]

- I. False pretenses or representations, 413.
- II. Wilful and malicious injuries, 414.
- III. Miscellaneous, 414.

I. FALSE PRETENSES OR REPRESENTATIONS (p. 716)

Effect of amendment on sec. 63.—The class of provable claims in bankruptcy, as set forth in the provisions of section 63, was not enlarged so as to include mere tort claims by anything in the amendment to section 17 made by the Act of February 5, 1903, confessedly designed to restrict the scope of a discharge in bankruptcy. *Schall v. Camora*,

(1920) 251 U. S. 239, 40 S. Ct. 135, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 5th Cir. 1918) 250 Fed. 6, 162 C. C. A. 178.

What fraud prevents bar by discharge.—The kind of fraud which exempts from a discharge is positive fraud or fraud in fact, involving moral turpitude or intentional wrong. *Sanger v. Barrett*, (Tex. Civ. App. 1920) 221 S. W. 1087.

Effect of accepting note.—The acceptance of a note from one who procures a sum of money by fraud, as an evidence of the debt thereby created, after the fraud has been discovered, does not take the case out of this section. *Gregory v. Williams*, (Kan. 1920) 189 Pac. 932.

Waiver of tort.—Filing a claim for the price of goods the sale of which was procured by false representations is not a waiver of the cause of action for deceit. *Sanger v. Barrett*, (Tex. Civ. App. 1920) 221 S. W. 1087.

Sufficiency of evidence.—In *Brooks v. Pitts*, (Ga. App. 1919) 100 S. E. 776, the holding was as follows: "While it is true that a discharge in bankruptcy does not release a bankrupt from liability for obtaining property by false pretenses or false representations (*Orr Shoe Co. v. Upshaw*, 13 Ga. App. 501, 79 S. E. 362 [2]; *Brandt v. Klement*, 20 Ga. App. 664, 93 S. E. 255 [1]), and that false representations may consist in the purchasing of goods with no present purpose of paying for them, and in contemplation of a fraudulent insolvency, and that it is a question for the jury to determine from the evidence whether the circumstances adduced, even though they be slight, are sufficient to carry conviction of the existence of fraud perpetrated by false pretenses (*Atlanta Skirt Mfg. Co. v. Jacobs*, 8 Ga. App. 299, 68 S. E. 1077 [2]), still there was in this case no evidence whatever to show that the goods, for the purchase price of which the present suit was brought, were obtained by false pretenses or representations, consisting in the purchase thereof with no present purpose of paying therefor, and in contemplation of a fraudulent insolvency, or the insolvency of the defendant was in fact fraudulent. The mere fact that the defendant procured credit and promised to pay for an ordinary current purchase of goods and subsequently failed to meet his obligation prior to the time that he voluntarily went into bankruptcy (some thirty-four days thereafter) is not of itself sufficient to bring the case within the ruling above announced, for ordinarily promises to perform some act in the future will not amount to fraud in legal acceptance, although subsequently broken without excuse, and especially is this true of a promise to pay money. Otherwise any breach of contract would amount to fraud. *Atlanta Skirt Mfg. Co. v. Jacobs*, *supra*. The statement of the plaintiff that he heard, a week or ten days after the sale, that the defendant was

contemplating taking bankruptcy, was hearsay, and, even though admitted without objection, is without probative value."

II. WILFUL AND MALICIOUS INJURIES (p. 720)

Wilful and malicious injuries—*Wilful and malicious injury defined.*—To the same effect as the original annotation, see *Wellman v. Mead*, (Vt. 1919) 107 Atl. 396.

Driving automobile against another.—In *Bazemore v. Stephenson*, (Ga. App. 1919) 100 S. E. 234, the court said: "The sole question in this case is whether the evidence authorized a finding by the jury that the defendant wilfully and intentionally drove his automobile against the automobile in which the plaintiff was riding, so as to constitute . . . a malicious tort. . . . The record fails to disclose any evidence which would have authorized such a finding. The plaintiff himself testified, in effect, that he did not know, and could not say, that the defendant deliberately or intentionally did so. The court, therefore, did not err in directing a verdict for the defendant."

A conversion of property by wrongful sale under a chattel mortgage to the injury of the rights of a holder of the notes secured thereby is a wilful and malicious injury to property. *Sabinal Nat. Bank v. Bryant*, (Tex. 1920) 221 S. W. 940.

III. MISCELLANEOUS (p. 722)

Liabilities for alimony.—To same effect as original annotation, see *In re Pyatt*, (D. C. Nev. 1918) 257 Fed. 362.

Support of wife or child.—To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

The phrase "for maintenance or support of wife or child" refers only to the bankrupt's wife or child. It does not include a debt of the bankrupt as surety on a bond given by his brother to the latter's wife as security for the payment to her of certain sums for her support. Such a debt is dischargeable. *In re Sullivan*, (N. D. N. Y. 1920) 262 Fed. 574. Regarding the dischargeability of such a debt, the court said:

"Subdivision (2) was added by the amendment of 1903, after the decisions of *In re Hubbard* (D. C.) 98 Fed. 710, and *Dunbar v. Dunbar*, 190 U. S. 345, 23 Sup. Ct. 757, 47 L. Ed. 1084. This evidently refers to the bankrupt's wife or child, and such debts are now not dischargeable, whether provable or not. But in the case at bar the form of the bond and the fact that it was given as security to a private party shows that the debt is not for breach of public duty, but for failure to meet a contract of guaranty.

"It must be held that section 17 of this statute is not broad enough in language to expressly include in the exceptions a debt such as that now under consideration, if no other part of the statute prohibits that result. Debts due the United States or due a municipality have priority. Taxes are not

dischargeable. An obligation upon a bail bond to produce a defendant in court would, if reduced to judgment or treated as a liquidated debt, be dischargeable in bankruptcy; but the United States or the state would have priority in distribution in so far as the assets might be available therefor. Public policy merely requires that the sovereign shall be protected, it does not provide or require that debts to the public, except taxes, shall be nondischargeable. It is for this reason that taxes are made liens upon property.

Under these circumstances it would seem that a penalty provided for in a bond to secure a private individual must be treated as a debt, when the condition of the bond has been met so that the obligation is payable. Unless the bond is so worded as to give the sovereign priority, it is of no higher rank than an obligation to pay an annuity or any other item which is necessary for the support of an individual. In the case at bar the support of the wife and child may have been required so as to protect the public, but the public could not collect upon this bond, or sue therefor, except in the name of the mother (the plaintiff in the action), to whom the bond ran. The possibility that the mother or child might become a public charge would be a sufficient motive for excepting such debt from the bankruptcy statute, if that motive so appealed to Congress; but the present bankruptcy statute does not in terms so provide, and a debt of this sort must be held provable, and therefore dischargeable."

Breach of promise to marry.—To same effect as second paragraph of original annotation, see *In re Madden*, (D. C. N. J. 1919) 257 Fed. 581.

Vol. I, p. 724, sec. 17a (3). [First ed., 1912 Supp., p. 577.]

Knowledge of bankrupt proceedings.—In *Brooks v. Pitts*, (Ga. App. 1919) 100 S. E. 776, it was held that the defendant, having introduced in evidence a certified copy of his discharge in bankruptcy, and it being admitted by the plaintiff that he had actual knowledge of such bankruptcy proceedings in ample time to have proved his debt against the bankrupt, the evidence demanded a verdict for the defendant.

Pleading discharge in action on nonscheduled debt as throwing on plaintiff burden of proof that debt was excepted from discharge.—Cases almost uniformly hold that, where the bankrupt is sued on a debt existing at the time of the filing of the petition, the introduction of the order of discharge makes out a prima facie defense, the burden being then cast upon the plaintiff to show that because of the nature of the claim, failure to give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge. *Morency v. Landry*, (N. H. 1919) 108 Atl. 855 (following *Kreitlein v.*

Ferger, (1915) 238 U. S. 21, 35 S. Ct. 685, 59 U. S. (L. ed.) 1184), wherein the facts showed that the plaintiff's intestate had a claim against the bankrupt by assignment which was not duly scheduled, and it was held that the plaintiff had the burden of showing that the bankrupt, when he filed his petition, knew of the assignment, since the duty of the bankrupt to schedule the assignee as creditor was dependent on the assignee notifying him of the assignment.

Vol. I, p. 728, sec. 17a (4). [First ed., 1912 Supp., p. 578.]

"Officer" as including bank director.—The director of a banking corporation is an "officer" and a discharge in bankruptcy cannot be pleaded in bar to a suit in equity by stockholders against a negligent director for losses occasioned by mismanagement of the bank's affairs, where the demands sued for were unliquidated and had not been reduced to a judgment at the time such discharge was granted. *Boyd v. Applewhite*, (Miss. 1920) 84 So. 16.

Vol. I, p. 738, sec. 18b. [First ed., 1912 Supp., p. 581.]

Motion to dismiss petition.—In the case of *In re Connecticut Brass, etc., Corp.*, (D. C. Conn. 1919) 257 Fed. 445, it was contended that the court could not entertain a motion to dismiss an involuntary petition in bankruptcy because such motion was not made within five days after the return day as required by this section. The court said: "The answer to this objection is simple. A court of bankruptcy is a court of equity, and in the equity court a motion to dismiss, made in good faith and raising substantial questions vitally affecting the merits, may be entertained by the court at any time within a reasonable time, and may be made even on its own motion. And further, if section 59f is read in connection with section 18b, it is clear that there is no merit in the objection made by the petitioning creditors."

Vol. I, p. 740, sec. 18c. [First ed., 1912 Supp., p. 582.]

Motion to dismiss petition.—Since a motion to dismiss a petition in bankruptcy is under equity rule 29 in lieu of a demurrer, and sets forth no facts, but raises only a question of law, it need not be verified as provided in this section. *In re Connecticut Brass, etc., Corp.*, (D. C. Conn. 1919) 257 Fed. 445.

Vol. I, p. 741, sec. 18d. [First ed., 1912 Supp., p. 583.]

Effect of adjudication.—An adjudication gives complete jurisdiction.—To same effect as original jurisdiction, see *In re Diamond*,

(C. C. A. 6th Cir. 1919) 259 Fed. 70, 170 C. C. A. 138, wherein the court said:

"Upon the adjudication of bankruptcy, the District Court acquired jurisdiction essentially exclusive to administer the estate of the bankrupts generally, including the determination of claims to or liens upon their property, as well as questions of disbursement and distribution generally. *In re Watts & Sachs*, 190 U. S. 1, 27, 23 Sup. Ct. 718, 724, 47 L. Ed. 933; *U. S. Fidelity Co. v. Bray*, 225 U. S. 205, 217, 32 Sup. Ct. 620, 56 L. Ed. 1055; *In re Martin* (C. C. A. 6) 193 Fed. 841, 846, 113 C. C. A. 627. The property so subject to its jurisdiction included that in its constructive as well as in its actual possession. . . . This exclusive jurisdiction the bankruptcy court was not at liberty to surrender (*Fidelity Co. v. Bray*, *supra*, 225 U. S. at page 218, 32 Sup. Ct. 620, 56 L. Ed. 1055); and after bankruptcy supervened the state court (broadly speaking) no longer had power, unless under circumstances of emergency not applicable to the order here, to so dispose of the bankrupts' estate, in whole or in part, as to deprive the bankruptcy court of power to determine finally the propriety of such disposition."

Vol. I, p. 745, sec. 18e. [First ed., 1912 Supp., p. 585.]

Vacating adjudications.—The fact that a bankrupt filed a voluntary petition a short time before the death of his mother, under whose will he expected to inherit a substantial amount of property, is not sufficient ground for vacating his adjudication. *In re Swift*, (N. D. Ga. 1919) 259 Fed. 612.

Vol. I, p. 748, sec. 19a. [First ed., 1912 Supp., p. 586.]

Res judicata.—An adjudication by the federal court in involuntary bankruptcy proceedings, initiated on the petition of a creditor, that the debtor proceeded against is not insolvent, such adjudication being founded on a verdict of a jury impaneled under this section, is not *res judicata* of the question of the validity of the claim of the creditor so initiating the proceeding. *Granite City Bank v. Tvedt*, (Minn. 1920) 177 N. W. 767, wherein the court said: "It appears that some time prior to the commencement of the action involuntary bankruptcy proceedings were initiated against defendant in the federal court of South Dakota on the petition of plaintiff herein, in which it was alleged and stated that plaintiff was a creditor of defendant, and that she was insolvent and unable to pay her debts. Defendant appeared in the proceeding and by her answer put in issue the alleged indebtedness to plaintiff, the petitioning creditor, and also the allegations of her insolvency, and demanded, as she had the right under section 19a of the Bank-

ruptcy Act, a jury trial of the issue of insolvency. Her demand was granted by the court, and that issue was thereafter in the due course of procedure duly submitted to a jury. The jury found that defendant was not insolvent, and judgment dismissing the proceedings was thereupon duly rendered and entered by the federal court. The contention of defendant that the judgment in that proceeding is *res judicata* of the question as to the validity of the note in suit is not sustained. It seems clear that the judgment can have no such effect. The question was not in fact litigated in that proceeding, defendant had no right to a trial of that feature of the bankruptcy proceeding before the jury (3 Ruling Case Law, 208), and the trial was limited to the single issue of insolvency. With that question determined in favor of defendant, the proceedings were at an end, and nothing remained but to dismiss them; which was accordingly done. The validity of the note was not involved in the issue tried, nor was the determination thereof necessary to a decision of the issue of insolvency. *Morse v. Franklin Coal Co.*, (D. C.) 125 Fed. 998. The judgment therefore is not *res judicata* thereof. *State ex rel. v. Great Northern Railway Co.*, 134 Minn. 249, 158 N. W. 972; *In re Lachenmaier*, 203 Fed. 32, 121 C. C. A. 368. The question would probably be different in a case where an adjudication of bankruptcy is made, for that conclusion, presumptively at least, would include a finding of the existence of creditors and perhaps the validity and extent of their respective claims. *Brandenburg, Bankruptcy* (4th ed.), § 648. But the trial and determination of the preliminary question of insolvency in this case went no further and embraced no other specific issue, presumptively or otherwise. 15 Ruling Case Law, 980; *In re Julius*, 217 Fed. 3, 133 C. C. A. 328, L. R. A. 1915C 89."

Vol. I, p. 759, sec. 23a. [First ed., 1912 Supp., p. 594.]

Scope of section.—This section covers all controversies at law and in equity concerning property acquired or claimed by the trustee. *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

Jurisdiction of bankruptcy court—Enjoining replevin suit in state court.—A bankruptcy court has no jurisdiction to enjoin the prosecution in a state court of a suit to replevy certain bonds alleged to have been converted by the bankrupt, and as to which no claim of ownership is made by him. *In re Amy*, (C. C. A. 2d Cir. 1920) 263 Fed. 8.

Jurisdiction of state courts—Suits to set aside fraudulent conveyances.—In *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614, it was contended that since a bankrupt could not have instituted an action to set aside a conveyance made by himself for a fraudulent purpose, a state court could not retain jurisdiction after the intervention of the trustee

in bankruptcy, because under this section a trustee can bring and prosecute suits only "in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted."

Answering this contention, the court said: "This argument is without merit. It confuses jurisdiction or the power to decide with the principles on which the decision shall be made. If sound, it would be destructive of the power of the trustee to recover by suit any property fraudulently transferred by the bankrupt, because it would apply to all courts. If the bankrupt before bankruptcy had brought such an action, the court would have taken jurisdiction, and thereafter decided against him, because his participation in the fraud precluded relief."

Vol. I, p. 761, sec. 23b. [First ed., 1912 Supp., p. 595.]

- I. Jurisdiction of adverse claims.
- II. Jurisdiction as affected by possession.
- III. Jurisdiction by consent.
- V. Summary and plenary jurisdiction.
- VI. Jurisdiction of state courts.

I. JURISDICTION OF ADVERSE CLAIMS (p. 761)

Bona fide adverse claims.—To same effect as original annotation, see *Monroe County v. Keil*, (C. C. A. 6th Cir. 1919) 259 Fed. 76, 170 C. C. A. 144; *In re Continental Producing Co.*, (S. D. Cal. 1919) 261 Fed. 627, wherein it was held that a referee had no jurisdiction to consider without a creditor's consent a counterclaim asserted against him by the bankrupt, and to render an affirmative judgment against him.

Against agent or general assignee of bankrupt.—To same effect as second paragraph of original annotation, see *In re Diamond*, (C. C. A. 6th Cir. 1919) 259 Fed. 70, 170 C. C. A. 138.

The possession of a bankrupt's estate by a state court's receiver is not adverse to the bankrupt and any controversy between the bankruptcy court's receiver and the state court's receiver is within the jurisdiction of the bankruptcy court. *In re Diamond*, (C. C. A. 6th Cir. 1919) 259 Fed. 70, 170 C. C. A. 138. In discussing this question the court said: "The fact that petitioner disbursed the \$1,175 fund under the state court's order of October 29th did not convert a formerly nonadverse holding into one of an adversary character; for he then knew of the bankruptcy proceedings and of the efforts of the bankruptcy court then and there being made to prevent such action. *Bryan v. Bernheimer*, *supra*, 181 U. S. at pages 191 and 193, 21 Sup. Ct. 557, 45 L. Ed. 814. The proposition that the bankruptcy court had no power to authorize its receiver (as distinguished from a trustee) to take possession of the fund is answered by what

is said in *Bryan v. Bernheimer*, *supra*, 181 U. S. at page 195, 21 Sup. Ct. 557, 45 L. Ed. 814, and in *Lazarus v. Prentice*, 234 U. S. 263, 266, 34 Sup. Ct. 851, 58 L. Ed. 1305. We see no merit in the proposition that the bankruptcy receiver, by going into the state court (as was highly proper in the observance of due comity) to ask that court to direct its receiver to turn over the fund to the bankruptcy receiver, thereby elected that remedy, so submitting himself to the jurisdiction of the state court and inviting the order complained of. The course taken by the bankruptcy receiver was designed to prevent that very action.

"The pendency of proceedings in the state appellate court for review of the state court's action of November 21st, setting aside its previous order for compensation, is not and could not well be urged against the jurisdiction of the bankruptcy court. The commendable action of the state court last referred to terminated any conflict between the federal and state courts. The legality of that order and of its predecessors, as affecting the jurisdiction of the bankruptcy court, is one arising under the bankruptcy law, which it is our duty to decide."

Injunction to restrain forfeiture of lease.—A bankruptcy court has no jurisdiction of a petition by a trustee in bankruptcy to restrain the lessors of a coal lease, held by the bankrupt as sublessee, from enforcing under the terms of the lease a forfeiture thereof, for alleged default in failing to pay royalties on coal mined by the lessee during a specified period, and failure to pay certain taxes likewise covenanted to be paid by the lessee. *In re Elk Brook Coal Co.*, (M. D. Pa. 1919) 261 Fed. 445.

II. JURISDICTION AS AFFECTED BY POSSESSION (p. 765)

Possession of property gives jurisdiction thereover—*Possession by act of officers.*—To same effect as original annotation, see *Monroe County v. Keil*, (C. C. A. 6th Cir. 1919) 259 Fed. 76, 170 C. C. A. 144.

Possession of, or under, assignee for creditors.—To same effect as original annotation, see *Galbraith v. Vallely*, (C. C. A. 8th Cir. 1919) 261 Fed. 670, holding that property may be recovered from an assignee by a summary proceeding.

III. JURISDICTION BY CONSENT (p. 767)

Effect of consent.—To same effect as original annotation, see *In re Tietje*, (E. D. N. Y. 1920) 263 Fed. 917, wherein it was held that a creditor by filing his proof of claim in the bankruptcy court submitted to the jurisdiction of the court the question of the amount due him.

V. SUMMARY AND PLENARY JURISDICTION (p. 770)

Necessity of plenary action.—To same effect as original annotation, see *Morris v.*

U. S., (C. C. A. 7th Cir. 1919) 261 Fed. 175; *In re Diamond*, (C. C. A. 6th Cir. 1919) 259 Fed. 70, 170 C. C. A. 138; *Eisenberg v. Weisskopf*, (C. C. A. 7th Cir. 1919) 258 Fed. 617, 170 C. C. A. 71 (following *In re Goldstein*, (C. C. A. 7th Cir. 1914) 216 Fed. 887, 133 C. C. A. 91); *In re Franklin Brewing Co.* (C. C. A. 2d Cir. 1920) 263 Fed. 512 (wherein it was held that a claim by the trustees of a bankrupt corporation against the executors of a deceased officer of the corporation to recover money alleged to have been illegally paid to him, was an adverse claim which could not be disposed of by summary proceedings); *Martin v. Oliver*, (C. C. A. 8th Cir. 1919) 260 Fed. 89, 171 C. C. A. 125 (wherein the court said: "An adverse claimant, whose lien attaches within four months prior to the filing of the petition in bankruptcy, and which is not conditioned by the insolvency of the debtor at the time such lien attached, has all the rights and privileges of an adverse claimant whose lien attached more than four months before the filing of the petition, because it is excluded from the provisions of section 67f, and is entitled to the trial of its claim in a plenary suit").

Summary jurisdiction.—To same effect as original annotation, see *In re Diamond*, (C. C. A. 6th Cir. 1919) 259 Fed. 70, 170 C. C. A. 138; *In re Clayton*, (D. C. N. J. 1919) 259 Fed. 911; *In re Looschen Piano Case Co.*, (D. C. N. J. 1919) 261 Fed. 93, in which last cited case it was said:

"In cases in which third parties hold property which the trustee believes belongs to the bankrupt and is a part of his estate in bankruptcy, great care should be exercised, for it is a serious matter to adjudge by summary process that the property claimed by one person belongs to the estate in bankruptcy of another, and therefore must be surrendered to his trustee. At the same time it should be borne in mind that the interest of creditors must not be sacrificed by long and useless litigation. The bankruptcy court is clothed with power 'to cause the estate of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto.' Power is also given to third parties, under certain conditions, to have their title to property litigated in a plenary suit; but the right to resort to such procedure does not preclude litigation of the rights of parties by summary proceedings in bankruptcy courts as distinguished from controversies by plenary suits, where the trustee applies for an order requiring third parties to turn over property in their possession, and bases his application upon the ground that the property in question belongs to the bankrupt and is held without color of right. If such application is made, the referee is bound to make the inquiry, and this inquiry requires a decision upon the merits. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. ed. 405. If the referee

decides that the application is made in good faith, and the applicant has color of title, though it may be of doubtful validity, there should be a plenary suit to try the question. If the referee decides that the claim to the property by third parties is not made in good faith and is without actual merit or legal foundation, the referee should regard the property as subject to the jurisdiction of the bankruptcy court, as property of the bankrupt, and should order it in summary proceedings to be surrendered to the court or trustee. *In re Holbrook Shoe & Leather Co.* (D. C.) 165 Fed. 973, 976."

Validity of sale by bankruptcy.—The bankruptcy court has summary jurisdiction to decide whether an alleged sale of a life estate by a bankrupt to his son, was made in good faith or was merely a colorable claim. *Gray v. Gudger*, (C. C. A. 5th Cir. 1919) 260 Fed. 931, 171 C. C. A. 573.

State court receivers.—A bankruptcy court has power, by summary order, to compel a state court receiver to turn over money of the bankrupt to the bankruptcy court, to await its action upon the question of compensation, fees, and disbursements of the receiver. *In re Diamond*, (C. C. A. 6th Cir. 1919) 259 Fed. 70, 170 C. C. A. 138.

Waiver of objections to jurisdiction.—When an answer to the merits is not interposed until after an objection to the summary jurisdiction of a referee is overruled pleading to the merits is not a waiver of the objection. *In re Looschen Piano Case Co.*, (D. C. N. J. 1919) 261 Fed. 93.

VI. JURISDICTION OF STATE COURTS (p. 772)

Jurisdiction of state courts.—*An order of the bankruptcy court upon the receiver of a state court to deliver property to the bankrupt without first causing notice of the bankruptcy proceedings to be given to that court, and without causing a motion or application to be made to it for an order on its receiver to deliver over the property, is erroneous.* *Martin v. Oliver*, (C. C. A. 8th Cir. 1919) 260 Fed. 89, 171 C. C. A. 125. Regarding the state court's jurisdiction, the court said:

"That court had full jurisdiction of the parties to the suit before it, of the property in its possession, and of the issues, whether or not *Lula M. Oliver* was insolvent when the levy was made, and whether or not the property was exempt when the petition in bankruptcy was filed and the adjudication in bankruptcy was made. It proceeded with its suit, so far as this record shows, without any notice to it of the bankruptcy proceedings, or any motion, or application in or to it, regarding the possession or disposition of the property, either by the bankruptcy court or any of its officers, and rendered its final decree that the property was not exempt, that *McNeill's* lien upon it was valid, and that the property be sold to pay it. As the Supreme Court said in *Jones v. Springer*, 226 U. S. 148, 155, 33 Sup. Ct. 64, 65 (57 L. ed.

161), 'But in a case like the present, where, under an attachment levied before the petition was filed, the property had been put into the hands of a receiver, without notice of the petition, it is not true that all power and jurisdiction of the local court were ended before notice of the bankruptcy proceedings.' If the bankruptcy court or its officers took any right or title to this property or to its possession, they took it from Lula M. Oliver pendente lite, and subject to the actual possession and lawful custody of that property in the chancery court. If they had any such rights the Arkansas court, on a suitable application or motion, would undoubtedly have preserved and enforced them."

Vol. I, p. 774, sec. 24a. [First ed., 1912 Supp., p. 603.]

II. Controversies arising in bankruptcy proceedings.

IV. Review by United States Supreme Court of decisions of Circuit Courts of Appeals.

II CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS (p. 776)

Exclusiveness of section 24a.—To same effect as original annotation, see *Youtsey v. Niswonger*, (C. C. A. 6th Cir. 1918) 258 Fed. 16, 169 C. C. A. 154.

Sections 24b and 24a contrasted.—To same effect as original annotation, see *In re Dressler Producing Corp.*, (C. C. A. 2d Cir. 1919) 262 Fed. 257.

Motion to reopen case.—In *Youtsey v. Niswonger*, (C. C. A. 6th Cir. 1918) 258 Fed. 16, 169 C. C. A. 154, an appeal was taken from an order denying a motion to reopen a case on the ground that the bankrupt had made an error in scheduling his interest in certain land. In affirming the decision of the lower court, it was said:

"An ultimate controversy as to the title of the land, duly instituted as between the bankrupt estate and adverse claimants, would doubtless be a 'controversy' within section 24a. But such controversy was not ultimately submitted. While the denial of the motion was based upon an adverse construction of the bankrupt's claimed title, such decision was incidental to the denial of the motion to reopen. Had administration been reopened upon the court's conception that the bankrupt owned an estate in fee simple, the reopening of administration would not have been an adjudication in the trustee's favor or against adverse claimants. It would still have been necessary to an adjudication that further proceedings be instituted to test the title, with opportunity to all adversely interested to be heard, including, at least, the other son of the bankrupt and perhaps other contingent heirs. Indeed, the bankrupt's son and wife, who were heard in opposition to the motion to reopen, were evidently notified of the hearing, not as claimants of the fee, but only as purchasers

of the life estate; and, as already said, even the purchasers were not made parties to this appeal. The motion to reopen was a proceeding of the most summary character, not even accompanied by possession on the part of the estate of the property in question. It would seem a strained construction to hold this proceeding, so far as it had gone, as of a plenary character, or more than merely a step in the course of administration. If of the latter character, it was reviewable by petition to revise, under section 24b. *In re Jacobs*, (C. C. A. 6) 241 Fed. 620, 154 C. C. A. 378; *Barnes v. Pampel*, (C. C. A. 6) 192 Fed. 525, 113 C. C. A. 81—remedies under sections 24a and 24b being mutually exclusive. *Barnes v. Pampel*, *supra*. We prefer, however, not to base our disposition of the case upon the nonappealability of the order below, for we think the bankrupt's claim of title on which the motion below was based is without merit."

Decisions held appealable.—A controversy between two claimants, whose claims have been allowed, as to the priority of their respective claims against the bankrupt's estate, is a proceeding arising in bankruptcy and appealable under this section. *In re Ieterman*, (C. C. A. 2d Cir. 1919) 260 Fed. 543, 171 C. C. A. 327.

An order for the delivery of property to the petitioner in a reclamation proceeding presents a controversy arising in bankruptcy which is reviewable by an appeal under this section. *In re Herbert*, (C. C. A. 2d Cir. 1920) 263 Fed. 351.

IV. REVIEW BY UNITED STATES SUPREME COURT OF DECISIONS OF CIRCUIT COURTS OF APPEALS (p. 788)

Decisions held not appealable.—An appeal will not lie to the federal Supreme Court from a decree of a federal circuit court of appeals which directs the dismissal by a bankruptcy court of a bill setting up as the ground of jurisdiction that it is ancillary to the bankruptcy proceedings. *Pell v. McCabe*, (1919) 250 U. S. 573, 40 S. Ct. 43, 64 U. S. (L. ed.) —, *dismissing appeal* (C. C. A. 2d Cir. 1919) 256 Fed. 512, 168 C. C. A. 18.

Vol. I, p. 791, sec. 24b. [First ed., 1912 Supp., p. 611.]

Appeal or petition to revise as exclusive or optional right.—To same effect as first paragraph of original annotation, see *Youtsey v. Niswonger*, (C. C. A. 6th Cir. 1918) 258 Fed. 16, 169 C. C. A. 154.

Where an aggrieved party does not proceed to bring his appeal according to the rules laid down by the appellate court, that court will not entertain the appeal. Thus, where an appeal is taken when the proper appellate remedy is by petition to revise, the appeal will be dismissed. *In re Reilly*, (C. C. A. 2d Cir. 1919) 258 Fed. 121, 169 C. C. A. 207.

Appeal united with petition.—To same effect as original annotation, see *Monroe County v. Keil*, (C. C. A. 6th Cir. 1919) 259 Fed. 76, 170 C. C. A. 144.

Questions and orders reviewable or not reviewable on petition.—*An order denying a motion to dismiss bankruptcy proceedings* is reviewable by petition to revise. *In re Dressler Producing Corp.*, (C. C. A. 2d Cir. 1919) 262 Fed. 257, wherein it was said:

"Petitions to revise bring up questions of law only; appeals, both of law and of fact. *Elliott v. Toepfner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. ed. 200. A petition to revise calls up any order or judgment and judicial action in bankruptcy proceedings; appeals, final judgments only. *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, 31 Sup. Ct. 25, 54 L. ed. 1047. If the question arises in an independent suit to determine the claim necessary for the settlement of the estate, or if it arises in one of the cases specified in section 25a, review may be had by appeal; but if the question pertains to and arises in a bankruptcy proceeding, and does not fall within either of the cases specified in section 25a, review may be had by petition to revise in matter of law. Under section 24a, a controversy arising between a trustee and a third party in respect to property either in the possession of the trustee or a third party, the review in the Circuit Court of Appeals is had on appeal and in the same manner as any other case; but in case of such controversy the revisory power is not available. On the review, the judgment in independent suits to recover assets, or to determine controversies arising relative to the bankrupt estate, the remedy is by appeal. We are of the opinion that the remedy of the aggrieved party here was by a petition to revise."

Summary proceedings are reviewable only by a petition to revise. *In re Dressler Producing Corp.*, (C. C. A. 2d Cir. 1919) 262 Fed. 257.

Assumption of jurisdiction to determine adverse claim.—To same effect as original annotation, see *In re Dressler Producing Corp.*, (C. C. A. 2d Cir. 1919) 262 Fed. 257; *Monroe County v. Keil*, (C. C. A. 6th Cir. 1919) 259 Fed. 76, 170 C. C. A. 144.

Decision that referee had no jurisdiction of bill filed by trustee to avoid alleged fraudulent transfers.—A decision of a bankruptcy court that the referee had no jurisdiction of a bill filed by the trustee to avoid certain transfers as in fraud of creditors is reviewable in the Circuit Court of Appeals by petition to revise under section 24b, although, had the District Court sustained the jurisdiction and passed upon the merits, the exclusive remedy would have been by appeal under section 24a, as the court thereby would have determined a controversy arising in bankruptcy proceedings. *Weidhorn v. Levy*, (1920) 253 U. S. 268, 40 S. Ct. 534, 64 U. S. (L. ed.) —, reversing (C. C. A. 1st Cir. 1918) 253 Fed. 28, 165 C. C. A. 48.

Misrepresentations by trustee on sale of bankrupt's property.—A controversy regarding the fact whether a trustee in bankruptcy made misrepresentations in selling certain assets of the bankrupt estate, is a proceeding in bankruptcy, and should be brought to the attention of an appellate court by a petition to revise under this section. *In re Reilly*, (C. C. A. 2d Cir. 1919) 258 Fed. 121, 169 C. C. A. 207.

"Matter of law."—To same effect as original annotation, see *In re De Rau*, (C. C. A. 6th Cir. 1919) 260 Fed. 732, 171 C. C. A. 470; *In re Leterman*, (C. C. A. 2d Cir. 1919) 260 Fed. 543, 171 C. C. A. 327.

Presumptions as to evidence.—On a petition to revise orders of the bankruptcy court where there is no evidence in the record, it will be assumed that it supports the allegations of the petition on which the orders were made. *Gray v. Gudger*, (C. C. A. 5th Cir. 1919) 260 Fed. 931, 171 C. C. A. 573.

Vol. I, p. 812, sec. 25a. [First ed., 1912 Supp., p. 623.]

Parties to appeal.—On an appeal by a creditor of a bankrupt from an order confirming a composition, neither the consenting creditors nor a representative fraction of them are necessary parties. *In re Gottlieb*, (C. C. A. 2d Cir. 1919) 262 Fed. 730.

Questions of fact—Concurrent findings of referee or jury and court below.—To same effect as original annotation, see *Thompson v. Lamb*, (C. C. A. 3d Cir. 1920) 263 Fed. 61.

The report of a referee in favor of a claim, based on an oral hearing of conflicting evidence and confirmed by the bankruptcy court, will not be reviewed. *In re Morrison*, (C. C. A. 7th Cir. 1919) 261 Fed. 355.

Finding of judge.—Where the evidence is conflicting and the witnesses are not before it, an appellate court will not disturb a finding by a lower court that certain payments made by a bankrupt to one of his creditors were preferential, unless it is satisfied that the conclusion reached by the lower court was clearly wrong. *Tremont Trust Co. v. Cohen*, (C. C. A. 1st Cir. 1920) 263 Fed. 81.

A judgment denying an adjudication on the ground that the bankrupt has transferred his property with intent to hinder, delay and defraud his creditors, will not be disturbed by the appellate court unless it appears that the evidence clearly preponderates against it. *Marine Nat. Bank v. Swigart*, (C. C. A. 6th Cir. 1920) 262 Fed. 854.

Vol. I, p. 824, sec. 25a (1). [First ed., 1912 Supp., p. 632.]

Writ of error or appeal.—A judgment denying an adjudication of bankruptcy without a jury trial is reviewable only by appeal and not by a writ of error. And the fact that the bankrupt, after having demanded a jury, withdrew his demand, does

not alter the case, since the necessity for writ of error relates only to an actual, not a potential, trial by jury. *Marine Nat. Bank v. Swigart*, (C. C. A. 6th Cir. 1920) 262 Fed. 854, wherein it was said:

"The question whether appeal or error is the proper remedy is more or less important as affecting the scope of our review, notwithstanding section 4 of chapter 448 of the Act of September 6, 1916 (39 Stat. p. 727), forbids dismissal of appeal or writ of error merely because the other remedy should have been taken. In our opinion appeal is the proper remedy. The statute (Bankr. Act, § 25a) expressly gives a right of appeal 'as in equity' from an order denying an adjudication of bankruptcy. It is only when a jury is had that writ of error is needed to enable review or rulings upon the trial. *Loveland on Bankruptcy* (4th ed.), pp. 1439 and 1441; *Elliott v. Toepfner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. ed. 200. The fact that appellee, after having demanded a jury, withdrew his demand, does not alter the case. The necessity for writ of error relates only to an actual, not a potential, trial by jury. Upon this appeal the whole case is open for review, on both law and facts. *Elliott v. Toepfner*, *supra*; *Merchants' Bank v. Cole*, (C. C. A. 6) 149 Fed. 708, 79 C. C. A. 414. The limitation upon the scope of review recognized in *Edwards v. La Dow*, 230 Fed. 378, 383, 144 C. C. A. 520, as applicable to that suit at law, where waiver of jury was not in writing, has no application to the hearing of this petition for adjudication in bankruptcy, on which a jury is not required, unless specially claimed."

Vol. I, p. 826, sec. 25a (2). [First ed., 1912 Supp., p. 633.]

Judgment on composition.—To same effect as original annotation, see *In re Gottlieb*, (C. C. A. 2d Cir. 1919) 262 Fed. 730; *In re O'Gara Coal Co.*, (C. C. A. 7th Cir. 1919) 260 Fed. 742, 171 C. C. A. 480.

Sufficiency of evidence.—In *Goerner v. Eastman*, (C. C. A. 5th Cir. 1919) 261 Fed. 177, it was held that the evidence was sufficient to sustain an order of the bankruptcy court denying the bankrupt's application for a discharge on the ground that he had obtained money from a creditor upon a materially false statement in writing by him to such creditor.

Vol. I, p. 826, sec. 25a (3). [First ed., 1912 Supp., p. 634.]

Assertion of lien on property in bankruptcy court's custody.—Where a creditor seeks to assert a lien on property which, at the time of the bankruptcy, passed into the possession of the bankruptcy court and the proceeds from the sale of which are constructively in its possession, a decree denying such lien presents a controversy in bankruptcy, reviewable by appeal, rather than by petition

to revise. *In re Sola e Hijo*, (C. C. A. 1st Cir. 1919) 261 Fed. 822.

Vol. I, p. 829, sec. 25a (3). [Time for taking appeal—hearing.] [First ed., 1912 Supp., p. 635.]

Provision as mandatory.—The provision of this section regarding the time within which an appeal must be taken is mandatory, and an appeal not taken within such time will be dismissed. *Youtsey v. Niswonger*, (C. C. A. 6th Cir. 1918) 258 Fed. 16, 169 C. C. A. 154.

Order not within section.—An appeal from an order denying a motion to reopen a case on the ground that the bankrupt made an error in scheduling his interest in certain land is one relating to a "controversy arising in bankruptcy," and is not limited to ten days by this section but may be taken within six months under section 24a. *Youtsey v. Niswonger*, (C. C. A. 6th Cir. 1918) 258 Fed. 16, 169 C. C. A. 154.

Vol. I, p. 838, sec. 25d. [First ed., 1912 Supp., p. 641.]

III. WRITS OF CERTIORARI (p. 840)

Cases in Circuit Court of Appeals "to superintend and revise."—A decision in such a case was reviewed on certiorari in *Weidhorn v. Levy*, (1920) 253 U. S. 268, 40 S. Ct. 534, 64 U. S. (L. ed.) —.

Vol. I, p. 844, sec. 29b (1). [First ed., 1912 Supp., p. 646.]

Conspiracy to violate this section, see notes under PENAL LAWS, sec. 37, post.

Nature of bankruptcy proceedings as affecting offense.—In a prosecution under this section it is immaterial whether the bankruptcy was voluntary or involuntary. *Tugendhaft v. U. S.*, (C. C. A. 5th Cir. 1920) 263 Fed. 562. The court said:

"In the part of the court's charge dealing with what was required to be found to support a verdict of guilty, the following statement was made: 'Now it is immaterial whether he is in voluntary or involuntary bankruptcy.'

"This statement was excepted to, and the making of it is assigned as error. The statute makes it a criminal offense for one knowingly and fraudulently to conceal while a bankrupt from his trustee any part of the property belonging to his estate in bankruptcy. Concealment in anticipation of bankruptcy was not charged, and is not a criminal offense. To support the charge made it is necessary to prove concealment after bankruptcy. If after bankruptcy the bankrupt does what the statute denounces, criminality attaches, whether the bankruptcy was voluntary or involuntary. The legal consequences of a concealment after bankruptcy being the same whether the bankruptcy was

of the one kind or the other, the court was not in error in making the above-quoted statement."

Conspiracy to conceal.—Insolvent debtors may be convicted of a conspiracy to conceal their assets, so that their creditors cannot reach them through bankruptcy proceedings which the debtors are expecting to be instituted. *Meyer v. U. S.*, (C. C. A. 7th Cir. 1919) 258 Fed. 212, 169 C. C. A. 280.

Indictment—Duplicity.—An indictment for a violation of this section which charges the bankrupt with several acts of concealment, is not duplicitous where it appears that such acts were merely component parts of a single continuous concealment. *Tugendhaft v. U. S.*, (C. C. A. 5th Cir. 1920) 263 Fed. 562.

Vol. I, p. 851, sec. 29b (3). [First ed., 1912 Supp., p. 651.]

Advice of counsel as defense.—In a prosecution for a violation of this section the fact that the defendant presented a claim on advice of counsel constitutes no defense where it appears that he did not fully and in good faith lay the facts in regard to the claim before his counsel. *Levinson v. U. S.*, (C. C. A. 3d Cir. 1920) 263 Fed. 257. Regarding such a defense, the court said:

"It is alleged to involve a situation where a man has in good faith submitted his claim to competent counsel and followed his advice, and is now convicted of a crime by reason of following such advice. Were the situation as above stated, a court might well pause before sustaining a sentence upon a defendant. But, when the facts of this case and the real issue are clearly grasped, it will be seen no such situation as above exists.

"In the first place, the statute provides: 'A person shall be punished by imprisonment, for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently . . . presented under oath any false claim or proofs against the estate of a bankrupt.'

"Applying that statute to the present case, the issue was: Did the defendant present a claim for money loaned to the bankrupt, which he knew was false and fraudulent? Had he loaned his money to the company? If he had not, a claim presented for loaned money was false and fraudulent, and the presentation of such unfounded false claim was, by the statute, made a crime. Whether the defendant loaned the company money was a fact, and the defendant, and he alone, knew whether he had in fact loaned the money to the company. He says he loaned it, but the jury has found he did not, and consequently that when he testified he had loaned his money to the company, he was not telling the truth. When, therefore, the defendant went to counsel, and told counsel, as he no doubt did, that he had loaned his money to the company, he had not, as the point quoted below assumes, 'fully and in good faith laid

the facts in regard to his claim against the Saunders Shoe Company before his counsel.'"

Admissibility of evidence.—In a prosecution for a violation of this section evidence of the books of the bankrupt company, the explanatory testimony of accountants who examined them, and statements as to the financial condition of the company made to credit companies and of which the defendant had knowledge, is admissible as being pertinent and helpful in determining whether the defendant really loaned his money to the bankrupt company as he claimed or paid it to the company in purchase of its stock. *Levinson v. U. S.*, (C. C. A. 3d Cir. 1920) 263 Fed. 257.

Vol. I, p. 898, sec. 38a. [First ed., 1912 Supp., p. 655.]

Referee's jurisdiction to determine counterclaims, see annotations to sec. 68a, *infra*, p. 445.

Review of proceedings had before referee.—A referee in bankruptcy is not in any sense a separate court nor endowed with any independent judicial authority. He is merely an officer of the court of bankruptcy, having no power except as conferred by the order of reference, read in the light of the Bankruptcy Act, and his judicial functions, however important, are subject always to the review of the bankruptcy court. *Weidhorn v. Levy*, (1920) 253 U. S. 268, 40 S. Ct. 534, 64 U. S. L. ed. —, *reversing* (C. C. A. 1st Cir. 1918) 253 Fed. 28, 165 C. C. A. 48.

Review by referee of allowed claim.—In *In re De Rau*, (C. C. A. 6th Cir. 1919) 260 Fed. 732, 171 C. C. A. 470, it was contended that the referee alone had jurisdiction to re-examine a claim which had been previously allowed. Answering this contention, the court said:

"The proposition that the referee alone had jurisdiction to re-examine the claim does not impress us. It is not accurate to say that the action allowing the claim was solely that of the referee; in a much more proper sense it was directly the action of the district judge. It is shown not only by the referee's record, but by that in the office of the clerk of the District Court, that petitioner filed with the trustee a claim for \$1,567.30; that the referee, in accordance with a then existing practice, certified the claim to the district judge, with recommendation that it be allowed at \$1,536.05; that the judge allowed the claim at \$1,356.05. The referee seems to have made no further order. It is immaterial that this practice of submitting to the district judge directly the allowance of claims of this nature, instead of having the allowance made by the referee subject to review under the act, was (as petitioner contends) not required by any actual rule of the District Court. It was apparently based upon an existing practice, presumably required by the district judge.

The latter had complete authority, notwithstanding the general reference, to take to himself the allowance of claims of this nature. The action had was as effectively that of the judge as if had under a positive order withdrawing that subject from the referee's consideration, or as if the referee had in the first instance allowed the claim, and the matter then been brought before the district judge for review."

Taking exceptions before referee — Necessity.—To same effect as original annotation, see *In re Schwab*, (E. D. N. Y. 1919) 258 Fed. 772, holding that where an exception is not taken to the overruling of an objection to a referee's jurisdiction, the objection will not be considered on a review of the referee's order by the court.

Ruling as to discharge.—Where a creditor files no exceptions to a referee's order recommending the bankrupt's discharge, he cannot obtain a review of such order by the bankruptcy court. *In re Stubblefield*, (W. D. Tex. 1919) 260 Fed. 591.

Determination on review — Petition not before referee.—Where an amended petition was not before a referee, the court cannot consider it on the reargument on a certificate for review. *In re Levy*, (E. D. Pa. 1919) 261 Fed. 432.

Weight of referee's findings of fact.—To same effect as original annotation, see *In re Rosen*, (C. C. A. 7th Cir. 1920) 263 Fed. 704; *In re Bradley*, (D. C. Conn. 1920) 263 Fed. 446; *In re Devon Manor Corp.*, (E. D. Pa. 1919) 257 Fed. 766; *In re Lake Chelan Land Co.*, (C. C. A. 9th Cir. 1919) 257 Fed. 497, 168 C. C. A. 501, 5 A. L. R. 557; *In re Bass*, (E. D. Pa. 1919) 257 Fed. 137.

Weight dependent on character of evidence.—To same effect as original annotation, see *Walter v. Atha*, (C. C. A. 3d Cir. 1919) 262 Fed. 75, holding that where the referee's finding is a deduction from established facts or uncontradicted evidence, the judge reviewing it is at liberty to draw his own inferences and deduce his own conclusions and that the same rule applies to a review by an appellate court.

Vol. I, p. 904, sec. 38a (4). [First ed., 1912 Supp., p. 659.]

Jurisdiction of suit to set aside fraudulent transfer.—A referee in bankruptcy, by virtue of a general reference under General Orders in Bankruptcy No. 12, which provides that "thereafter all the proceedings, except such as are required by the act or by these General Orders to be had before the judge, shall be had before the referee," has no jurisdiction of a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under § 70e of the Bankruptcy Act, (1 Fed. Stat. Ann. (2d ed.) 1212) and affecting property not in the custody or

control of the court of bankruptcy. *Weidhorn v. Levy*, (1920) 253 U. S. 268, 40 S. Ct. 534, 64 U. S. (L. ed.) —, reversing (C. C. A. 1st Cir. 1918) 253 Fed. 28, 166 C. C. A. 48.

Vol. I, p. 912, sec. 40a. [First ed., 1912 Supp., p. 666.]

Referee's commissions.—To same effect as original annotation, see *In re Motridge*, (C. C. A. 9th Cir. 1919) 258 Fed. 229, 169 C. C. A. 539, wherein an order of the District Court allowing a referee as commission one per cent of the total amount of the estate, was reversed, the court saying:

"We are of the opinion that the court below was in error. Section 40 of the original act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 556) provided as compensation to referees 'from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions,' and section 48 of that act provided that trustees should receive 'from estates which have been administered such commissions on all moneys disbursed by them as may be allowed by the courts.'

"Both of those sections were amended Feb. 5, 1903, the former being made to read as follows: 'Referees shall receive as full compensation for their services, payable after they are rendered, a fee of fifteen dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and twenty-five cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.'

"We agree with the Court of Appeals of the Fourth Circuit in the case of *Bray, Trustee, etc., v. Johnson, Referee, et al.*, 166 Fed. 57, 91 C. C. A. 643, that there is no mistaking that language. By it Congress not only specifically declared what referees should receive, namely, one per centum on all moneys disbursed to creditors by the trustee, but by section 72 of the same act of February 5, 1903, further expressly provided: 'That neither the referee . . . nor the trustee shall in any form or guise, receive, nor shall the court allow them, any other or further compensation for their services than that expressly authorized and prescribed in this act.'

"Moreover, by section 2 of the General Order No. 35, prescribed by the Supreme Court for the enforcement of the Bankruptcy Law, it is also declared that: 'The compensation of referees prescribed by this act shall be in full compensation for services

performed by them under the Act or under these General Orders.'

"See, also, Matter of Lacey & Co., 35 Am. Bankr. Rep. 231, and Matter of C. J. McCubbin Co., 33 Am. Bankr. Rep. 277."

Vol. I, p. 923, sec. 41b. [First ed., 1912 Supp., p. 674.]

Appeal in forma pauperis.—A bankrupt may be permitted to prosecute an appeal in forma pauperis from an order of the bankruptcy court adjudging him to be in contempt for failure to pay over a certain sum of money to his trustee, where it appears that he questions the sufficiency of the evidence in the contempt proceedings as to his ability to pay the money. *Henkin v. Fousek*, (C. C. A. 8th Cir. 1920) 262 Fed. 957.

Modification of contempt order.—In *In re Rosen*, (C. C. A. 7th Cir. 1920) 263 Fed. 704, it was held that an order of the District Court requiring a bankrupt to pay over to his trustee a certain sum of money within 15 days, or in default thereof be committed to jail, should be modified by allowing the bankrupt to show cause after default why he should not be punished for contempt. The court said:

"Judge Sanborn ordered Rosen to pay over \$1,900.47 within 15 days, and in the same order directed that in default thereof Rosen should be committed to jail. Inasmuch as Judge Sanborn saw fit to reduce the amount theretofore required to be paid by Rosen, he was entitled to a reasonable time thereafter in which to pay, which was given. Whether he should be held in contempt for failure to make such payment must have necessarily depended upon conditions existing at the expiration of that time. *Re Baum*, 169 Fed. 410, 94 C. C. A. 632.

"The order should be modified, by omitting that part which directs that the bankrupt, if he is in default in making said payment within 15 days, shall be committed to the county jail. The District Court is directed to enter an order, requiring the bankrupt, within 15 days after notice to him of the filing of the mandate in the District Court, to show cause why he should not be punished for contempt for failure to comply with the order of the District Court."

Vol. I, p. 933, sec. 46. [First ed., 1912 Supp., p. 681.]

Ground for removal.—Although a trustee acted as trustee and attorney in fact for a bankrupt in paying his debts prior to the bankruptcy, this is not ground for his removal where it appears that on the adjudication he made a full accounting and turned over all the bankrupt's property remaining in his hands and it is not asserted that he has done anything since his appointment to justify removal. *In re Holden*, (N. D. N. Y. 1919) 258 Fed. 720.

Vol. I, p. 933, sec. 47a (2). [First ed., 1912 Supp., p. 682.]

Collection and reduction of assets.—It is the duty of the trustee in bankruptcy to take into custody for the benefit of creditors, such properties as belong to the bankrupt. *In re Amy*, (C. C. A. 2d Cir. 1920) 263 Fed. 8.

Assessment of stockholders.—"There are two entirely separate and distinct branches of the proceedings to compel the payment by a stockholder of a bankrupt corporation of any moneys due on his stock, viz.: First, a determination by the court as to whether it is necessary to assess such stock for the purpose of paying the debts of the bankrupt and the necessary costs of administration, and, if so, then the fixing of the rate of the assessment and the levying of the same upon whatever stock may appear prima facie to be subject thereto; and, second, if a stockholder disputes his individual liability as prima facie determined, then the institution by the trustee of an appropriate suit or proceeding to fix definitely his liability or nonliability for the assessment and the amount thereof. The first branch is purely administrative and is binding upon any stockholder in any subsequent proceedings instituted to fix his personal liability; but in respect to the second branch the stockholder may make any defense which may affect his individual liability, other than the correctness of the administrative order." *Bergdoll v. Harrigan*, (C. C. A. 3d Cir. 1920) 263 Fed. 279, wherein it was held that the appearance of a stockholder at a hearing before a referee for the purpose of contesting the necessity and advisability of making an assessment did not subject him to the jurisdiction of the referee so as to permit the latter to finally adjudicate his liability to such assessment.

Trustee's right to collect assets.—*Since the amendment of 1910.*—To same effect as original annotation, see *In re A. E. Savage Baking Co.*, (D. C. N. J. 1919) 259 Fed. 976, holding that where conditional sales of chattels were void as to the trustee and judgment creditors because not properly recorded, the referee should sell the chattels free and clear of all liens.

Trustee's right as execution creditor.—Where, although there is an absolute transfer of property by the bankrupt to one of his creditors with a lease back, the actual purpose of the transaction is to give the creditor security for a loan on property which the bankrupt had in his possession and never surrendered, the bankrupt's trustee, being vested with the rights of an execution creditor under the provisions of this section, is entitled to the proceeds from the sale of the property. *Burnett v. Frederick*, (C. C. A. 3d Cir. 1920) 263 Fed. 681. Regarding the trustee's right, the court said:

"Under these facts, the referee committed no error in denying Mrs. Burnett's petition. When the bankruptcy occurred, the bankrupt

company was indebted (although the time for the payment of their claims had previously been extended to a date subsequent to the filing of the petition for adjudication) in a considerable amount to creditors whose debts antedated the Burnett transfer and lease. If one of these creditors had eventually secured judgment against the Drug Company, and had issued an execution thereon, and levied on these fixtures, and if Mrs. Burnett had given notice of the unrecorded and unnoted lien which the referee had found the facts of the case alone amounted to, would the execution of the Drug Company's creditor or this attempted lien of Mrs. Burnett's have prevailed? Under such facts, the attempted secret lien must yield, under the laws of Pennsylvania, to the superior right of the creditor's execution levied on the goods in the open, unchanged, and credit-inviting possession of the debtor. Such being the superior right of an execution creditor of the Drug Company to this property, when the bankruptcy occurred, sections 47a and 70e of the Bankrupt Law vested the right of the execution creditor in Frederick, the trustee."

Unrecorded conditional sale.—To same effect as original annotation, see *In re Mutual Motors Co.*, (E. D. Mich. 1919) 260 Fed. 341, holding that an unrecorded conditional sale was void as to the trustee.

As against a chattel mortgage given by the bankrupt the trustee has the rights of a judgment creditor. *Union First Nat. Bank v. Wegener*, (1919) 94 Ore. 318, 181 Pac. 990, 186 Pac. 41, holding unrecorded chattel mortgage under which possession had been taken superior to rights of trustee. See to the same effect *Kettenbach v. Walker*, (1920) 32 Idaho 544, 186 Pac. 912, wherein it appeared that possession was taken less than four months before the filing of the petition.

Moneys paid for completing work commenced by bankrupt as recoverable by trustee.—Where a construction company, before bankruptcy, enters into a building contract whereby it engages to erect and complete a building on or before a specified date, with a provision authorizing the owner, upon failure or inability of the contractor to secure sufficient supplies, material, or labor to prosecute the work continuously and diligently to completion, to secure the same and deduct the cost thereof from any amount then due the contractor or which may thereafter be due him, and a subcontractor, fearing the insolvency of his principal, refuses to proceed with his part of the work, but later completes it after receiving verbal assurance from the owner, in accordance with the provision of the contract, that the latter will pay him out of the balance due the contractor, and he does so pay him, the sum so paid constitutes no part of the assets of the bankrupt, and recovery thereof may not be had at the suit of the trustee. *Custard v. McNary*, (W. Va. 1920) 102 S. E. 216.

Sale of property—Property in hands of third person having lien.—Property sold by

a trustee not in his possession but in that of a person having a lien thereon cannot be recovered by the purchaser by an action of trover because the sale did not vest in him that title and that right to immediate possession which are necessary to the maintenance of such an action. *American Bottle Co. v. Finney*, (Ala. 1919) 82 So. 106.

Time as of which trustee takes status of creditor.—To same effect as original annotation, see *Scales v. Holje*, (Cal. App. 1919) 183 Pac. 308.

The rights of an ancillary receiver under this section are those of an execution creditor, and it is well settled that the priority rights of such creditors as against claims for superior liens must be determined by the laws of the state wherein the execution is levied. *Hoyt v. Zibell*, (C. C. A. 7th Cir. 1919) 259 Fed. 186, 170 C. C. A. 254.

Vol. I, p. 950, sec. 48 (d). [First ed., 1912 Supp., p. 690.]

Compensation of state receivers.—The determination of the question of compensation of a receiver appointed by a state court to take charge of a bankrupt's property, rests with the bankruptcy court, although it will give due weight to any finding on the subject by the state court. *In re Diamond*, (C. C. A. 6th Cir. 1919) 259 Fed. 70, 170 C. C. A. 138, wherein the court said: "Any other rule would, pro tanto, take the ultimate distribution of the assets of the bankrupt estate out of the hands of the bankruptcy court."

Vol. I, p. 953, sec. 50a. [First ed., 1912 Supp., p. 693.]

Purpose.—The requirement that referees in bankruptcy shall execute a bond for the faithful performance of their duties is an assurance to persons interested that, within the penalty of any bond taken from them by the United States their rights will be protected against any act or omission on the part of referees resulting to their injury. *U. S. v. Ward*, (C. C. A. 8th Cir. 1919) 257 Fed. 372, 168 C. C. A. 412.

Vol. I, p. 955, sec. 51a (1). [First ed., 1912 Supp., p. 694.]

Necessity of accounting for amounts collected for mailing notices.—A clerk of a District Court may not be required to account to the United States for amounts collected by him under a court order from bankrupt estates for mailing notices, in view of the provisions of this section, section 52a and General Order 35, and also by virtue of the general provisions regarding clerks of District Courts contained in R. S. secs. 839 and 844 (4 Fed. Stat. Ann. (2d ed.) 703, 707) and in the Act of June 28, 1902, ch. 1501 (4 Fed. Stat. Ann. (2d ed.) 735). *U. S. v. United States Fidelity, etc., Co.*, (S.

D. Tex. 1919) 263 Fed. 442. Regarding these general provisions, the court said:

"The allegations of the plaintiff's petition, the accounting of the auditor, and the opinion of the Comptroller which underlies this suit, charge that these moneys in controversy constitute fees and emoluments under these general provisions.

"In *United States v. Mason*, 218 U. S. 517, 31 Sup. Ct. 34, 54 L. ed. 1133, the court says: 'The fees and emoluments are not received by the clerk as moneys or property belonging to the United States, but as the amount allowed him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to, the amount payable when the return is made the clerk is not trustee, but debtor.'

"In *In re Loughney*, (D. C.) 218 Fed. 981, the court declared that the amounts allowed a clerk for sending out notices are not fees, but expenses, while rule 10 of the Supreme Court in bankruptcy cases provides: 'Before incurring any expenses in publishing or mailing notices the clerk may require from the bankrupt, or other person in whose behalf the duty is to be performed, indemnity for such expense, and money advanced for this purpose by the bankrupt or other person shall be repaid him out of the estate as part of the cost of administering same.'

"In *U. S. v. MacMillan*, (D. C.) 209 Fed. 266, appears a clear and to my mind entirely satisfactory statement of the test for determining what moneys are fees and emoluments within the meaning of the statute; the court saying: 'What test is afforded in determining whether a sum of money received by an official is an emolument of his office? Certainly this: That the official do some act or perform some service pursuant to the obligation or sanction of his office to or for the benefit of the one paying the money charged to be an emolument; that the one paying the money has the right to exact from the official rendition of the service, and the official has the right to exact the money in return—under the official obligation or sanction of the particular office to which the emolument is claimed to attach. To put it another way: The payment moves to the official in consideration of the rendition by him of some official act or service; the official does the act or renders the service by virtue of his office. The official character of the act is his warrant for exacting the payment.'

"The moneys sought to be recovered in the case at bar were received by the clerk, not ex virtute officii, but under the authority of an order of the court allowing an expense theretofore incurred, which order would have been equally effective had it named as the recipient an entire stranger to the court, and to its general machinery. Neither the bankruptcy statutes nor the general statutes imposing duties upon the clerk form the basis or warrant for the collection of these funds. That warrant is found in the order of the

District Court, which furnishes at once the reason and the justification for their retention by the clerk."

Vol. I, p. 962, sec. 56b. [First ed., 1912 Supp., p. 699.]

Who are secured creditors.—Creditors who have furnished materials to a bankrupt and who have served attested accounts on the owners, have recorded their claims, and are also protected by surety bonds under the provisions of state statutes, are secured creditors within the meaning of section 1(23) and are not entitled to vote at an election of the bankrupt's trustee. *In re Ferrand*, (E. D. La. 1920) 263 Fed. 908.

Vol. I, p. 962, sec. 57a. [First ed., 1912 Supp., p. 700.]

Who may prove claims—Proof by relative of bankrupt.—To same effect as original annotation, see *Walter v. Atha*, (C. C. A. 3d Cir. 1919) 262 Fed. 75.

Vol. I, p. 967, sec. 57d. [First ed., 1912 Supp., p. 703.]

Allowance of claims—Power of court.—In allowing or disallowing claims against estates in bankruptcy the court is bound by the established rules of law and equity, and cannot arbitrarily exercise its power in the allowance or disallowance of such claims. Thus, when a contract is illegal because contrary to a statute, and the parties thereto are in pari delicto, neither party will be permitted to have the aid of the court in obtaining any relief in regard to such contract, but it will leave the parties where it finds them. *In re Springfield Realty Co.*, (E. D. Mich. 1919) 257 Fed. 785.

Claim of stockholder against corporation for purchase of stock.—A stockholder of a corporation may not, by an executory contract with the corporation to purchase his stock, change his position from that of a stockholder to a creditor, and share with its other creditors if it subsequently becomes bankrupt. *Keith v. Kilmer*, (C. C. A. 1st Cir. 1919) 261 Fed. 733.

Notes issued by corporation in payment for stock.—In *In re Brueck*, etc., (S. D. N. Y. 1919) 258 Fed. 69, a bankrupt corporation issued its notes in payment for its own stock when one of the stockholders severed his connection with it. He transferred the notes to a third party in extinguishment of a valid antecedent debt owing by him to such third party. It was held that the evidence was sufficient to place upon the holder the duty of making inquiry as to the manner in which the stockholder acquired the notes, that he could not be regarded as an innocent purchaser and that hence he was not entitled to have his claim on the notes allowed against the corporation. The court said:

"From the foregoing and other testimony to the same effect, and from the fact that the notes were signed by the corporation and were long-term notes, the inference was plain that the corporation had issued its notes in some manner in connection with the sale to it by Blum of his stock. The slightest inquiry of Blum would have disclosed the fact that the notes were issued for stock. In such circumstances, Rothenberg could have decided whether not to take the notes and extinguish the antecedent debt.

"The protection of the New York and similar statutes, reinforced by the decisions of the courts, is based on the proposition that the capital of the corporation is a trust fund for the benefit of its creditors, which cannot be depleted by the corporation by the purchase of its own stock. So important a safeguard should not be removed, nor impaired, where the circumstances are such as at once to excite inquiry by a man of ordinary business prudence. Surely, if Rothenberg had contemplated buying the notes for cash, he would have inquired as to the circumstances of their origin, and no less measure of inquiry should be expected where the consideration is the payment of an antecedent debt.

"As matter of law, then, the facts are such that Rothenberg cannot be regarded as an innocent purchaser. If, looking only at his testimony, the inference was not clear that the notes were for the purchase of the corporation's stock, he could not, in any event, close his eyes, but it was his affirmative duty, in order to protect himself (if he so desired), to make inquiry. Not being an innocent purchaser, he took the notes with all the risk which inhered in them as against Rothenberg."

Interest.—The bankruptcy court must adopt the interpretation given by the highest state court of the provisions of the state statute specifying the character of obligations which shall bear interest after they become due and the rate therefor. *In re Morrison*, (C. C. A. 7th Cir. 1919) 261 Fed. 355.

Re-examination and disallowance of claim on motion of court.—Where it appears that the allowance of a claim of an attorney for services to a trustee in bankruptcy has been procured through fraud, the bankruptcy court on its motion may re-examine the claim and disallow it. *In re De Rau*, (C. C. A. 6th Cir. 1919) 260 Fed. 732, 171 C. C. A. 470.

Vol. I, p. 969, sec. 57e. [First ed., 1912 Supp., p. 704.]

"Secured."—Ownership of a judgment against a bankrupt makes the creditor "secured" within the meaning of the Bankruptcy Act, where there is property of the bankrupt upon which the judgment has attached as a lien. *Oilfields Syndicate v.*

American Imp. Co., (C. C. A. 9th Cir. 1919) 260 Fed. 905.

Allowance of secured and priority claims.—Where a bankrupt firm in consideration of the payment by one of its creditors of the claims of other creditors of the firm, executes a chattel mortgage on its stock of goods to such creditor, which is later replaced by a bill of sale of the business, the claim of the creditor should be allowed for the amount due in excess of the value of the security held by him, to wit, the goods held under the bill of sale, in the absence of proof that the transaction was in fraud of other creditors of the bankrupt and that it was usurious under the state statute. *In re Paul*, (C. C. A. 9th Cir. 1919) 260 Fed. 114, 171 C. C. A. 150.

Proof of secured claims.—Where a creditor holds notes of a bankrupt company and, as collateral security therefor, bonds of the company secured by a mortgage on its property, he may not prove claims on both the notes and bonds, but may prove and receive dividends only on the deficit arising after a sale of the bankrupt's property under the mortgage and a payment to him of his pro rata share of the proceeds. *In re Battle Island Paper Co.*, (N. D. N. Y. 1919) 259 Fed. 921. The court said:

"The National Park Bank, having received its pro rata share of the proceeds of the sale of the real estate and property covered by the trust mortgage, and having become the purchaser of the said 36 bonds so held by it as collateral to said notes in the manner and under the circumstances mentioned, and having so credited the amount of its bid for such bonds on its claim as stated, now claims and insists that it is entitled, and that this order of distribution should provide, that it be paid first its pro rata share of the amount to be paid bondholders from the general estate arising on the claim of the Columbia Trust Company for such deficiency on such bonds and allowed to it on account thereof, but, as stated, directed paid directly to the bondholders, and secondly, and in addition, its pro rata share of the general estate on the amount of its claim, as reduced by such payment on account of the deficiency claim. The trustees in bankruptcy and the Columbia Trust Company, the trustee under the mortgage given to secure such bonds, contest this claim.

"The mortgaged property having been sold, and its proceeds applied to the payment of the bonds as far as it would go, and the bonds or mortgage containing a promise of the Battle Island Paper Company to pay the entire amount of the bonds, the holders of such bonds through the trustee were entitled to prove and have allowed a claim for the deficiency against the general estate. This claim, as stated, was presented and allowed, and directed paid from the general estate. The claim on the notes was a promise of the Battle Island Paper Company to pay them or the amount represented thereby. The

promise to pay the bonds was another obligation of the company to pay the amount represented thereby, and the dividend declared thereon, when paid, satisfies that promise, to whomsoever paid, if paid to the holder of the bonds. There can be no doubt that the National Park Bank, as owner and holder of these bonds, is entitled to its pro rata share of that dividend. It is entitled thereto by virtue of its ownership of the bonds on which the amount received on the claim for a deficiency is to be applied.

"The National Park Bank held the promissory notes of the Battle Island Paper Company for \$25,000, and it received from that company its bonds, issued by it and payable by it; that is, its additional promise to pay the several amounts represented by the bonds, not for a new and a different and an independent consideration, but as collateral security for the payment of the same original indebtedness represented by the notes. This second promise was secured by a mortgage on real estate of the promisor, but when that was sold, and its proceeds applied as agreed in reduction of the bonds, nothing remained but the promise of the debtor.

"Prior to the bankruptcy, and prior to the sale of the bonds held by the bank as collateral to the notes, the bank held a secured claim, as the bonds were secured; but when the mortgaged property was sold, and its proceeds applied to the payment of the bonds so far as such proceeds should go, the security was exhausted, unless it be held that one promise of a debtor to pay, secured by collateral consisting of another promise of the same debtor to pay certain sums, and which latter promise is secured by a mortgage on the debtor's property, remains a secured claim after the mortgaged property has been applied on the collateral promise, and that the collateral promise remains a security to the extent that one dividend, in case of bankruptcy, may be paid from the general estate on the promise contained in the notes, and another dividend may be paid from the general estate on the collateral and additional promise contained in the bonds. It seems to me that this is contrary to the authorities. In *First National Bank v. Eason* (C. C. A. 5th Cir.) 149 Fed. 204, 79 C. C. A. 162, it is held: 'A creditor holding the note of a bankrupt, and, as collateral security therefor, another note on which the bankrupt is also liable, is not entitled to prove his claim against the estate in bankruptcy for both, but only for the amount of the actual indebtedness to him.'

"In *John Matthews, Inc., v. Knickerbocker Trust Co.* (C. C. A. 2d Circuit) 192 Fed. 557, 558, 113 C. C. A. 29, 30, the court with other things said: 'The real debt which the bankrupt corporation owed the petitioner was evidenced by the note, and nothing was added to it by giving as collateral another promise to pay. Any rule which would permit the proof of two notes for one indebtedness would permit the proof of a dozen, and would substitute, for pro rata distribution

among real creditors, distribution in accordance with the ability of a bankrupt to make manifold obligations for single debts. It is a safe and equitable proposition that, in the distribution of bankrupt estates, paper obligations issued without consideration as security for an indebtedness shall not be permitted to increase it.'

"In the case at bar the security has been exhausted and applied on the debt, and the mere promise contained in the collateral should not be permitted to increase the charge on the general assets of the bankrupt corporation."

Waiver of security.—In *First Sav., etc., Co. v. Kilmer*, (C. C. A. 4th Cir. 1919) 263 Fed. 497, it appeared that after a sale of the property of a bankrupt corporation had been advertised, a bank filed a petition with the referee asserting ownership to certain property covered by the order of sale, alleging that it was the assignee of a creditor from whom the bankrupt had obtained the property and that the creditor had reserved title under three contracts of sale. The property described in the bank's petition was sold separately and the proceeds paid into court. Thereafter it was found that the bankrupt had satisfied the claims arising under two of the contracts. The trustee contended that the bank had waived its claim under the third contract by consenting to the sale of the property covered by all of the contracts. It was held that the bank should be given opportunity to establish by testimony the share of the proceeds to which it was entitled, and that it should not be remitted to the status of an unsecured creditor if it could satisfy the court that its original claim was the result of an inadvertent and excusable error, and could prove with reasonable certainty the relative value of the property on which it had a valid lien.

Vol. I, p. 971, sec. 57f. [First ed., 1912 Supp., p. 706.]

Necessity of final meeting.—An estate cannot be closed without a final meeting of the creditors upon ten days' notice as prescribed by section 58 of the Bankruptcy Act. In *re Levy*, (E. D. Pa. 1919) 261 Fed. 432.

Determination.—To same effect as original annotation, see *In re O'Gara*, (D. C. N. J. 1919) 259 Fed. 935.

Vol. I, p. 978, sec. 57i. [First ed., 1912 Supp., p. 710.]

Proof by surety.—To same effect as original annotation, see *J. S. Farming Co. v. Brannon*, (C. C. A. 6th Cir. 1920) 263 Fed. 891.

Proof of claim by guarantors.—Where a bankrupt, together with certain other persons, guarantees the payment to a bank of all sums of money advanced by it to a designated company, and subsequently they become liable on notes of the company, the

bank may prove its claim against the bankrupt's estate, and if it fails to do so the bankrupt's co-guarantors may prove the bank's claim under this section, whether the indebtedness is due or not, and are subrogated to the bank's rights on payment of the indebtedness. *Moore v. Simms*, (C. C. A. 6th Cir. 1918) 257 Fed. 540, 168 C. C. A. 524.

Vol. I, p. 979, sec. 57j. [First ed., 1912 Supp., p. 710.]

Fine in criminal proceeding as penalty.—The right of the United States to claim priority under R. S. sec. 3466 (2 Fed. Stat. Ann. (2d ed.) 562) for debts due to it, is modified and restricted by this section, under which its right to have a claim for a penalty or forfeiture allowed is denied, except as to the actual pecuniary loss suffered by it. Thus, where a bankruptcy corporation is prosecuted for violating sec. 215 of the Penal Laws (7 Fed. Stat. Ann. (2d ed.) 812) and sentenced to pay a fine and the costs of the prosecution, the United States is entitled to have only the costs allowed as a claim against the corporation, since the fine is a penalty. *U. S. v. Birmingham Trust, etc., Co.*, (C. C. A. 5th Cir. 1919) 258 Fed. 562, 169 C. C. A. 502.

Vol. I, p. 982, sec. 57n. [First ed., 1912 Supp., p. 712.]

Time for proving claims—One-year limitation.—To same effect as original annotation, see *Moore v. Simms*, (C. C. A. 6th Cir. 1918) 257 Fed. 540, 168 C. C. A. 524.

The fact that a composition is effected does not extend the time given a creditor to prove his claim. In re Bickmore Shoe Co., (N. D. Ga. 1920) 263 Fed. 926, wherein it was said:

"But it is contended that section 57n on its face applies only to claims 'against the bankrupt estate,' and that in this case a composition is involved, and not a bankrupt estate. It is urged that in the former case a proof of claim is necessary in order to participate in the administration and distribution of the estate, but a composition presents a wholly different matter, rather outside of the bankruptcy proceeding, and covered, not so much by the principles of judicial procedure, as by the terms of the contract. It cannot be successfully maintained that a composition is not a part of the bankruptcy procedure. While it depends for its effect upon an acceptance by a majority in number and amount of the creditors, it is only of 'creditors whose claims have been allowed.' Section 12b. The allowance is itself court action. The composition is of no avail, unless confirmed by the court after a judicial hearing. It results, not alone in a contract between those who have assented, but in a judgment imposing its terms upon those who have not assented, and establishes consequences declared by the law independent of stipulation in the contract, such as

that the title to the bankrupt's property shall revert in him, and that a discharge from his debts, with fixed exceptions, shall result.

"The Bankruptcy Act of 1867 (14 Stat. 517) contained no provision for composition. This was added by an act of 1874 (18 Stat. 178). The contention was made in *Wilmot v. Mudge*, 103 U. S. 217, 26 L. Ed. 536, that a composition was aside from the bankruptcy proceeding, and provisions of the Bankruptcy Act as to what debts were dischargeable in bankruptcy had no application to a composition. The court denied this argument, holding that the act of 1874 must be construed with that of 1867, and that its provisions as to discharge should be held to relate to composition proceedings, saying: 'The composition proceeding is therefore a part of the proceeding in bankruptcy, and one of the modes which the bankrupt law authorizes of releasing the debtor and securing to his creditors an equal share of his means.'

As we have . . . said, these several statutes, sections, and provisions are to be construed as parts of one entire system of bankrupt law.'

"This principle of construction was repeated as to the present act in *Cumberland Glass Manufacturing Co. v. De Witt*, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. 1042. It may fairly be said that the consideration paid for a composition is but a permitted substitute for the bankrupt estate, and, save that it may be more simply administered, it is to be handled, so far as the court is concerned, under the same restrictions and procedure so far as applicable. It is urged that in cases of composition no conflict between the claims of one creditor and another could arise, but that any conflict would be between a creditor and the bankrupt, and that the same reasons for limiting the time of proof and for making contest over a creditor's claim do not exist in the one as in the other. While it is true that in the present case a percentage to each unsecured creditor is offered, and the observation made would apply, this need not be true in all cases, for the consideration, so far as the terms of the act are concerned, need not even be money, much less need it be a percentage on the claims of the creditors. It may consist of an entire sum paid in consideration of the release of the bankrupt's property, without regard to the percentage that it may yield to the creditors. In such case manifestly the rights of the creditors would be in conflict one with another, and the bankrupt would have no interest in the adjustment of them, and exactly the same considerations would apply in requiring promptness on the part of creditors in proving their claims as would apply were the estate regularly administered.

"The law must be interpreted in the light of all cases and situations that may arise under it; and in a case like the present the same chances for dispute over the allowance of the claim, the same reasons why the court and its officers should be promptly relieved

of the custody, and direction of the fund in its hands, still remain. Remembering that the limitation is for the good of the public and the protection of the court, rather than of the person in whose favor it operates, it must be said that no reason can be seen why Congress should not have intended this limitation to apply to all proofs of claim. It is not true, as argued, that a proof of claim is unnecessary to share in a composition. No such adjudication has been produced. In order to vote upon the acceptance of a composition, the claim of a creditor must have been allowed. Section 12b. This is in line with the general provision of section 56a, recognizing as voters only creditors whose claims have been allowed. Dividends are to be paid only to claims that have been allowed. Section 65. Allowance amounts practically to a judgment of the court that the claim is due. The law intends that a debt shall be shown to the court, not only by the bankrupt's oath in his schedule, but by the creditor's oath in his proof, and with a definiteness and detail that are specially prescribed in section 57. So long as the proceeding is in court, and so long as the court is directing payment to creditors, the relaxation of these requirements is not contemplated."

Time of proving claims liquidated by litigation—"Liquidated by litigation."—Where a bankrupt and certain other persons guarantee the payment to a bank of all sums of money advanced by the bank to a designated company, and subsequently all the guarantors, except the bankrupt, are sued on notes of the company and judgments rendered against them and collected, the bankrupt's liability to his co-guarantors under the agreement cannot be regarded as having been "liquidated by litigation" within the meaning of this section. *Moore v. Simms*, (C. C. A. 6th Cir. 1918) 257 Fed. 540, 168 C. C. A. 524.

Claims due United States.—The United States has the right to present a claim in a bankruptcy case at any time while the bankruptcy is pending and the funds thereof are not distributed. *U. S. v. Birmingham Trust, etc., Co.*, (C. C. A. 5th Cir. 1919) 258 Fed. 562, 169 C. C. A. 502.

Vol. I, p. 988, sec. 59a. [First ed., 1912 Supp., p. 717.]

Filing petition as affecting state court proceedings.—State court proceedings are superseded upon the filing of a petition in bankruptcy. *In re Dressler Producing Corp.*, (C. C. A. 2d Cir. 1919) 262 Fed. 257.

Vol. I, p. 1001, sec. 59f. [First ed., 1912 Supp., p. 727.]

Joining in petition.—To same effect as original annotation, see *In re Jutte*. (C. C. A. 3d Cir. 1919) 258 Fed. 422, 169 C. C. A. 438, wherein the court said:

"The appellants base their appeal on section 59f of the bankruptcy Act, which provides, that 'creditors other than original petitioners may at any time enter their appearance and join in the petition. . . . Relying on the broad terms of this provision, the appellants claim, that, notwithstanding their seemingly inexcusable delay in entering an appearance, they have a right under the statute, being creditors, to appear 'at any time' and join in the petition of bankruptcy. The appellee, arguing as though the petition in bankruptcy had been dismissed and as though the appellants claim a right to appear 'at any time' thereafter, maintains that the allowance of a petition to intervene in such a case is not based on a statutory right but is purely discretionary with the court and should be denied, unless the application be seasonably made. The cases cited in support of the latter contention hold quite uniformly, that a petition to intervene after an order of adjudication or dismissal has been made, that is, after the issue of bankruptcy has been determined, is addressed to the discretion of the court. *In re First National Bank of Belle Fourche*, 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355; *In re Jemison Mercantile Co.*, 112 Fed. 966, 50 C. C. A. 641; *In re Koenig & Van Hoogenhuyze* (D. C.) 127 Fed. 891; 1 *Love-land on Bankruptcy*, 467. But the rule of these cases, which no one questions, is not applicable to this case, because, through inadvertence of counsel, or otherwise, Judge Orr's opinion was not followed by an order dismissing the original petition. We thus have a situation in which the court has expressed its conclusion on the issue of bankruptcy but has not reduced it to judgment. We are not unmindful of the distinction between the rendition of a judgment and the record of a judgment rendered. 15 R. C. L. 571, 572, 578. The trouble here is that while the views of the court were expressed in an opinion indicating its purpose to render a judgment in accordance with them, no judgment has, in fact, been rendered. The last act of the court was the direction: 'Let an appropriate order be drawn.' None was drawn. Until the order is drawn and signed, the original petition in bankruptcy is not dismissed. It remains pending, and so long as it is pending and the issue of bankruptcy is not disposed of by an order of adjudication or dismissal, creditors, other than original petitioners, stand where the statute places them, and they may, by authority of the statute as construed by the courts, intervene and join in the petition."

Withdrawal of petition.—Where a bankrupt has filed an answer to an involuntary petition and strenuously opposed an adjudication for nearly two years, he will not be permitted to change his attitude and to obtain an adjudication as of the date of the filing of the petition where it appears he has acquired considerable property since the

filing of the petition. In such case the creditors in the absence of any objection will be permitted to withdraw the petition and file a new one. *In re Weidenfeld*, (E. D. N. Y. 1919) 257 Fed. 872.

Vol. I, p. 1003, sec. 59g. [First ed., 1912 Supp., p. 729.]

Proposal of composition as authorizing vacation of adjudication.—This section provides that a bankruptcy proceeding once begun must result either in an adjudication or a dismissal on the merits. Accordingly, an adjudication may not be vacated over the objection of a creditor, because of a proposed composition, if it appears that he will be unjustly deprived of the rights secured to him by the adjudication. *In re Malkan*, (C. C. A. 2d Cir. 1919) 261 Fed. 894, wherein it was said:

"When, on the 7th of January, 1919, a decree was entered by the District Court adjudicating Henry Malkan a bankrupt, a final decree of the court, which was binding not only upon the bankrupt but upon the petitioning creditors and the other creditors, was made. *Acme Harvester Co. v. Beekman*, 222 U. S. 300, 32 Sup. Ct. 98, 56 L. Ed. 208; *Clay v. Waters*, 178 Fed. 385, 101 C. C. A. 645, 21 Ann. Cas. 897. The result of this proceeding made the proceeds a 'res' in the hands of the court, and the creditors, including the petitioner, became interested in the res, and must be regarded as parties to the bankruptcy proceedings. *Manson v. Williams, etc.*, 213 U. S. 453, 29 Sup. Ct. 519, 53 L. Ed. 869.

"This adjudication established, for all the creditors of the bankrupt, rights of which they could not be divested, except by orderly and lawful proceedings in the administration of the bankrupt's estate. It is not averred in this case that the adjudication was procured by fraud or mistake, and the only reason assigned for the vacation of the order is a desire to settle and obtain a composition for the creditors. The decree could not be vacated, and deprive the petitioning creditors of the right secured to it, unless there be some authority in the court to do so. Section 59g of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 561) provides that a proceeding once begun must result either in an adjudication or a dismissal. Subdivision g provides only for dismissals therein on the merits.

"It is the intentment of the act that dismissal may not be had against the protest of a creditor, if he be deprived unjustly of the rights secured to him by the adjudication and the creation of the estate in the hands of the court for all the creditors. *In re Rosenblatt & Co.*, 193 Fed. 638, 113 C. C. A. 506. Section 12 provides for compositions. It is not contended that the proceeding here was in conformity with the requirements of section 12 as to composition, The

consideration for the composition was not deposited prior to the order. The form of the order and the recitals do not indicate that the parties were attempting a composition. At best, it was an informal composition, which should be condemned. The bankrupt's estate can be wound up in but two ways: First, by distribution in bankruptcy; and, second, by distribution in composition. An effort made to start a proceeding in bankruptcy, and then settle with creditors outside the proceeding, and then ask for the approval of the court, should not be encouraged, but should be discouraged."

Vol. I, p. 1004, sec. 60a. [First ed., 1912 Supp., p. 729.]

- I. Creation of preferences.
- II. Constituent elements.

I. CREATION OF PREFERENCES (p. 1005)

A preference was valid at common law.—To the same effect as the original annotation, see *Harman v. Haight*, (Mich. 1920) 177 N. W. 281, wherein the court said: "And this but followed the settled law of the state that laying aside the federal Bankruptcy Act, not there nor here involved, a debtor has the right to prefer one creditor to another; to use his property for the payment of one debt or of many debts to the exclusion of one or many creditors."

Preference created by transfer.—*The filing of an affidavit of removal of a chattel mortgage* within four months prior to the filing of a petition in bankruptcy is not a transfer within the meaning of this section. *In re Dagwell*, (E. D. Mich. 1920) 263 Fed. 406.

Transfer to wife.—In *Baldwin v. Kingston*, (C. C. A. 3d Cir. 1919) 257 Fed. 554, 168 C. C. A. 538, a trustee in bankruptcy appealed from a decree dismissing a bill of complaint in an action brought by him to have a transfer of property by the bankrupt to his wife declared void as being a preference. The Circuit Court of Appeals, in affirming the judgment of the District Court, held "that the conveyance was not voluntary and was supported by a consideration; that there was an agreement whereby the conveyance should be in satisfaction, whole or partial, of the wife's right to support; and that the value of the property transferred was not so disproportionate to the bankrupt's pecuniary obligation to his wife as to justify the application of the equitable doctrine that where, under certain circumstances, the consideration for a conveyance is sufficiently inadequate the conveyance will be sustained only to the extent of the consideration actually given, and be declared voluntary and void as to the residue."

Assignment of accounts.—Where a bank, within the four months period, surrenders the notes of third parties, upon which a bankrupt corporation is the indorser, and receives in lieu thereof the assignment of

accounts of the bankrupt to secure a new note practically equal in amount to the notes surrendered, the transfer constitutes a preference. *In re Star Spring Bed Co.*, (D. C. N. J. 1919) 257 Fed. 176.

Conveyance to prefer surety—*Taking back property from debtor*.—See *Egner v. Parshelsky*, (C. C. A. 2d Cir. 1919) 258 Fed. 238, 169 C. C. A. 304, *affirming* (E. D. N. Y. 1918) 254 Fed. 907, in 1919 Supplement p. 451.

Preference created by mortgage.—To same effect as original annotation, see *McHenry v. Dwelling Bldg., etc., Assoc.*, (E. D. Pa. 1919) 259 Fed. 880.

An agreement by a mortgagee, within four months prior to a bankrupt's adjudication, to subordinate his mortgage on the bankrupt's property to a new mortgage which the bankrupt is placing thereon, is valid and does not constitute a preference. *In re Schwab*, (E. D. N. Y. 1919) 258 Fed. 772, wherein it was said:

"The question presented, therefore, is whether a mortgagee, with reasonable cause to believe a bankrupt to be insolvent, and within four months prior to the adjudication, could subordinate a valid mortgage upon the bankrupt's property to a new mortgage which the bankrupt was placing thereon, or whether such attempted subordination constituted a voidable preference.

"In every novation there are four essential requisites: (1) A previous valid obligation; (2) the agreement of all the parties to the new contract; (3) the extinguishment of the old contract; and (4) the validity of the new one.' Cyc. vol. 29, p. 1130.

"It is obvious that if there was a new contract which was invalid, as the referee holds, there could be no novation, because it is essential that the new contract be valid.

"The learned referee states in his decision (folio 48): 'By the terms of the subordination agreement, Meta Mayer gave up and surrendered any claim she formerly had by way of her mortgage lien on the property, prior to September 30, 1915.'

"It will readily be seen that, so far from surrendering any claim she had, she did no more than agree that before the property in question could be applied to the satisfaction of her mortgage, the Obernier mortgage (concededly a valid lien) would first have to be paid. Such an agreement is legal. *Loucks v. Union Bank of Louisiana*, 2 La. Ann. 617. If the latter had been placed upon the property as a second mortgage, there could be no possible attack upon the Mayer mortgage. There cannot be a preferential transfer without a depletion of the bankrupt's estate."

Taking of possession under chattel mortgage.—If a chattel mortgage is given by the bankrupt more than four months before the filing of the petition and is not recorded, the taking of possession by the mortgagee within the four months period does

not create a preference. *Kettenbach v. Walker*, (1920) 32 Idaho 544, 186 Pac. 912.

Preference created by payment—*Payment for goods obtained by fraud*.—Where, within the four months period, a creditor discovers that the bankrupt has purchased goods from him on credit by making fraudulent statements, he has the right to rescind such sales and recover such of the goods as are then in the bankrupt's possession. And since a return of the goods under such circumstances would not be a preference, payment to the extent of their value does not effectuate a preference. *Illinois Parlor Frame Co. v. Goldman*, (C. C. A. 7th Cir. 1919) 257 Fed. 300, 168 C. C. A. 384.

Banking transactions—*In general*.—Where a bankrupt obtains money by fraud, and being without sufficient funds to repay it when called upon to do so, gives a post-dated check which is paid from general funds in a bank, the transaction is a preference. *Watchmaker v. Barnes*, (C. C. A. 1st Cir. 1919) 259 Fed. 783, 170 C. C. A. 583.

II. CONSTITUENT ELEMENTS (p. 1014)

In general.—To same effect as original annotation, see *In re Star Spring Bed Co.*, (D. C. N. J. 1919) 257 Fed. 176; *Craig v. Sharp*, (Mo. 1920) 219 S. W. 95 (holding on the facts that the person receiving the preference had notice of facts sufficient to put him on inquiry).

Insolvency.—To same effect as original annotation, see *Hicks Co. v. Moore*, (C. C. A. 5th Cir. 1919) 261 Fed. 773, wherein it was held that the evidence was insufficient to sustain a decree that the bankrupts were insolvent, within the meaning of section 1 of the Bankruptcy Act, at the time they made the transfer attacked as preferential.

Intention to give a preference.—To same effect as original annotation, see *Watchmaker v. Barnes*, (C. C. A. 1st Cir. 1919) 259 Fed. 783, 170 C. C. A. 583.

Preference must be given to creditor—*Payment benefiting accommodation indorsers of note*.—Payments made by a bankrupt, while insolvent, to the holders of notes on which he was the maker may be recovered from accommodation indorsers of the notes on the ground that such payments constitute voidable preferences. *Goldman v. Cohen*, (C. C. A. 1st Cir. 1919) 261 Fed. 672.

Time of obtaining preference—*Confirmation of prior assignment and transfer pursuant thereto*.—Where an assignment of stock is made prior to the four months period pursuant to a verbal agreement, the fact that such agreement is confirmed in writing during the four months period, and the certificates of stock transferred then, does not render the transaction preferential. *Wiener v. Union Trust Co.*, (E. D. Mich. 1919) 261 Fed. 709, wherein it was said:

"It will be noted that the instrument referred to shows upon its face that it is a legal assignment, that is, a transfer of the property alleged to have been preferentially

transferred; and if such transfer antedated the four months period before the filing of the bankruptcy petition, it did not constitute a voidable preference under the Bankruptcy Act. It is also clear from the language of this instrument that it was not made pursuant to a prior verbal agreement, but was merely confirmatory of such verbal agreement, which was itself an assignment of the stock in question, at least in equity. It is plain, therefore, that the transaction constituted, if not a legal, at least an equitable, assignment of this stock, and created an equitable lien thereon in favor of the defendant. In this view of the matter, the subsequent written assignment, and the still later delivery of the certificates of said stock, were merely formal and incidental to the real transfer, made prior to the statutory period. *Sexton v. Kessler & Co.*, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; *Clark v. Sigua Iron Co.*, 81 Fed. 310, 26 C. C. A. 423 (C. C. A. 3); *McDonald v. Daskam*, 116 Fed. 276, 53 C. C. A. 554 (C. C. A. 7); *Union Trust Co. v. Bulkeley*, 160 Fed. 510, 80 C. C. A. 323 (C. C. A. 6); *Lowell v. International Trust Co.*, 159 Fed. 781, 86 C. C. A. 137 (C. C. A. 1); *Gage Lumber Co. v. McEl-downey*, 207 Fed. 255, 124 C. C. A. 641 (C. C. A. 6), 5 C. J. 911."

Payment by post-dated check.—Where an alleged preferential transfer of a bankrupt's property is by means of a post-dated check, the transfer takes place not at the delivery of the check but at the payment of the same. *Watchmaker v. Barnes*, (C. C. A. 1st Cir. 1919) 259 Fed. 783, 170 C. C. A. 583.

Sale of pledged property within four months period.—Where grain, pledged by a bankrupt prior to the four months period, is sold by a committee of the bankrupt's creditors with his consent and that of the pledgee and the proceeds turned over to the latter within the four months period, the transaction relates back to the date of the pledge and does not constitute a preference. *Britton v. Union Invest. Co.*, (C. C. A. 8th Cir. 1919) 262 Fed. 111.

Greater percentage—The test of preference.—To same effect as original annotation, see *In re Star Spring Bed Co.*, (D. C. N. J. 1919) 257 Fed. 176.

A charge of a court was held erroneous which was as follows: "The test of a preference is the payment out of the bankrupt property of a larger percentage of the creditor's claim than others of the same class receive." *Slayton v. Drown*, (Vt. 1919) 107 Atl. 307, wherein the court said:

"The defendant argues that the charge upon this point places the test of preference upon the distribution of the estate at the end of litigation, and not upon what the creditor would have received if the bankrupt estate had been liquidated at the date of the alleged preference. The plaintiff claims that such is the test of a preference; and the question to be determined here is whether the payment of an insolvent to his creditor of only such part of his creditor's debt as

such creditor would be entitled to receive, if all the debtor's property liable to the payment of his debts should be apportioned among his creditors at the time of the alleged preference, amounts to a preference within the provisions of section 60b of the Bankruptcy Act. The case shows that the defendant received less than 50 per cent. of his debt against the bankrupt, and the evidence tended to show that the bankrupt had assets exceeding 50 per cent. of his liabilities at the time of that payment. In this state of the case, it became necessary for the court to instruct the jury upon this point. In disposing of the question here presented, it is necessary to take into consideration section 60b, as well as section 60a, of the Bankruptcy Act. Our attention has not been called to any case where the present question, here raised, has been determined by the Supreme Court of the United States. We find cases decided by that court where questions related to it have been discussed, but in none of those do we find where the question is directly determined. We are therefore compelled to rely upon our own construction of sections 60a and 60b.

"Section 60a seems to refer to the condition of the bankrupt estate at the time of the alleged preference, and the ability of the bankrupt to pay to his other creditors at the time of the alleged preference as large a percentage as he paid the alleged preferred creditor; and this construction is strengthened by the provisions in section 60b. To recover the payment, the trustee must show that the payment at the time it was made operated then as a preference, and that the defendant 'then' had reasonable cause to believe that the payment would effect a preference. This language means no more than this: If the creditor receives what he had reason to believe was more than his proportionate share of the bankrupt's property, as it 'then' existed at the very time of the alleged preference, and it turns out to be as he believes, he has received a preference that is recoverable by the trustee. Such is the view taken in the case of *Herzberg v. Riddle*, 171 Ala. 368, 54 South. 635, in which it is said: 'If a man's debtor who is solvent pays him his debt in full, surely there is no ground to suspect a preference because every other creditor can compel payment; but if he accepts all of his debt, or a large part thereof, from a debtor known or suspected to be hopelessly insolvent, then he may know or have reasonable cause to believe that a preference is made in violation of the statute. But if he accepts only that part of his debt to which he would be entitled if all the property liable to the debts should be apportioned among the creditors, then, of course, there is no preference such as is prohibited by the statute, though the debtor may be hopelessly insolvent.' This same view is taken in *Dry Goods Co. v. Bertenshaw*, 68 Kan. 734, 75 Pac. 1027.

"It should be kept in mind that we are here dealing with a 'voidable preference,' so-called, as distinguished from one that is not

voidable. A preference may be given that is not voidable, as well as one that is. *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 427, 21 Sup. Ct. 906, 45 L. Ed. 1171, 1177.

The portion of the charge excepted to made the recovery to depend, not upon the defendant's having received a greater percentage of the bankrupt's estate than other creditors of the same class would have received if the assets had then been distributed pro rata, but upon his having received more than other creditors of the same class might ultimately receive on the final settlement of the estate. As we have seen, this was error, and harmful error, and the exception to the charge must be sustained."

Meaning of term "class."—Within the meaning of the Bankruptcy Act, the test of classification is the percentage paid upon the claim out of the estate of the bankrupt, and hence secured and unsecured creditors are in the same class. *In re Star Spring Bed Co.*, (D. C. N. J. 1919) 257 Fed. 176. In defining the term "class," the court said: "The act itself does not define the word 'class,' nor state in terms what creditors are in the same class, or different classes. It creates and specifies classes, and from a study of these it may be possible to arrive at a definition of the word 'class' within the meaning of the act. Section 64 specifies three classes—parties to whom taxes are owing, employees holding claims for certain wages, and those who, by the laws of the states or of the United States, are entitled to priority. There are also general creditors. The three classes above mentioned have priority over general creditors. There are, broadly speaking, two classes of creditors—those who have priority and are paid in full, and general creditors, including secured and unsecured. These are the classes of creditors of which the Bankruptcy Act treats. Every creditor in the same class always receives the same percentage on his claim that every other creditor in that class receives. Different classes of creditors are paid different percentages in accordance with the provisions of the act, but creditors of the same class always receive the same percentage. Creditors entitled to receive out of the bankrupt estate the same percentage of their claims are therefore in the same class, regardless of whether they may collect any deficiency from others. A creditor may have two notes made by the bankrupt—one secured by the indorsement of a third party, the other unsecured. He is entitled to receive the same percentage out of the bankrupt estate on both notes. He may, however, collect the deficiency on the secured note from the indorser, or he may collect the entire note in the first place from the indorser, who in turn may prove the note against the bankrupt estate and receive the same percentage upon the claim which the original creditor would have received, or which was received on the unsecured note."

In *Wartell v. Moore*, (C. C. A. 6th Cir. 1919) 261 Fed. 762, it appeared that the

bankrupt borrowed a certain sum of money to engage in business. He formed a partnership, but later it was dissolved, the bankrupt assuming all its obligations and continuing the business as an individual. Several days after the dissolution he paid off the loan and a month later filed a voluntary petition in bankruptcy. His trustee brought action to recover the payment on the ground that it was a voidable preference. The creditor denied this, contending that he was an individual creditor of the bankrupt, that all of the other creditors were partnership creditors because no notice of dissolution had been given, and that, therefore, he had not received a greater percentage than other creditors "of the same class." Answering this contention, the court said: "Creditors who have been dealing with a partnership, and who continue to furnish credit to the concern after it has become the personal business of one of the partners, and who have no notice of the change, have a right to enforce their new debt against the old partnership; but this is an option. The truth is that the debt accrued against the new concern, but the old partners are estopped to make this defense, because, by failing to give notice, they had misled the creditors. Surely, in the absence of any exercise by the creditors of this optional right to hold the old concern, there can be no legal presumption that their debt is not against the new business, but is against the old; yet to this presumption the position of counsel must come.

"We think it clear that the motion to direct was rightly denied. We are the better content to dispose of the case upon a somewhat strict construction of the right to review, because the transaction shown by the peculiar facts of this case, even if it might be thought to lack some element necessary to a voidable preference under section 60b, was nevertheless voidable under section 67e, as an attempt to defeat the intended operation of the Bankruptcy Law."

Vol. I, p. 1026, sec. 60b. [First ed., 1912 Supp., p. 739.]

- I. Elements of voidability.
- II. Recovery of voidable preferences.

I. ELEMENTS OF VOIDABILITY (p. 1026)

Reasonable cause to believe transaction would effect preference.—To same effect as original annotation, see *In re Star Spring Bed Co.*, (D. C. N. J. 1919) 257 Fed. 176.

The validity of the transfer does not turn upon the creditor's personal belief, but upon reasonable cause to believe that the enforcement of the transfer would effect a preference and such cause depends upon all circumstances and not merely upon the debtor's declaration. *Schuetz v. Swank*, (1920) 265 Pa. St. 576, 109 Atl. 531, wherein the court said: "In such case, where there is reasonable cause to believe, the creditor's actual

belief is immaterial (7 C. J. p. 153, note; also *In re Hines* [D. C.] 144 Fed. 543); and reasonable cause to believe does not require actual knowledge or actual belief (*Sundheim v. Ridge Avenue Bank* [D. C.] 138 Fed. 951). But the transfer is not voidable merely because the creditor had some cause to suspect the insolvency of his debtor. *Keith, Trustee, v. Bank*, 23 Pa. Super. Ct. 14; *Arthur v. Harrington* (D. C.) 211 Fed. 215. However, where the circumstances are such as to incite a man of ordinary prudence to inquire, the creditor is chargeable with notice of all facts which a reasonably diligent inquiry would have disclosed (*Tilt v. Citizens' Trust Co. et al.* [D. C.] 191 Fed. 441); and inquiry of the debtor alone is not sufficient (*McGirr v. Humphrey's Grocery Co.* [D. C.] 192 Fed. 55, 57)."

The bare circumstance that those in charge of a sick man's affairs paid on Friday the balance of an indebtedness due on the following Monday, is insufficient ground for suspecting the payer's motives or for impugning the payee's good faith and holding that he had reasonable cause to believe that the payment would effect a preference. *Richardson v. Germania Bank*, (C. C. A. 2d Cir. 1919) 263 Fed. 320.

Including debtor's insolvency.—To same effect as original annotation, see *In re Looschen Piano Case Co.*, (D. C. N. J. 1919) 259 Fed. 931.

It cannot be affirmed as matter of law that, because a debtor's business is bad and it is necessary continually to press him for payment, the creditor has reasonable cause to believe him insolvent. *Schuetz v. Swank*, (1920) 265 Pa. St. 576, 109 Atl. 531.

Reasonable cause as of what time.—On the question of reasonable cause to believe, evidence of the creditor as to the bankrupt's financial condition, which he obtained sometime subsequent to the transaction alleged to effect a preference, is not admissible. *Schuetz v. Swank*, (1920) 265 Pa. St. 576, 109 Atl. 531.

Opinion evidence.—A creditor's agent may not state his belief concerning the solvency of the bankrupt when the transaction was made if he makes no claim of personal knowledge of the assets and liabilities of the bankrupt. *Schuetz v. Swank*, (1920) 265 Pa. St. 576, 109 Atl. 531.

Sufficiency of evidence.—In the following case it was held that under the evidence the creditor had reasonable cause to believe that the transaction would effect a preference. *In re Clayton*, (D. C. N. J. 1919) 259 Fed. 911.

Jury question.—Reasonable cause to believe is a matter for the jury upon all the facts and circumstances. *Schuetz v. Swank*, (1920) 265 Pa. St. 576, 109 Atl. 531.

Positive knowledge unnecessary.—Knowledge that the bankrupt has committed forgery is notice of a fact which would incite a person of reasonable prudence to an inquiry under similar circumstances, and is

notice of all the facts which a reasonably diligent inquiry would disclose. Thus, the payment of a note on which the holder knows that the indorsers' signatures have been forged by the maker, is a voidable preference, if the maker is insolvent. *Watchmaker v. Barnes*, (C. C. A. 1st Cir. 1919) 259 Fed. 783, 170 C. C. A. 583.

Knowledge presumed.—*Knowledge of insolvency.*—In an action under this section by a trustee in bankruptcy to recover the value of property transferred by the bankrupt to a creditor on the ground of preference, the creditor must be regarded to have had knowledge of the bankrupt's insolvency where it appears that he was a close adviser of the bankrupt in business matters, that he had an intimate acquaintance with the bankrupt's affairs, and that he took two-thirds of a bill of goods purchased by the bankrupt entirely on credit and charged to a partnership of which the bankrupt was a member, and applied it in liquidation, pro tanto, of a debt owing him by the bankrupt before the debt matured. *Gooch v. Stone*, (C. C. A. 6th Cir. 1919) 257 Fed. 631, 163 C. C. A. 581.

Intent to prefer.—To same effect as original annotation, see *Richardson v. Germania Bank*, (C. C. A. 2d Cir. 1919) 263 Fed. 320.

Preference only sufficient to pay part of indebtedness.—A preference may be unlawful when only sufficient to pay part of the indebtedness for which it was given. *Schuetz v. Swank*, (1920) 265 Pa. St. 576, 109 Atl. 531.

II. RECOVERY OF VOIDABLE PREFERENCES (p. 1038)

Recovery of voidable preferences.—To same effect as original annotation, see *Watchmaker v. Barnes*, (C. C. A. 1st Cir. 1919) 259 Fed. 783, 170 C. C. A. 583.

Jurisdiction.—A federal district court of bankruptcy in Illinois has jurisdiction of a bill on its chancery side by a trustee in bankruptcy to cancel, as preferential and also as fraudulent, a conveyance of real estate by the bankrupt within four months preceding the filing of the petition in bankruptcy, though the bankrupt and the defendant, the grantee, are both citizens of Illinois and the real estate is situated in that state. *Ward v. Central Trust Co.*, (C. C. A. 7th Cir. 1919) 261 Fed. 344.

Recovery by bill in equity.—*Where the trustee has an adequate remedy at law.*—The remedy at law being adequate, equity is without jurisdiction to entertain a suit brought by a trustee in bankruptcy solely to recover back money unlawfully paid by the insolvent debtor to one of his creditors in preference to others. *Irons v. Bias*, (W. Va. 1920) 102 S. E. 126.

Defenses in general.—Affirming a decree in favor of the trustee in a suit by him to set aside as preferential, and also as fraudulent, a conveyance of real estate by the bank-

rupt within the four months period, the court said:

"Because the evidence showed that at the time of the trial the trustee had on hand a sum from rents largely in excess of the amount of the only claim then allowed, appellant urges that the chancery court should not have set aside the conveyance. (1) The chancery court was not asked, even if it had the power, to control the administration of the bankruptcy proceeding. (2) The rents were collected and held by the receiver, and afterwards by the trustee, under interlocutory orders of the bankruptcy court. If appellant's title to the real estate should be upheld, presumably the rents would belong to him. He made no offer that the rents should be applied by the trustee in satisfaction of claims against the bankrupt estate." *Ward v. Central Trust Co.*, (C. C. A. 7th Cir. 1919) 261 Fed. 344.

Res judicata.—In a suit by the trustee to set aside, as preferential and also as fraudulent, a conveyance made by the bankrupt within the four months period, the court has no jurisdiction to review the existence of the necessary facts involved in the adjudication of bankruptcy. But that is the extent of the binding effect of the adjudication as a judgment in rem, and although the petition in bankruptcy charged that the conveyance from the bankrupt was an act of bankruptcy, the grantee was entitled, in the suit against him to set it aside, to have a full opportunity to controvert the trustee's allegations and proofs respecting the grantee's guilty knowledge and fraudulent conduct. *Ward v. Central Trust Co.*, (C. C. A. 7th Cir. 1919) 261 Fed. 344.

Where the question whether a creditor has received a voidable preference from the bankrupt has been properly put in issue and litigated in the bankruptcy proceeding between the trustee and the creditor, the findings of the referee in favor of the trustee constitute an adjudication and the question cannot thereafter be litigated in the district court. *Lincoln v. People's Nat. Bank*, (E. D. Mich. 1919) 260 Fed. 422.

Pleadings—Complaint.—In *Minnesota, etc., Power Co. v. Losey*, (C. C. A. 8th Cir. 1919) 260 Fed. 689, 171 C. C. A. 427, it was contended that the bill of complaint in an action to recover a voidable preference, was insufficient to state a cause of action. Answering this contention, the court said:

"The action is statutory and the bill fully recites the statutory requirements. The bill of complaint need not allege the identity of the existing creditors with those at the time of the alleged transfer in an action to recover a preference. The citations by the appellant are not those of suits to recover preferences, but are to avoid transfers in fraud of creditors, which suits may be brought at any time subsequent to the transfer, and are not limited to the four months. In suits to avoid transfers in fraud of cred-

itors, allegations are required such as are insisted upon by the defendant here. It may be added, however, that before defendant made its motion to dismiss the bill at the close of plaintiff's case, evidence had been introduced fully covering all of the matters which appellant insists should have been stated in the bill of complaint. This evidence showed the identity of the creditors at the time this alleged transfer was made, and also that their claims had been allowed in the bankruptcy proceeding."

Issues determinable.—In a suit by the trustee to set aside, as preferential and also as fraudulent, a conveyance of real estate by the bankrupt within the four months period, it is not within the province of the court to determine whether the unexpended balance of funds in the hands of the trustee shall be returned to the grantee defendant, or whether the trustee shall be required to convey to the grantee defendant any unsold parcels of the real estate. *Ward v. Central Trust Co.*, (C. C. A. 7th Cir. 1919) 251 Fed. 344.

Evidence—Sufficiency.—In *Minnesota, etc., Power Co. v. Losey*, (C. C. A. 8th Cir. 1919) 260 Fed. 689, 171 C. C. A. 427, it was held that the evidence was sufficient to support the findings of the trial court that the transfer of certain property of the bankrupt to the defendant constituted a voidable preference.

Request for directed verdict.—In an action by the trustee to recover payments alleged to have been preferential, there being evidence tending to prove that the bankrupt was insolvent when the payments were made, and that the defendant had reasonable cause to believe that the enforcement of the transfer would effect a preference, the court did not err in refusing a request to charge the jury to return a verdict for the defendant. *J. M. Radford Grocery Co. v. Haynie*, (C. C. A. 5th Cir. 1919) 261 Fed. 349.

Judgment—Entry with stay.—In an action for the recovery of a voidable preference, the defendant contended that a judgment against him should be entered with stay of execution until the defendant has opportunity to prove its claim in the bankruptcy court, and having done so, then have the amount thereof set off against the judgment, leaving execution to issue for the balance. The court denied this contention. *Minnesota, etc., Power Co. v. Losey*, (C. C. A. 8th Cir. 1919) 260 Fed. 689, 171 C. C. A. 427.

Vol. I, p. 1048, sec. 62a. [First ed., 1912 Supp., p. 749.]

Necessary expenses allowed—Power of court.—Within the limitations prescribed by this section and General Order No. 26 (1 Fed. Stat. Ann. 2d ed. 857), the allowance of necessary expenses in bankruptcy proceedings is within the power and control of the United States District Court, both as

to the occasion therefor and the amount thereof, and if parties are aggrieved by the action of the court in this behalf, they must, by petition for review or appeal, bring the matter directly before an appellate tribunal, and that, if this is not done, the judgment becomes final and is not subject to collateral attack. *U. S. v. Ward*, (C. C. A. 8th Cir. 1919) 257 Fed. 372, 168 C. C. A. 412.

Clerk hire and office expenses.—The United States District Court may authorize the referee to employ a clerk, and allow an expense for stationery, office rent, light, heat, and phone, and these authorizations may be made by standing rule or order as well as by special order in any particular case. *U. S. v. Ward*, (C. C. A. 8th Cir. 1919) 257 Fed. 372, 168 C. C. A. 412.

Expenses of clerk in mailing notices.—A District Court has the authority to allow as charges against bankrupt estates the reasonable expense incurred by its clerk, in issuing, mailing and publishing notices, and such judgment of allowance may not be collaterally attacked. *U. S. v. United States Fidelity, etc., Co.*, (S. D. Tex. 1919) 263 Fed. 442.

The expenses of an assignee for the benefit of creditors.—To same effect as original annotation, see *Gardner v. Gleason*, (C. C. A. 1st Cir. 1919) 259 Fed. 755, 170 C. C. A. 555, holding that where the occupancy of premises by an assignee was of benefit to the estate, rent for such occupancy should be allowed as one of the expenses in preserving the estate; *In re Morris*, (D. C. Mass. 1919) 258 Fed. 712, wherein various items of an assignee's account were considered. The court said: "Before the petition in bankruptcy is filed the rule will be leniently applied, and the assignee will be given the benefit of any fair doubt so long as he keeps within the powers conferred upon him in the instrument of assignment. But after bankruptcy proceedings have been instituted, there is no reason why the rule should not be strictly applied and the assignee be compelled to establish that the payments with which he seeks to be credited did in fact benefit the estate."

Fees of trustee's attorney—Allowance of claim through fraud.—Where it appears that an attorney for a trustee, while acting as attorney for the estate and its creditors in rendering services for which his claim was allowed, was really working against their interests, and without the knowledge of the court allowing his claim, such court will on its motion re-examine the claim and disallow it. *In re De Rau*, (C. C. A. 8th Cir. 1919) 260 Fed. 732, 171 C. C. A. 470.

Vol. I, p. 1055, sec. 63a (1). [First ed., 1912 Supp., p. 753.]

Judgments—A judgment for a tort rendered after the filing of a petition in bankruptcy is not a provable claim against the

bankrupt's estate. *In re Kroeger Bros. Co.*, (E. D. Wis. 1920) 262 Fed. 463, wherein the court said regarding claims provable under this section:

"Under the provision of the Bankruptcy Act (section 63) governing the case before us, a claim to be provable must have the dual ingredients, (1) a fixed liability, as evidenced by a judgment or an instrument in writing (2) at the time of filing the petition in bankruptcy. It will be conceded that the bankruptcy court is bound absolutely to ascertain the facts and apply the statute according to its very terms; that it is powerless and without discretion, upon considerations of justice or otherwise, to antedate a liability or to give it a fixed character as of any time other than that prescribed in the statute. So, in the present case, if the judgment presented as the basis of the claim had been rendered in the ordinary course, after filing the petition, but upon a verdict rendered before, the court would be powerless to treat the judgment as effective on or prior to the date of filing the petition in bankruptcy. It is agreed, however, that at the time when the bankruptcy petition was filed, there was not only no judgment in favor of the petitioner herein, but in truth against her; and if the Supreme Court of Wisconsin had not directed a *nunc pro tunc* entry of the judgment, I believe there would be no question that the bankruptcy court would be powerless to give the judgment effect as of July, 1918. Now, if the bankruptcy court is so limited, it cannot be that any other court has greater power or any discretion in respect of the ingredients of a provable claim and the manner of evidencing them. Indeed, if such power or discretion were recognized, no good reason can be urged for denying to private parties the analogous power or right of moving back, by agreement, the effective date of an 'instrument in writing'—the other evidence or test of 'fixed liability.'"

Contingent claims.—An unpaid stock subscription of the bankrupt in a corporation, as evidenced by an order in a state court, making a call and assessment upon the bankrupt in a receivership proceeding in that court prior to the bankruptcy proceedings, is not a contingent claim but a fixed liability, and is provable in bankruptcy. *In re Thompson*, (W. D. Wash. 1918) 257 Fed. 140, wherein the court said: "The subscription of Peter Thompson for stock in the Peter Thompson Company, a corporation, prior to his bankruptcy, was the creation of a debt. Whether it was fully paid or not by the property which he turned over to the corporation was a question to be determined upon the liquidation of the claim on account of his stock subscription, and the only thing in the nature of a contingency involved would be the amount, if any, of the debts of the corporation, for the payment of which the stock subscription would be a trust fund.

This, as shown by the referee's certificate, had ceased to be a contingency incapable of determination prior to Peter Thompson's going into bankruptcy—ceased by reason of the assignment for the benefit of creditors of Peter Thompson Company, a corporation, which assignment was, without interruption, followed by the receivership proceeding, all antedating the bankruptcy of Peter Thompson. It had ceased to be 'contingent,' in the sense of liable to occur, at the time of filing the petition. It had occurred, and already had come to pass, and all that was left was to determine that which had already occurred."

Fraud—Bankrupt's fraud.—Where a bankrupt has attained money by fraud, he is under an obligation to restore it, and the person defrauded has a claim against him which is provable in bankruptcy and is a creditor. *Watchmaker v. Barnes*, (C. C. A. 1st Cir. 1919) 259 Fed. 783, 170 C. C. A. 583.

Vol. I, p. 1073, sec. 63a (5). [First ed., 1912 Supp., p. 764.]

Partnership debt reduced to judgment as provable against partner.—A partnership debt reduced to judgment after the filing by one of the partners in his individual capacity of a petition in bankruptcy is provable against the individual estate of the petitioner, provided costs and interest, after such filing and up to the time of the entry of judgment, have been credited. *Gordon v. Texas Co.*, (Me. 1920) 109 Atl. 368.

Vol. I, p. 1074, sec. 63b. [First ed., 1912 Supp., p. 765.]

Liquidation of claims for tort.—A claim for unliquidated damages arising out of a pure tort which neither constitutes a breach of an express contract nor results in any unjust enrichment of the tortfeasor that may form the basis of an implied contract is not made provable in bankruptcy by the provision of this section, since this provision does not add claims of purely tortious origin to the provable debts enumerated in paragraph a of such section, but provides a procedure for liquidating claims provable under that paragraph if not already liquidated. *Schall v. Camors*, (1920) 251 U. S. 239, 40 S. Ct. 135, 64 U. S. (L. ed.) —(affirming (C. C. A. 5th Cir. 1918) 250 Fed. 6, 162 C. C. A. 178) wherein the court said: "Historically, bankruptcy laws, both in England and in this country, have dealt primarily and particularly with the concerns of traders. Our earlier bankruptcy acts invariably have been regarded as excluding from consideration unliquidated claims arising purely ex delicto. Act of April 4, 1800, chap. 19, 2 Stat. at L. 19; *Dusar v. Murgatroyd*, 1 Wash. C. C. 13, Fed. Cas. No. 4,199; Act of August 19, 1841, chap. 9, 5 Stat. at L. 440; *Doggett v. Emerson*, 1 Woodb. & M.

195, Fed. Cas. No. 3,962; Act of March 2, 1867, chap. 176, §§ 11 and 19, 14 Stat. at L. 517, 521, 525, U. S. Rev. Stat. §§ 5014, 5067; *Black v. McClelland*, Fed. Cas. No. 1,462; *Re Schuchardt*, 8 Ben. 585, Fed. Cas. No. 12,483; *Re Boston & F. Iron Works*, 23 Fed. 880.

"Can it be supposed that the present act was intended to depart so widely from the precedents as to include mere tort claims among the provable debts? Its 63b section does not so declare in terms, and there is nothing in the history of the act to give ground for such an inference. It was the result of a long period of agitation, participated in by commercial conventions, boards of trade, chambers of commerce, and other commercial bodies. To say nothing of measures proposed in previous Congresses, a bill in substantially the present form was favorably reported by the Committee on the Judiciary of the House of Representatives in the first session of the 54th Congress. Having then failed of passage, it was submitted again in the second session of the 55th Congress as a substitute for a Senate bill; after disagreeing votes of the two Houses, it went to conference, and as the result of a conference report became law. It is significant that § 63, defining 'debts which may be proved,' remained unchanged from first to last, except for a slight and insignificant variance in clause (5) in the final print, the word 'interests' having been substituted for 'interest.' House Rept. No. 1228, 54th Cong. 1st Sess. p. 39; House Rept. No. 65, 55th Cong. 2d Sess. p. 21; Senate Doc. No. 294, 55th Cong. 2d Sess. p. 22. Evidently the words of the section were carefully chosen; and the express mention of contractual obligations naturally excludes those arising from a mere tort. Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause b fulfils this function, and would have to receive a strained interpretation in order that it should include claims arising purely ex delicto. Such claims might easily have been mentioned if intended to be included. Upon every consideration, we are clear that claims based upon a mere tort are not provable. Where the tortious act constitutes at the same time a breach of contract, a different question may be raised, with which we have no present concern; and where, by means of the tort, the tortfeasor obtains something of value for which an equivalent price ought to be paid, even if the tort as such be forgiven, there may be a provable claim quasi ex contractu.

"Of course, §§ 63 and 17 are to be read together. The reference in the latter section to 'provable debts,' defined in the former, would be sufficient to show this. . . . There is an argument ab inconvenienti, based upon the supposed danger that if tort claims be held not provable they may be preferred by failing debtors without redress under sec-

tion 60, a and b (30 Stat. 562), amended February 5, 1903 (chapter 487, § 13, 32 Stat. 797, 799), amended June 25, 1910 (chapter 412, § 11, 36 Stat. 838, 842), held to apply only to provable claims. *Richardson v. Shaw*, 209 U. S. 365, 381, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981. See also *Clarke v. Rogers*, 228 U. S. 534, 542, 33 Sup. Ct. 587, 57 L. Ed. 953. We are not much impressed. If there be danger of mischief here, other than such as may be reached under the provisions of section 67e or section 70e respecting fraudulent conveyances and transfers (see *Dean v. Davis*, 242 U. S. 438, 444, 37 Sup. Ct. 130, 61 L. Ed. 419), the Congress may be trusted to supply the remedy by an appropriate amendment."

Vol. I, p. 1076, sec. 64a. [First ed., 1912 Supp., p. 766.]

Order of priority—Priority over cost of administration.—A claim of the United States for priority for taxes owing by a bankrupt to it is governed by this section and section 64b rather than by R. S. sec. 3466 (2 Fed. Stat. Ann. (2d ed.) 216). Under this section, however, the United States is only entitled to priority over the claims of other "creditors." It is, therefore, not entitled to have its claim for taxes paid before the costs and expenses of administering the insolvent estate. *In re Jacobson*, (C. C. A. 7th Cir. 1920) 263 Fed. 883. In passing upon this question, the court said:

"The first section quoted (R. S. sec. 3466) is a general statute. It existed prior to the passage of the Bankruptcy Act and was partly superseded by that act. In other words, sections 64a and 64b of the Bankruptcy Act are in pari materia with section 3466. Debts due the United States other than taxes are not given the same protection in the two cited sections of the Bankruptcy Act as existed under the general statute, section 3466, or under the Bankruptcy Act of 1867. 14 Stat. 517. This is clearly brought out by Mr. Justice McKenna in *Guarantee Title & Trust Co., Trustee, v. Title Guaranty & Surety Co.*, 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706. Speaking of the various Bankruptcy Acts, the court says (224 U. S. 158, 32 Sup. Ct. 459, 56 L. Ed. 706): 'The Bankruptcy Act of 1867, as we have seen, provided for priority, first, for the payment of expenses, and second, of "all debts due to the United States, and all taxes and assessments under the laws thereof." The priority, therefore, given by the Bankruptcy Act, was coextensive with the priority given by the statute of 1797. In other words, to repeat, there was a reaffirmation by the Bankruptcy Act of the statute of 1797. But there is not such affirmation by the Bankruptcy Act of 1898 of that statute, which still exists, as we have said, as section 3466 of the Revised Statutes, *supra*. There is a change in provisions, and we come to the question if there is a change of purpose.'

"Proceeding further, the court says (224 U. S. 159, 32 Sup. Ct. 459, 56 L. Ed. 706): 'It will be seen, therefore, that by the statute of 1797 (now section 3466) and section 5101 of the Revised Statutes all debts due to the United States were expressly given priority to the wages due any operative, clerk or house servant. A different order is prescribed by the act of 1898, and something more. Labor claims are given priority, and it is provided that debts having priority shall be paid in full. The only exception is "taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality." These were civil obligations, not personal conventions, and preference was given to them, but as to debts we must assume a change of purpose in the change of order. And we cannot say that it was inadvertent. The act takes into consideration, we think, the whole range of indebtedness of the bankrupt, national, state, and individual, and assigns the order of payment.'

"We have quoted thus freely to justify the elimination from this case—that is, so far as it relates to taxes as distinguished from other debts—of section 3466, Revised Statutes, confidently relied upon by counsel for the government. And his chief citations (*In re Weiss* [D. C.] 159 Fed. 295; *In re Prince* [D. C.] 131 Fed. 546; *In re Cramond* [D. C.] 145 Fed. 966; *City of Chattanooga v. Hill*, 139 Fed. 600, 71 C. C. A. 584, 3 Ann. Cas. 237) were all decided prior to the decision in *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*

"If petitioner's claim is entitled to priority, it must then be by virtue of section 64a of the Bankruptcy Act. Its claim, being for a tax, is entitled to the preference and priority which this section provides. But what is the priority thus created? Clearly priority over claims of other 'creditors.' This section directs payment of these taxes 'in advance of the payment of dividends to creditors.' 'Creditors' of the bankrupt are not entitled to dividends until the taxes are paid. No recognition of priority in favor of taxes appears, except as to creditors. Who, then, are the 'creditors' of whose claims Congress was speaking? Having defined the term 'creditor' by a previous section, it was no doubt making use of its own definition, in thus using the term in section 64a. "'Creditors' shall include any one who owns a demand . . . provable in bankruptcy.' Thus Congress by section 1, subd. 9, of the act, comprehensively designates the class known as creditors, the class whose claims are subject to the claims of 'the United States, state, county, district, or municipality' for taxes. By no stretch of the definition of this term 'creditor' could it be construed to include clerk, trustee, referee, or any one whose relation with the bankrupt or the bankrupt's estate began subsequent to the filing of the petition in bankruptcy.

"Moreover, it is hardly conceivable that

the Congress should confer upon the District Court power to administer bankrupt estates, to sequester and preserve property, perishable as well as losable, and yet deny to the court the right to protect its officers in the performance of their duties, notwithstanding such performance of duties and such administration of the insolvent estate is for the benefit of the taxing powers even more than it is for the general creditors. *State of New Jersey v. Lovell*, 179 Fed. 321, 102 C. C. A. 505, 31 L. R. A. (N. S.) 988."

Vol. I, p. 1083, sec. 64b (2). [First ed., 1912 Supp., p. 771.]

Recognition of creditor's right to recover property for estate.—To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

Vol. I, p. 1083, sec. 64b (3). [First ed., 1912 Supp., p. 772.]

The lien of attorneys of the bankrupt for costs in an action by a creditor in which the bankrupt was named as one of the defendants, is superior to the right claimed by the creditor to set off a judgment held by it against the bankrupt and her husband. *In re Hughes*, (E. D. N. Y. 1919) 257 Fed. 986.

Vol. I, p. 1090, sec. 64b, Fourth. [First ed., 1912 Supp., p. 774.]

Relation of master and servant contemplated.—Where the salary to be paid an employee under an agreement is not merely for his services in carrying on a certain business but also consideration for the sale of such business to his employer, he is not entitled to claim priority in payment under this section. *In re Quackenbush*, (D. C. N. J. 1919) 259 Fed. 599.

Time of earning wages—Priorities accorded by state laws.—Claims of workmen for labor performed more than ninety days prior to the filing of the petition in bankruptcy, are entitled to priority if such priority is accorded them by state laws. *In re Western Condensed Milk Co.*, (C. C. A. 9th Cir. 1919) 261 Fed. 62, 171 C. C. A. 658.

Vol. I, p. 1100, sec. 64b (5). [First ed., 1912 Supp., p. 777.]

Priority dependent on state law—Labor claimants who filed their claims as required by the state statute with the receiver of a corporation employer appointed by a state court within the time required by the state statute, and whose claims are properly allowed by the state court, and under the statute are entitled to priority of payment over other creditors, are entitled to that priority in the bankruptcy court, although a period of more than ninety days has elapsed from the time those claimants performed the work or labor, for which they filed their claims

with the receiver, before the corporation was adjudged a bankrupt. *In re Western Condensed Milk Co.*, (C. C. A. 9th Cir. 1919) 261 Fed. 62, 171 C. C. A. 658, citing as a case "quite like the one at bar," *In re Laird*, (C. C. A. 6th Cir. 1901) 109 Fed. 550, 48 C. C. A. 538.

Landlord's right to priority.—To the same effect as the original annotation, see *Slayton v. Droun*, (Vt. 1919) 107 Atl. 307.

Priority between assignees.—The question of priority between assignees of choses in action is one of general jurisprudence and the decisions of the highest court of a state are not controlling. *In re Leterman*, (C. C. A. 2d Cir. 1919) 260 Fed. 543, 171 C. C. A. 327, wherein it was said:

"In *Methven v. Staten Island*, 66 Fed. 113, 13 C. C. A. 362, this court had before it the question whether an assignee who first gives notice to the debtor has the prior right though the assignment to him is later in date than that to the other assignee. The court held that as between two assignees the one who first gives notice has the better right. In so deciding this court declared that the question is one of general jurisprudence and that the decisions of the highest court of the state are not controlling. We adhere to that ruling in this case. The clause found in the agreement between *Coleman & Co.* and the bankrupt, that 'this agreement shall be construed according to the law of the state of New York,' if binding as between assignor and assignee, is not binding as against a subsequent assignee, who was not a party to it. It is not decisive in this court of the question now presented that the courts of the state of New York have laid down the rule that, as between different assignees of a chose in action by express assignment from the same person, the one prior in point of time will be protected, although he has given no notice of such assignment to either the subsequent assignee or the debtor. *Fortunato v. Patten*, 147 N. Y. 277, 283, 41 N. E. 572. In this respect the rule in New York differs from the rule in the federal courts and from that which prevails in England and in the courts in many of the states.

"The leading case on this subject is the well-known case of *Dearle v. Hall*, 3 Rus. 1, which held that a third assignee who had given notice was entitled to priority over a first and second assignee who did not give notice. That case and the cases which have followed it have gone upon the theory that personal property passes by delivery of possession, and that if one who acquires the right to take possession does not take it he is responsible for the consequences. A chose in action does not admit of tangible actual possession, but the assignee who gives notice to the legal holder of the fund does that which is tantamount to obtaining possession by placing the holder of the fund under an obligation to treat it as his property; and if he omits to give that notice he is guilty of the same neglect as he who

leaves a personal chattel to which he has acquired a title in the actual possession and under the absolute control of another person."

Laches of creditor as affecting claim to priority.—A creditor is not entitled to a preferred claim on the proceeds from the sale of certain real property of a bankrupt, where it appears that the bankrupt executed a void mortgage on the real property to the creditor, which created no lien, and the recordation of which gave no notice of a lien to other creditors of the bankrupt, and it further appears that the creditor brought no suit for the reformation of the mortgage before the institution of the bankruptcy proceeding or for the enforcement of an equitable lien on the property. *Rader v. Star Mill, etc., Co.*, (C. C. A. 8th Cir. 1919) 258 Fed. 599, 169 C. C. A. 541.

Vol. I, p. 1106, sec. 65a. [First ed., 1912 Supp., p. 781.]

Allowed claims.—Dividends may be paid only to those creditors whose claims have been filed and allowed. *In re Schloss*, (E. D. N. Y. 1919) 257 Fed. 876.

Vol. I, p. 1109, sec. 66b. [First ed., 1912 Supp., p. 783.]

Disposition of surplus of estate after payment of claims and expenses.—Where after the payment of all proved and allowed claims against a bankrupt's estate and all expenses and commissions there is a surplus of personal property remaining in the hands of the trustee, it should be paid to the bankrupt, or in case of his death without leaving a will, to his administrator. *In re Ohl*, (N. D. N. Y. 1919) 260 Fed. 338, wherein the court said:

"In this case there was a trustee and an estate in his hands, but no creditor or creditors have proved a claim, and all expenses and commissions have been paid and allowances made. There can be no distribution in bankruptcy to creditors, as no creditor has proved a claim, so as to be entitled to share in distribution. J. August Ohl died during the pendency of the proceedings, and his administrator, duly appointed, was substituted or brought in and represents and succeeds to the interest and right of the bankrupt in the property in the hands of such trustee. This administrator also represents the creditors, if any, of J. August Ohl, where debts, if any, were created after the filing of the petition in bankruptcy. There is no evidence there are or are not any such creditors, but the ordinary and legal method of disposing of the estate of a deceased person is, in case there be no will, to have an administrator appointed by the proper Surrogate's Court, notice to creditors published, and then after payment of debts, if any, and payment of the expenses of administration, the balance is decreed paid to the widow, if any, and next of kin of the deceased."

Vol. I, p. 1109, sec. 67a. [First ed., 1912 Supp., p. 783.]

Validity determined by state law.—To same effect as original annotation, see *In re Perrell*, (C. C. A. 2d Cir. 1919) 261 Fed. 858.

Vol. I, p. 1112, sec. 67c. [First ed., 1912 Supp., p. 785.]

A judgment lien attaching more than four months prior to the petition is not affected. *American Imp. Co. v. Lilienthal*, (Cal. App. 1919) 184 Pac. 692.

Vol. I, p. 1115, sec. 67d. [First ed., 1912 Supp., p. 786.]

Mortgages.—A mortgage given by a corporation to certain of its directors as security for sums advanced to it by them is not invalid where it appears that such advances were present ones, to be used by the corporation to pay its pressing debts, and in the expectation that it could continue in business and meet its obligations. *In re Lake Chelan Land Co.*, (C. C. A. 9th Cir. 1919) 257 Fed. 497, 168 C. C. A. 501, 5 A. L. R. 557.

Mechanics' and kindred liens.—In *Danville Ben., etc., Ass'n v. Huff*, (C. C. A. 7th Cir. 1919) 262 Fed. 403, it was held that on the evidence mortgages held by the plaintiff on property of the bankrupt were superior to mechanics' liens held by the defendant on the same property.

Attorney's lien.—The institution of bankruptcy proceedings will not invalidate an attorney's lien on a bankrupt's fire insurance policies held by the attorney. Such a lien, however, is merely possessory, giving him the right to retain possession of the policies until his fee is paid. Hence, if he delivers the policies to the bankrupt's trustee his lien is lost. *In re Luber*, (E. D. Pa. 1919) 261 Fed. 221.

Equitable liens.—A creditor who files his bill and notice of lis pendens more than four months prior to commencement of proceedings in bankruptcy, acquires an equitable lien upon the property sought to be subjected to his debt and thereby is entitled to a preference over the general creditors of the bankrupt. *In re Pemberton*, (S. D. Fla. 1919) 260 Fed. 521, wherein the court said:

"There is no question but that the bill was filed more than four months before any proceedings in bankruptcy were taken to subject the property theretofore conveyed away by the bankrupt and a lis pendens filed, an action at law commenced seeking to reduce its claim to judgment, and that said action at law subsequently resulted in a judgment in favor of the bank. Under well-recognized rules of law the filing by a judgment creditor of a bill to accomplish the object of the bill in this case, would constitute an equitable lien."

"The contention in this case is that because the complainant did not at the time of filing its bill have such judgment, nor a receiver appointed, nor injunction issued, but filed its bill in the state court, pursuant to authority given in the state statute (section 1961, General Statutes of Florida), no such equitable lien exists. There can scarcely be any doubt that, had the bank procured the appointment of a receiver or the issuance of an injunction on its bill, such an equitable lien would have entitled the bank to a preference, although no judgment at law had been obtained prior to the filing of the bill. As I understand the law, the filing of such a bill by a creditor to subject property, the title to which is not in the name of the debtor, is an equitable levy upon such property, and vests in the complainant the right to have such property first applied to the payment of his debt, if he prevails.

"Under the general rules of law a creditor before judgment could not maintain such a bill, nor does the act of the legislature of Florida vest the chancery side of this court with jurisdiction to entertain such a bill, but it does vest such jurisdiction in the state circuit court, and the bankruptcy law recognizes and enforces such liens given by state laws. Chancery was without jurisdiction to entertain such suits because no lien existed prior to the creditor obtaining judgment, but the section of the General Statutes of Florida referred to vests this jurisdiction in the state circuit courts where action at law has been commenced. It was not the lien of judgment that gave priority to the creditor, but equitable lien created by the filing of the bill. I can see no just reason why the same effect should not be given to the bill filed in the state court and the state statute."

In *Britton v. Union Invest. Co.*, (C. C. A. 8th Cir. 1919) 262 Fed. 111, regarding the validity of an equitable lien, it was said: "The undisputed facts are that the bankrupt, a grain firm owning a line of elevators, had for some time been borrowing from appellee. These loans were secured by various instruments supposed to represent the grain handled by appellee, such as bills of lading and receipts. More than four months before the bankruptcy adjudication these receipts had been replaced by one receipt covering grain in various elevators in several states. The present controversy revolves around the proceeds of grain covered by this receipt, which grain was sold by a creditors' committee and the proceeds turned over to appellee before, but within four months of, the bankruptcy proceedings. It is admitted that this receipt did not comply with the state laws governing warehouse receipts; therefore no reliance is placed upon it as a warehouse receipt. Appellee's contention is that its course of dealing in connection with its loans, made upon the faith of the receipts replaced by this last one, coupled with the later reduction and realization upon the pledged

property before the bankruptcy proceedings began, established its right to an equitable lien on the grain covered thereby. This position is sound, as against a trustee in bankruptcy, who stands in no better position to avoid an equitable claim of this character under these circumstances than the bankrupt itself."

The trustee further contended that the identity of the grain pledged was not preserved nor proven. Answering this contention, the court said:

"Because of the character of grain, it is rare that receipts, pledges, or contracts with warehousemen regarding it, attempt to segregate the particular grain. The needs of all parties are usually met by description of the warehouse, or receptacle therein, the kind, quantity, and quality of grain. The contract here was of this character. The evidence establishes that the grain sold by the committee met the description of this pledge. There is no testimony showing that it was not the identical grain, if absolute identity be required. Nor is it material that the money received for this grain was not kept physically isolated until paid to appellee. It was deposited in a bank with other money, and promptly checked out to appellee, so there is no question that the identical amount received for this grain was in the bank and paid the check."

Where a bankrupt, in order to obtain a loan from a trust company, agrees orally to deliver to it a certain deed of trust of a lot owned by him, together with certain notes secured by such deed, and pursuant to such agreement delivers the deed of trust but fraudulently substitutes copies of the genuine notes, the bankruptcy court, after the sale of the lot and satisfaction of the claim of the holder of the genuine notes, will not declare an equitable lien on the remainder of the proceeds in the trust company's favor, so as to give it preference over unsecured creditors of the bankrupt. This is especially true where there is a state statute declaring such oral agreements void as to creditors and bona fide purchasers. *Page v. Old Dominion Trust Co.*, (C. C. A. 4th Cir. 1919) 257 Fed. 402, 168 C. C. A. 442.

Vol. I, p. 1122, sec. 67e. [First ed., 1912 Supp., p. 792.]

Intent to hinder, delay, or defraud essential.—To same effect as original annotation, see *Richardson v. Germania Bank*, (C. C. A. 2d Cir. (1919) 263 Fed. 320.

The intent denounced by this section is only the intent unlawfully to hinder. Only to that extent does this section interfere with the *jus disponendi* of an insolvent. *Richardson v. Germania Bank*, (C. C. A. 2d Cir. 1919) 263 Fed. 320.

Intent to prefer as warranting inference of intent to violate section.—A desire to prefer, and thereby incidentally to hinder creditors, is not as matter of law an intent ob-

noxious to this section; and is not persuasive in point of fact that such intent, evil in itself, ever existed. *Richardson v. Germania Bank*, (C. C. A. 2d Cir. 1919) 263 Fed. 320, holding that the fact that a bankrupt made a payment with intent to prefer a certain creditor did not warrant the inference that such payment was made with intent to hinder, delay and defraud creditors and hence was invalid under this section.

Claims arising in four months period.—In *Smith v. Seibel*, (N. D. Ia. 1919) 258 Fed. 454, a trustee in bankruptcy brought an action to recover property transferred by the bankrupt to his wife about eleven months before the petition in bankruptcy was filed, on the ground that the property was transferred in fraud of creditors. It appeared that all claims owing by the bankrupt at the time of the adjudication, except a claim on a judgment within four months immediately preceding the bankruptcy, had been paid or otherwise settled. It was held that the unpaid claim passed under this section to the trustee in bankruptcy, and could be recovered by him for the benefit of the judgment creditor. The court said: "It is urged in behalf of the trustee that under sections 70a (4) and 70c the trustee may recover the value of the property fraudulently transferred under these sections, regardless of the four months limitation of section 67e, and some cases are cited in support of such contention; but the purpose of section 70a (4), as expressed therein, is to vest in the trustee by operation of law, as of the date of the adjudication in bankruptcy, the title to the bankrupt's property (other than exempt property) 'to all (1) documents relating to his property; (2) . . . patent rights,' etc.; '(3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors'—thus vesting him with the right to recover, under section 67e of the act, all property transferred in fraud of creditors within four months prior to the bankruptcy, which any creditor of such bankrupt might have avoided under the law of the state, territory, or district where it is situated, and may so recover such property or its value from the person to whom transferred for the benefit of such creditors; otherwise, there might be inconsistency between sections 70a (4), 70e, and 67e. But as the only debt unpaid against the bankrupt estate, which the trustee in this action may recover, is the Cavanaugh judgment and costs, which accrued within the four months immediately preceding the filing of the petition in bankruptcy, such inconsistency, if any there be, is not, therefore, important in this case, unless the master's report might permit a recovery against the defendant Mrs. Seibel for an amount greater than the unpaid indebtedness of the bankrupt, which excess would have to be returned

by the trustee, if recovered, to the bankrupt estate."

Transfers void under state laws.—Trover lies by a trustee in bankruptcy against the purchaser of the entire stock of merchandise of the bankrupt, the sale having taken place within four months preceding the filing of the bankrupt's petition and in violation of a state statute known as the Bulk Sales Law which explicitly made the sale void as to creditors of the seller irrespective of intentional fraud. *Philoon v. Babbitt*, (Me. 1920) 109 Atl. 817, wherein the court said:

"In the instant case the sale to the defendant was by the state law made null and void as to creditors. Bankruptcy proceedings were begun within four months. The evidence shows that Stetson was insolvent at the time of the sale. The stock therefore 'passed to the assignee' (trustee) under section 67e, 'to be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.'

"We do not lose sight of the fact that in opinions by courts of the highest authority are general statements that seem to be in conflict with our conclusions. We refer especially to *Coder v. Arts*, 29 Sup. Ct. 436, 213 U. S. 223, 53 L. ed. 772, 16 Ann. Cas. 1008, wherein the court says: 'To constitute a conveyance voidable under section 67e actual fraud must be shown.'

"But in that case (and the same is true in other cases) the court is considering only that part of section 67e as is involved in the then pending controversy. Indeed, in quoting section 67e 'so far as it is necessary to consider it,' the second paragraph relating to transfers void under state laws is entirely omitted. As Judge Newman remarks, in *In re Walden Bros. Clothing Co.* (D. C.) 199 Fed. 318, referring to *Coder v. Arts*: 'It leaves out of the question entirely consideration of the effect of a transfer void under the laws of the state.'

"It is not important that the stock was not in possession of the defendant at the time of demand, having been previously sold by him. As between the defendant and trustee, the stock belonged to the latter, and the sale of it by the defendant rendered him liable in trover without demand. Nor is it material that the stock was sold by the defendant before the appointment of the trustee. The trustee's title relates back to the beginning of bankruptcy proceedings. 3 R. C. L. p. 231.

"A trustee in bankruptcy may sue in trover for a conversion of goods occurring either before or after bankruptcy.' *Burns v. O'Gorman Co.*, (C. C.) 150 Fed. 226."

Mortgages.—Where a mortgage on property belonging to a bankrupt firm was executed nearly a year prior to its adjudication at a time when the property was owned by one of the partners, but was not recorded by the mortgagee until several days before the adjudication owing to the fact that the mort-

gagor failed to record a deed of the property to himself, and the firm had full knowledge of such mortgage at the time of the conveyance of the property to it, the mortgage cannot be regarded as an incumbrance made with intent to hinder, delay and defraud creditors within the meaning of this section. *In re Sola e Hijo*, (C. C. A. 1st Cir. 1919) 261 Fed. 822. Regarding the trustee's contention that recordation of the mortgage was necessary to its legal existence, the court said:

"His contention now is that under the law of Porto Rico (Civil Code, § 1776; Mortgage Law, art. 146; *Hidalgo v. Garcia*, 4 Porto Rico 64), the mortgage of July 8, 1911, had no legal existence until it was recorded as above stated; that its record on that day constituted the placing of an incumbrance upon the property by the firm of Sola e Hijo, the bankrupt, within four months prior to the filing of the petition in bankruptcy with the intent and purpose on its part to hinder, delay or defraud its creditors, and was null and void as to such creditors within the meaning of section 67e of the Bankruptcy Act. If, in considering this contention, it be assumed without deciding the question that under the law of Porto Rico the mortgage did not exist as a mortgage lien until recorded May 11, 1912, we are unable to see how it can be said that it was an incumbrance made or given by the firm of Sola e Hijo. The mortgage had its inception July 8, 1911, at which time the legal title to the warehouse was in Marcelino Sola. Nothing at that time remained to be done to make the mortgage a legal incumbrance upon the property but to have it recorded, and its inscription in the Registry was dependent upon the mortgagor, Marcelino Sola, first recording the deed of the property from the old firm of Sola e Hijo to him. This he failed to do until May, 1912, having in the meantime conveyed the warehouse to the firm of Sola e Hijo, which took title with full knowledge of the mortgage of July 8, 1911, and the obligation of Marcelino Sola to do the acts necessary to permit the mortgage to be recorded in the registry. Under these circumstances we do not think that the acts of Marcelino Sola, which he was in duty bound and could be compelled to do to enable the mortgage to be recorded, can be said to have been done with the intention on the part of the firm of Sola e Hijo to hinder, delay, or defraud its creditors, either in fact or in law, and that the mortgage cannot be held to be void under section 67e."

Where the effect of a mortgage given by a company on all its property within four months prior to the filing of an involuntary petition against it, is to so incumber the property that an antecedent indebtedness represented by a certain creditor's notes will be secured thereby, to the exclusion of all the other creditors of the company, the mortgage is void under this section. *MacHenry v.*

Dwelling Bldg., etc., Assoc., (E. D. Pa. 1919) 259 Fed. 880. Regarding this section, the court said:

"Section 67e provides that if a debtor within four months before the filing of the petition in bankruptcy makes any transfer or incumbrance on his property, 'with the intent to hinder, delay, or defraud his creditors, or any of them,' it shall be null and void except as to purchasers in good faith and for a present fair consideration. As was stated by Mr. Justice Brandeis in *Dean v. Davis*, 242 U. S. at page 444, 37 Sup. Ct. at page 131, 61 L. ed. 419, in discussing the sections now under consideration:

"But under section 67e the basis of invalidity is much broader. It covers every transfer made by the bankrupt 'within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors or any of them' 'except as to purchasers in good faith and for a present fair consideration.' As provided in section 67d only 'liens given or accepted in good faith and not in contemplation of or in fraud upon this act' are unassailable. A transfer the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act 'hinders, delays or defrauds creditors' within the meaning of section 67e. *Van Iderstine v. National Discount Co.*, 227 U. S. 575, 582 [33 Sup. Ct. 343, 57 L. ed. 652], points out the distinction between the intent to prefer and the intent to defraud. A transaction may be invalid both as a preference and as a fraudulent transfer. It may be invalid only as a preference or only as a fraudulent transfer. Making a mortgage to secure an advance with which the insolvent debtor intends to pay a pre-existing debt does not necessarily imply an intent to hinder, delay, or defraud creditors. The mortgage may be made in the expectation that thereby the debtor will extricate himself from a particular difficulty and be enabled to promote the interest of all other creditors by continuing his business. The lender who makes an advance for that purpose with full knowledge of the facts may be acting in perfect 'good faith.' But where the advance is made to enable the debtor to make a preferential payment with bankruptcy in contemplation, the transaction presents an element upon which fraud may be predicated. The fact that the money advanced is actually used to pay a debt does not necessarily establish good faith. It is a question of fact in each case what the intent was with which the loan was sought and made."

"In the present case, except as to the actual sums of money paid by the Building & Loan Association amounting to \$8,350.09, the obvious effect of the acts of the Bakers' Baking Company in mortgaging its property was to so incumber it that the antecedent indebtedness represented by Mr. Coyle's notes would

be secured by mortgage, and thereby the other creditors of the Bakers' Baking Company would be deprived of the opportunity afforded by the Bankruptcy Act to share equally in the company's assets. This was the actual clear intent and purpose of the creating of the mortgage. The Building & Loan Association by the issue of its note to Brooks and the subsequent issue to him as substitute therefor of its paid-up stock became the holder of the notes. These notes can in no sense be considered a present, fair consideration. They were not a present consideration, for they represented an antecedent debt. The haste with which the mortgage was authorized and executed immediately upon its authorization, while in offices in the same building the defendant was authorizing the loan, and the subsequent arrangement and knowledge of the merely colorable transactions between Mr. Coyle and Mr. Brooks, as appears by the minutes of the defendant company, is sufficient to remove any doubt that the consideration was not a fair one, and its effect was a fraud upon the creditors of the Baking Company."

Bona fide purchasers protected.—*The burden rests on the purchaser.*—To same effect as original annotation, see *Crawford v. Broussard*, (C. C. A. 5th Cir. 1919) 260 Fed. 122, 171 C. C. A. 153.

Sufficiency of evidence.—In *Dwelling Bldg., etc., Assoc. v. MacHenry*, (C. C. A. 3d Cir. 1920) 263 Fed. 702, it was held that the evidence was sufficient to sustain a finding that a mortgage given by the bankrupt was invalid as being in contravention of this section.

Vol. I, p. 1129, sec. 67e. [*Jurisdiction.*] [First ed., 1912 Supp., p. 797.]

Jurisdiction of suit.—See *Ward v. Central Trust Co.*, (C. C. A. 7th Cir. 1919) 261 Fed. 344, as cited in notes to vol. I, p. 1026, sec. 60b, *supra*, this Supplement, p. 434.

Vol. I, p. 1130, sec. 67f. [First ed., 1912 Supp., p. 797.]

- I. Annulment of liens generally.
- III. Judgment liens.
- IV. Attachment and garnishment liens.

I. ANNULMENT OF LIENS GENERALLY (p. 1130)

A vendor's lien against a bankrupt's real estate, established in a suit against it to foreclose the lien, is not one obtained through legal proceedings, and consequently is not defeated by this section, although the final decree in the suit is rendered within four months preceding the filing of the petition in bankruptcy. *Rader v. Star Mill, etc., Co.*, (C. C. A. 8th Cir. 1919) 258 Fed. 599, 169 C. C. A. 541.

Annulment of liens obtained through legal proceedings.—To same effect as original annotation, see *Martin v. Oliver*, (C. C. A. 8th Cir. 1919) 260 Fed. 89, 171 C. C. A. 125.

Waiver by trustee.—The adjudication operates not only for the benefit of the bankrupt but for the general creditors, and accordingly the trustee cannot waive the discharge of a lien created less than four months before the filing of the petition. *Mechanics', etc., Ins. Co. v. McVay*, (Ark. 1920) 219 S. W. 34.

III. JUDGMENT LIENS (p. 1134)

Delay in execution sale as affecting execution's validity.—The fact that the sheriff delays four months in selling property of the bankrupt after having levied execution upon it, does not render the execution void as against the bankrupt's trustee because of dormancy, where it does not appear that the plaintiff's attorney directed the sheriff to delay the sale or that the trustee was harmed by the delay. *In re Fraser*, (W. D. N. Y. 1919) 261 Fed. 558. The court said:

"The law is that an execution may become dormant after levy, if instructions were given to the sheriff not to sell the property levied upon, and when such a delay ensues a senior judgment loses its priority over a junior judgment or levy, or other liens acquired during the dormancy. In the present case it is not shown that plaintiff was favoring the bankrupt by delaying to enforce his lien, or that any junior judgment creditors or others acquiring intervening rights were hindered or interfered with during the time the execution was extended, and accordingly the invalidity of the levy and sale in my opinion is not sufficiently clear to justify requiring the sheriff to surrender to the trustee the entire amount realized on the sale. The lien acquired by Rouse on the unmortgaged property was good, I think, as against the trustee at the date of filing the petition in bankruptcy. Indeed, the trustee possessed only such rights as a junior creditor had on that day. *In re Zeis*, 245 Fed. 737, 156 C. C. A. 139."

IV. ATTACHMENT AND GARNISHMENT LIENS (p. 1136)

Payment by garnishee.—A garnishment levied less than four months before the filing of the petition is discharged, and payment by the garnishee to the plaintiff does not protect him in an action by the trustee. *Mechanics', etc., Ins. Co. v. McVay*, (Ark. 1920) 219 S. W. 34.

Vol. I, p. 1141, sec. 68a. [First ed., 1912 Supp., p. 805.]

Mutual debts and credits.—To same effect as third paragraph of original annotation, see *Boatmen's Bank v. Laws*, (C. C. A. 8th Cir. 1919) 257 Fed. 299, 168 C. C. A. 383.

Money collected by delivery company.—A company engaged in delivering for a store parcels purchased by its customers, and in making collections on C. O. D. parcels, may, on the bankruptcy of the store, apply the amount of such collections on its bill against the store for delivery charges. *In re W. & A. Bacon Co.*, (D. C. Mass. 1919) 261 Fed. 109. The court said:

"The bankrupt contends that the collections constituted trust funds, which the claimants were bound to return to the Bacon Company, regardless of the state of its general account, and with no right of set-off. That depends on whether, *quoad* the collections, the claimants occupied a trust relation to the bankrupt. It does not seem to me that they did. The relation, as I view it, was a purely commercial one, and there was nothing of a fiduciary nature in it. The bankrupt employed the claimants to transact certain business for it, instead of doing the business itself. As part of it the claimants were to make collections when required, for which they were accountable to the bankrupt; the bankrupt being indebted to them in turn for services rendered. There was nothing which expressly or impliedly bound the claimants to return the collections in specie, whatever the effect of that might have been, and their liability for parcels stolen or lost was part of the general understanding. In respect to this, as in other matters, each party seems to have relied on the general financial responsibility of the other.

"The course of business was such that there were mutual accounts between the bankrupt and the claimants; no distinctions were made, so far as appears, as to the character of the claimant's liability (whether at law or in equity), in regard to any items entering into the account, except that the moneys collected by them were paid over within two or three days after collection, instead of monthly or semimonthly when the bills were rendered. That of itself does not show, I think, that the money so paid over was regarded, or should be treated, as trust funds. It was money which belonged to the bankrupt, and which a proper dispatch of the business intrusted to the claimants by the bankrupt required should be promptly paid over."

Money due by creditor under court orders.—To same effect as 1919 Supplement annotation, see *In re Barnes Gear Co.*, (N. D. N. Y. 1919) 259 Fed. 320, affirming on rehearing (N. D. N. Y. 1918) 251 Fed. 764 in 1919, Supplement annotation, p. 467.

Set-off between bank and depositor.—Where a bank sells at a reduced price property, pledged with it by a bankrupt as security for certain loans, to a third party who has knowledge of all the facts and fails to credit the bankrupt anything at all out of the sum which comes into its hands as surplus, it estops itself from applying that surplus as a set-off on the amount due to it by the bankrupt on other loans, and must

account for it to the bankrupt's trustee. In such case the purchaser is secondarily liable in case the bank fails to account. *Howard v. Mechanics' Bank*, (E. D. N. Y. 1920) 262 Fed. 699.

Stockholder as creditor.—A stockholder cannot set off a debt owed to him by the corporation in a proceeding by the trustee of the corporation to collect an unpaid balance of the subscription. *Cochran v. Monteith*, (Tex. Civ. App. 1920) 221 S. W. 1055.

Claims not due at the institution of proceedings.—To same effect as original annotation, see *In re Pottier, etc., Co.*, (C. C. A. 2d Cir. 1919) 262 Fed. 955.

Set-off against lien of bankrupt for labor performed.—Where a bankrupt has a lien for repairs on property of one of his creditors, the latter may set off the amount of his admitted claim against the amount of the lien and reclaim his property upon payment of any balance due after allowing the set-off. *In re Pottier, etc., Co.*, (C. C. A. 2d Cir. 1919) 262 Fed. 955.

Counterclaims.—Where a claim of a bankrupt against one of his creditors does not arise out of the same transaction as the creditor's claim, and is in the nature of a counterclaim rather than a set-off, a referee has no jurisdiction to determine the merits of the counterclaim unless the trustee specifically waives all of his demand in excess of the creditor's claim. In such case the referee has jurisdiction to consider the counterclaim merely for the purpose of determining whether or not the amount actually due thereon is sufficient to offset, in whole or in part, the claims actually allowed in favor of the creditor. In no event, however, has the referee jurisdiction to consider the counterclaim without the creditor's consent and render an affirmative judgment against him. *In re Continental Producing Co.*, (S. D. Cal. 1919) 261 Fed. 627. The court said:

"Section 68 of the Bankruptcy Act does provide that in all cases of mutual debts or mutual claims between the estate of the bankrupt and a creditor, the 'account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid.' Respondent's contention is that, the trustee's counterclaim having been urged under the terms of this section, it became the duty of the referee to give it consideration for the purpose of enabling the account to be stated and one debt to be set off against the other. He insists that this would have been clearly so had the counterclaim been for a less amount than the total claim presented by the creditor against the bankrupt estate, and that in such event, under established precedents, it would have been the duty of the referee to strike a balance and allow the claim of the creditor only for such surplus as was shown to exist. It is then said that if the referee could thus enter upon a consideration of the entire matter, with respect to any amount up to the

very sum demanded by the creditor, out of considerations of expediency, if not of necessity, it was proper that the referee should proceed in like manner with respect to a case in which the amount claimed by the trustee against the creditor was in excess of the claim presented by the creditor himself. Then it is asserted that, if it were found in the course of such hearing that the amount thus claimed by the trustee was a valid charge against the creditor, a finding to that effect should be made, as was done in the case at bar.

"In this connection, although it is admitted that such a finding would not of itself constitute an enforceable judgment against the creditor, yet it is urged that such finding would be conclusive against him, and that, in a suit thereafter to be brought upon the alleged overplus thus found to be due, he would be estopped from urging any defense other than that of payment. *Ereit v. Moore*, 220 Fed. 97, 99, 135 C. C. A. 573. That is, in any subsequent suit, the merits of the claim would not be inquired into, on the ground that there had been an adjudication had in the matter, and that the same question could not again be litigated. The net result is that, though the finding of the referee with respect to the counterclaim of the trustee does not in form constitute a judgment against the creditor, yet it does in substance, in that the creditor is estopped to go behind the finding thus made, and the only defense he would have to a subsequent suit brought to secure an enforceable judgment would be the defense of payment made. In this wise, and in its substantial aspects, the finding is tantamount to a judgment, and the creditor stands in the position of having had a money judgment pronounced against him by a court which, under the law limiting its power, was without jurisdiction so to do.

"Though section 68, *supra*, does confer upon the referee jurisdiction to entertain consideration of the merits of an asserted counterclaim, this is done only for the purpose and to the extent of ascertaining the net amount, if any, due to the creditor from the bankrupt estate. The spirit and purpose of the Bankruptcy Act, and of the decisions construing it, do not look to the rendition of any general judgment in favor of the bankrupt estate as against third persons, even though they may be proven creditors. The jurisdiction, I am confident, in the absence of consent, goes no further than to permit of an inquiry into and determination of the net amount due the creditor. Outside and beyond that, the general laws of the land, and the courts authorized to administer them, must be looked to for affirmative relief.

"Upon the reconsideration of the creditor's claims in connection with the asserted counterclaim of the trustee, it would be the duty of the referee, and clearly within his jurisdiction, under the terms of section 68, *supra*,

to enter upon a determination of the validity and extent of those claims. Having determined that the creditor had valid claims against the estate, in such amount as he might find, it would then be his duty to consider whether or not such claims were to be subject to offset in virtue of the counterclaim asserted. If the amount of the counterclaim as asserted was clearly in excess of the amount of the creditor's claims as allowed, and if the trustee did not then and there waive a recovery, and the right to proceed further against the creditor for all amounts in excess of the claims actually allowed, then it would seem as if, under the authorities, it was the instant duty of the referee to refuse to enter upon a determination of the merits of the asserted counterclaim, because of the fact that he lacked jurisdiction. 34 Cyc. 646. He should have contented himself with merely staying the payment of the creditor's claims until there had been a final judgment upon the counterclaim, remitting the trustee in his prosecution of the same to a court possessing the requisite jurisdiction.

"If the trustee had entered his waiver with respect to the excess and the right to proceed further against the creditor, I am constrained to believe the referee would have had jurisdiction to enter upon the consideration of the entire counterclaim, merely for the purpose of determining whether or not the amount actually due thereon was sufficient to offset, in whole or in part, the claims actually allowed in favor of the creditor. 34 Cyc. 647.

"It would seem as if, in the absence of the necessary waiver by the trustee, the referee would not be entitled to consider the merits of the entire counterclaim, and then, if in his judgment it was sustained in an amount in excess of the creditor's claims, to allow it for the amount of those claims, thus offsetting completely such claims, and then remitting the trustee to another suit for the balance. The creditor may not thus be harassed by having two suits for the same demand. Furthermore, it would be incongruous to permit a hearing by the referee with respect to a part of the demand, and an allowance perhaps of that part, and then a hearing in another tribunal with respect to another part of the demand, and a possible disallowance by that tribunal of the part brought within its jurisdiction.

"So I am constrained to hold that, except in the event of a specific waiver by the trustee of all of his demand in excess of the allowed claim of the creditor, it is the duty of the referee to refuse to entertain consideration of the merits of the counterclaim at all, and, upon the allowance of the claim of the creditor, to hold all payments in satisfaction of the same in abeyance, until there shall have been a final determination of the question of the amount due the bankrupt estate in a forum having jurisdiction of such controversy."

Vol. I, p. 1150, sec. 70a. [First ed., 1912 Supp., p. 811.]

- I. What constitutes "property."
- II. Nature of trustee's title.
- III. Time when title passes.
- V. Burdensome property.
- VI. Exempt property.
- VII. Reclamation proceedings.

I. WHAT CONSTITUTES "PROPERTY" (p. 1150)

Amount of credit on bank account.—In the absence of proof that the transaction would effect a preference, a bankrupt's trustee is not entitled to the amount of checks given by the bankrupt to a trust company as payment on account of a note held by the trust company, because of the fact that the trust company has failed to debit the bankrupt account with the amount of the checks. *In re Looschen Piano Case Co.*, (D. C. N. J. 1919) 259 Fed. 931.

II. NATURE OF TRUSTEE'S TITLE (p. 1151)

Trustee takes bankrupt's title.—To same effect as original annotation, see *In re Tietje*, (E. D. N. Y. 1920) 263 Fed. 917.

Title subject to existing equities—Execution sale by sheriff after filing of petition.—Unless stayed by an order of the bankruptcy court, a sheriff may sell property of the bankrupt after the filing of a petition against him, where he has made a levy under a valid execution prior to its filing. *In re Fraser*, (W. D. N. Y. 1919) 261 Fed. 558.

Valid liens and incumbrances.—To same effect as original annotation, see *In re Fraser*, (W. D. N. Y. 1919) 261 Fed. 558.

III. TIME WHEN TITLE PASSES (p. 1154)

Effect of commencement of proceedings—Property of in custodia legis.—To same effect as original annotation, see *In re Diamond*, (C. C. A. 6th Cir. 1919) 259 Fed. 70, 170 C. C. A. 138; *In re Arctic Stores*, (D. C. N. J. 1919) 258 Fed. 688.

Effect of adjudication.—To same effect as original annotation, see *In re Arctic Stores*, (D. C. N. J. 1919) 258 Fed. 688, holding that upon his appointment the trustee's right to possession of the bankrupt's property related back to the time a receiver appointed by a state court took it over. *In re Diamond*, (C. C. A. 6th Cir. 1919) 259 Fed. 70, 170 C. C. A. 138.

Property acquired subsequent to adjudication.—To same effect as original annotation, see *In re Swift*, (N. D. Ga. 1919) 259 Fed. 612; *In re Morris*, (D. C. Mass. 1919) 258 Fed. 712.

V. BURDENSOME PROPERTY (p. 1160)

Property held by bankrupt as bailee and subsequently mortgaged.—In *In re Erie Lithograph Co.*, (W. D. Pa. 1919) 260 Fed. 490, the referee certified to the bankruptcy court the following question:

"Whether, where more than four months prior to proceedings in bankruptcy the bankrupt corporation procured certain machinery, equipment, etc., used in the operation of their plant, which said property was held under bailment or leases from the owners thereof, the said bailment or leases providing for payment of certain rental for a specified term at the expiration of which said property was to be returned to the bailors or lessors, coupled with an option to buy at a price stipulated, and said property was placed on premises covered by a mortgage or mortgages, which said mortgages contained a clause that it should be a lien on all machinery, fixtures, equipment, etc., then on the premises or thereafter to be acquired by said mortgagor, such property so leased becomes subject to the lien of said mortgages."

The referee had previously given the trustee in bankruptcy a negative answer to this question. The court reversed his order and answered the question in the affirmative.

VI. EXEMPT PROPERTY (p. 1162)

Life insurance policies.—To same effect as original annotation, see *In re Brinson*, (S. D. Miss. 1919) 262 Fed. 707, holding that where under the law of the state the surrender value of life insurance policies was exempt, the bankrupt should not be compelled to pay the amount of such surrender value to his trustee under sec. 70a(5) (1 Fed. Stat. Ann. (2d ed. 1196)).

VII. RECLAMATION PROCEEDINGS (p. 1165)

Right to reclaim.—To same effect as original annotation, see *Smith v. Carukin*, (C. C. A. 6th Cir. 1919) 259 Fed. 51, 170 C. C. A. 51, holding that where property was sold to the bankrupt but title reserved in the vendor until full payment of the purchase price, the transaction was a conditional sale and the vendor might reclaim it from the bankrupt's trustee. The court said:

"It is sought to classify the transaction as a passing of title and a reserved lien, because the title was to remain in Carukin as his equity appears from time to time, sufficient to secure him for the amount unpaid at such times." It is said that this demonstrates the dominant thought to be to secure Carukin for his debt, thus constituting it really a mortgage. It clearly has a tendency in this direction; but the mere use of the words 'equity' and 'secure' cannot control. In the plainest and clearest case of a mere executory contract of sale with installment payments, the equitable interest of the vendor is only that he shall get his money, and it is natural to speak of this interest as 'his equity'; and, in a very common and fair sense, the reservation of title is, in the same case, for the purpose of 'securing' payment of the purchase price. On the other hand, this instrument lacks entirely these elements which are most essential as matter of form to make it a conveyance of title with a mortgage back or reserved lien. There are

no words of conveyance; there was no bill of sale; there was no invoice or other customary incident of transferring title; and there were no promissory notes creating an apparently independent obligation to pay. If the clause reserving title in the vendor had been entirely omitted, the document would still have been, in form, a mere executory contract of purchase. Nor is any way provided for getting the benefit of the security and preserving the balance of the obligation—as would be appropriate to a mortgage. The paper seems to contemplate no remedy for the vendor, excepting that reclamation which, without mention, appertains by law to a reservation of title; and this tends to show that the title did not pass.

"Upon the whole, when we come to classify the instrument as a conditional sale or as the reservation of a lien, we consider it ambiguous, and when we take into account the aggregate of the contract provisions and also all the conduct and relations of the parties which the record discloses, and observe the question in the light of the rule that ambiguities will be solved against that party who was relied upon to, and who did, select the language of the contract, we conclude that the judgment of the District Court was right, that the instrument was not of the class requiring record, and that Carukin's title is superior to the trustee's."

So, property delivered to a bankrupt prior to his bankruptcy as bailee for sale but kept entirely separate from his property, the title being expressly reserved in the owner, may be reclaimed from the bankrupt's trustee. *In re King*, (C. C. A. 9th Cir. 1920) 262 Fed. 318.

Likewise, property delivered to a bankrupt prior to his bankruptcy on "consignment for sale," and for the sale of which he is paid by commissions, may be reclaimed by the owner from his trustee in bankruptcy. *In re King*, (C. C. A. 9th Cir. 1920) 262 Fed. 318.

Assignment of claim against United States.

—On a petition by a company for an order requiring a trustee in bankruptcy to turn over a certain sum due by the bankrupt to the petitioner under a contract, it appeared that the petitioner had agreed to furnish to the bankrupt certain automobile bodies and fenders to be used by it in carrying out a contract with the United States government. The bankrupt agreed that the title to the bodies and fenders should remain in the petitioner until delivery to the government, the warrants to be issued therefor to become the property of the petitioner, and to be collected, indorsed and forwarded by the bankrupt to the petitioner as its agent, any sum over the contract price of the bodies and fenders to be applied to the payment of any balance then due by the bankrupt to the petitioner, the bankrupt assigning to the petitioner all its right, title and interest in its contract with the government and agreeing to give such further assurance to the petitioner as it might deem necessary to carry out the agreement. The petition was denied

on the ground that the assignment was in contravention of R. S. section 3477 (2 Fed. Stat. Ann. (2d ed.) 179) which prohibits the assignment of claims against the United States before allowance except under certain conditions. *In re Hud.ord Co.*, (C. C. A. 2d Cir. 1919) 257 Fed. 722, 169 C. C. A. 10.

Fraudulent statements by bankrupt's husband.—In *In re Bernstein*, (S. D. N. Y. 1919) 261 Fed. 719, it appeared that a bankrupt was doing business under the name of a company and that her husband in purchasing goods for it represented to the seller that he was the owner of the business. It was held that such representation would not sustain a reclamation proceeding by the creditor on the ground that the goods had been obtained by fraud, since such statement was not material nor binding on the bankrupt. The court said:

"The facts, briefly stated, are that Tillie Bernstein, the alleged bankrupt, did business under the name of Rialto Tire Company. The special master has reported: 'The evidence shows that Jack Bernstein, with the knowledge and consent of Tillie Bernstein, carried on the business of the Rialto Tire Company; that Jack Bernstein transacted most of the business, bought all the merchandise, and drew all the checks in the name of the business, by virtue of a power of attorney given him by his wife.'

"The special master also held that Jack Bernstein made certain statements, upon which Rauchfuss, the president of the reclaiming creditor, relied, and that these statements were both false and material. An examination of the record fails to disclose any statement as to the actual financial condition of Tillie Bernstein. . . .

"There is no testimony whatever that the statement thus made by Jack Bernstein was either authorized by or known to Tillie Bernstein. Assuming, for the purpose of the argument, that the agency as between Tillie Bernstein and Jack Bernstein existed in the manner and to the extent above quoted, there is nothing in such an agency which can be construed as an authorization by Tillie Bernstein to Jack Bernstein to make a statement of this kind.

"It must be concluded in the first place, that the statement of Jack Bernstein was not in any manner binding upon Tillie Bernstein. In the second place, a reading of the record discloses that the statement was in no sense a material statement. There is nothing to show what, if any, Jack Bernstein's own resources were. All that the statement would amount to would be an assurance to Rauchfuss that Bernstein's business ability could be relied upon. There was nothing material in such a statement, because Bernstein, according to the special master, transacted most of the business and bought all the merchandise."

Refund of payments by bankrupt as condition precedent to reclamation.—In a proceeding to reclaim a machine held by a bank-

rupt as bailee, it appeared that the creditor shipped the machine to the bankrupt on a bill of lading, thereby requiring him to pay \$1,000 and freight charges before he could obtain possession of it. After paying these amounts the bankrupt attempted to assemble and put the machine in workable order but found it could not be done by reason of the creditor's failure to deliver certain essential parts. It was held that the creditor should be required to refund the amounts paid by the bankrupt before being allowed to reclaim the machine. *Goldman v. Shreve*, (C. C. A. 3d Cir. 1920) 263 Fed. 74.

Illegality of agency contract as defense to reclamation by principal.—The fact that a contract of agency with a corporation contains an illegal provision is no defense in a reclamation proceeding by the principal to obtain possession of property held by the corporation as his agent at the time of its bankruptcy. *In re Herbert*, (C. C. A. 2d Cir. 1920) 263 Fed. 351.

Reclamation precluded by act of claimant—Filing claim.—A claimant by filing a claim against a bankrupt's estate is not thereby precluded from reclaiming property belonging to him which is held by the bankrupt's trustee, where in filing the claim he disclaims any such result and refers specifically to his petition for the reclamation of the property. *Smith v. Carukin*, (C. C. A. 6th Cir. 1919) 259 Fed. 51, 170 C. C. A. 51.

Vol. I, p. 1168, sec. 70a (2). [First ed., 1912 Supp., p. 821.]

The rights under an incomplete invention are "property" and on the bankruptcy of the owner of the invention pass to his trustee in bankruptcy. *Ingle v. Landis Tool Co.*, (M. D. Pa. 1919) 262 Fed. 150.

Vol. I, p. 1169, sec. 70a (4). [First ed., 1912 Supp., p. 821.]

Property fraudulently transferred vests in trustee.—To same effect as original annotation, see *Moran v. Morgan*, (C. C. A. 2d Cir. 1919) 258 Fed. 234, 169 C. C. A. 300, wherein it was held that a trustee in bankruptcy was entitled to recover real property fraudulently transferred by the bankrupt to his wife.

Concealment of money.—Where a bankrupt conceals money from his trustee and uses it in purchasing a business under the name of another person, who also becomes bankrupt, the proceeds from a sale of the business pass to the first bankrupt's trustee subject to the payment of costs legally incurred in the administration of both of the bankrupt estates and subject further to the payment in full of all claims incurred by the business, while conducted under the name of the second bankrupt, in conserving and replenishing its assets. *In re Offricht*, (W. D. Tex. 1919) 260 Fed. 682.

Bona fide transfers.—Where reasonable salaries are paid to officers of a corporation for past services, without objection by any

stockholder or creditor, and pursuant to a resolution adopted by its directors who own the large majority of its stock, and the corporation becomes bankrupt ten years later, its trustees may not recover such payments on the ground that they were made in fraud of creditors. *In re Franklin Brewing Co.*, (C. C. A. 2d Cir. 1920) 263 Fed. 512.

Vol. I, p. 1171, sec. 70a (5). [First ed., 1912 Supp., p. 823.]

I. In general.

II. Interests in real property, etc.

V. Trust funds and deposits.

VIII. Membership in stock exchange.

IX. Contractual interests and obligations.

XI. Effect of commingling property.

I. IN GENERAL (p. 1171)

Goods leased to bankrupt.—Where machinery ordered by a corporation is shipped to the order of the vendor and held at its destination by the vendor's agents until the corporation signs an agreement to lease it, the transaction is a bailment rather than a conditional sale, and on the bankruptcy of the corporation its trustee may be compelled to return the machinery to the vendor. *In re Devon Manor Corp.*, (E. D. Pa. 1919) 257 Fed. 766.

II. INTERESTS IN REAL PROPERTY, ETC. (p. 1174)

Generally.—In *Scott v. Cline*, (C. C. A. 8th Cir. 1919) 257 Fed. 706, 168 C. C. A. 656, it was held that under the evidence certain lots purchased by the owner of a bankrupt company must be regarded as his own private property and that a certain other lot purchased by him must be regarded as property of the company which passed to its trustee on its bankruptcy.

Dower and curtesy rights.—Dower interests of a bankrupt's wife in her husband's real property do not pass to his trustee in bankruptcy. *Marine Nat. Bank v. Swigart*, (C. C. A. 6th Cir. 1920) 262 Fed. 854.

Homestead interest.—A bankrupt's homestead interest in real property does not pass to his trustee. *Marine Nat. Bank v. Swigart*, (C. C. A. 6th Cir. 1920) 262 Fed. 854.

V. TRUST FUNDS AND DEPOSITS (p. 1185)

Deposits—Tracing funds deposited.—In *In re Jarmulowsky*, (C. C. A. 2d Cir. 1919) 261 Fed. 779, it appeared that the claimant deposited certain checks in the bankrupts' private bank the day before an involuntary petition was filed against them. On the same day the checks were deposited by the bankrupts in certain national banks for collection, and the latter banks, being creditors of the bankrupts, retained the proceeds of the checks in payment of their claims against the bankrupts. It was held that the claimant could not recover the amount of the checks since he could not identify the money and trace it into any specific fund in the hands of a representative of the bankrupts' estate.

VIII. MEMBERSHIP IN STOCK EXCHANGE (p. 1189)

Distribution of proceeds from sale of membership.—To same effect as original annotation, see *Solinsky v. New York Stock Exch.*, (S. D. N. Y. 1919) 260 Fed. 266.

IX. CONTRACTUAL INTERESTS AND OBLIGATIONS (p. 1191)

Fire insurance policy.—To same effect as original annotation, see *In re Luber*, (E. D. Pa. 1919) 261 Fed. 221.

Property purchased by contractor to perform contract.—Where a contractor is required under the terms of a contract with a county, to furnish all the materials and perform all the labor necessary to construct and complete a highway, the title to brick purchased by him for use pursuant to such contract passes on his bankruptcy to his trustee. And the fact that payments are made to him by the county from time to time on estimates as the work progresses, one of which estimates includes the brick, does not vest title to the brick in the county. *In re Schilling*, (N. D. Ohio 1919) 258 Fed. 489. In construing the contract, the court said:

"The contract contains, among other clauses, the following:

"Estimates will be made once a month by the engineer as the work satisfactorily progresses, of the amount and value of material in place on the ground and work done. Ninety per cent. of the value so determined, less any previous payments made, will be paid to the contractor five days after being approved by the county commissioners. No partial payment can be construed as an acceptance by the county highway superintendent or county commissioners of any material furnished or work done. Any or all estimates may be withheld indefinitely until any or all of the orders given by the engineer or county commissioners, in compliance with and by virtue of the terms of this contract, have been complied with by the contractor."

"Authority to include brick in the engineer's estimate is deduced from the words 'material in place on the ground.' The trustee contends that this means such brick only as had been placed in the highway in their final position, and not brick merely delivered and stacked up by the roadside, ready and available for such use by the contractor. On the other hand, the contention is that any material delivered on the premises and in a position to be used by the contractor as required is within the meaning of the paragraph above quoted. Supporting this contention is invoked the fact that this practice had been followed under this contract.

"I deem a decision of this question of construction immaterial, for the reason that, if the inclusion in the estimate of the brick was authorized, it does not follow therefrom as a matter of law that title or property in the bricks passed, as a result thereof, to the

county commissioners. This contract is not a contract for the sale of goods. It is one requiring the bankrupt to furnish all the materials and perform all the labor necessary to construct and complete a highway according to certain definite plans and specifications. This contract is not fully performed until the highway is entirely completed and all unused material and rubbish is removed therefrom. Payments are to be made from time to time on estimates as the work progresses. These payments are in effect payments on account, and the paragraph above quoted furnishes only a basis whereby the amounts may be computed with safety as the work progresses. Obviously the bankrupt, as materials were furnished and labor was performed, needed payments. It was not contemplated that the bankrupt should fully perform the contract and get no payment until the final completion of the work. The provisions in the paragraph above quoted, so far as they permit material in place on the ground to be included in an estimate, are intended to accomplish this purpose, and not to relieve the bankrupt from responsibility for material not yet in its final resting place, or from the burden of performing such further labor as was needed.

"Manifestly, notwithstanding this estimate and payment, the bankrupt was required to perform much additional labor in placing these bricks in their final position, and to do this at their own expense. The title to the brick, it seems to me, therefore, remained in the bankrupt, notwithstanding such payment. No change in the relations of the parties to materials not yet used, nor with respect to their obligations and liabilities, was contemplated or is effected merely by the issue and payment of an estimate."

XI. EFFECT OF COMMINGLING PROPERTY (p. 1195)

When property traceable.—Private bankers in receiving money from a depositor for transmission act in a fiduciary capacity, and on tracing it into the possession of their trustee in bankruptcy the depositor may recover it. *In re Jarmulowsky*, (C. C. A. 2d Cir. 1919) 258 Fed. 231, 169 C. C. A. 297.

Vol. I, p. 1196, sec. 70a (5). [*Policy of insurance.*] [First ed., 1912 Supp., p. 835.]

Effect of order denying petition for surrender of policy.—An unreversed order denying the petition of a trustee that the bankrupt be required to deliver a life insurance policy or pay its surrender value as a condition of keeping it, bars a subsequent petition by the trustee that the policy be surrendered or that the bankrupt pay over the loan value thereof. *In re Samuels*, (C. C. A. 2d Cir. 1920) 263 Fed. 561.

Right to surrender accruing after bankruptcy.—The cash surrender value of a life

insurance policy passes to the trustee though the policy provides that the cash surrender value does not accrue until after six months' notice given after default in the payment of a premium, and there was no default at the time of the filing of the petition. *Travelers' Ins. Co. v. Middlekamp*, (Colo. 1619) 185 Pac. 335.

Vol. I, p. 1204, sec. 70b. [First ed., 1912 Supp., p. 839.]

II. SALES (p. 1205)

What may be sold.—Non-scheduled property.—The District Court has jurisdiction to sell a life estate of a bankrupt which he has not listed in his schedule. *Gray v. Gudger*, (C. C. A. 5th Cir. 1919) 260 Fed. 931, 171 C. C. A. 573.

Confirmation of sale.—A trustee's deed is not necessarily void because it does not conform to the order of confirmation of the court. *Olitaky v. Estersohn*, (1919) 90 N. J. Eq. 459, 108 Atl. 88.

Vol. I, p. 1212, sec. 70c. [First ed., 1912 Supp., p. 844.]

Power conferred on trustee.—In general.—"It is well established that the effect of this section is to clothe the trustee with no new or additional right in the premises over that possessed by a creditor, but simply puts him in the shoes of the latter, and subject to the same limitations and disabilities that would have beset the creditor in the prosecution of the action on his own behalf; and the rights of the parties are to be determined, not by any provision of the Bankruptcy Act, but by the applicable principles of the common law, or the laws of the state in which the right of action may arise. In other words, the Bankruptcy Act merely permits the trustee to assert the rights which the creditor could assert but for the pendency of the bankruptcy proceedings, and if, for any reason arising under the laws of the state, the action could not be maintained by the creditor, the same disability will bar the trustee." *Davis v. Willey*, (N. D. Cal. 1920) 263 Fed. 588.

Property transferred in violation of state statute.—To same effect as original annotation, see *Sabin v. Horenstein*, (C. C. A. 9th Cir. 1919) 260 Fed. 754, 171 C. C. A. 492, holding that the evidence was insufficient to show a violation of "Bulk Sales Law" of the state by the bankrupt.

Right of trustee to sue as transferable.—A trustee has no authority under this section to sell and convey a right of action, under a state statute, to set aside a fraudulent conveyance not executed within the four months period. *Neuberger v. Felis*, (Ala. 1919) 82 So. 172.

Property subject to seizure by trustee.—Property acquired by the wife of a bankrupt through business enterprises inaugurated by her with her own capital after the in-

solveny of her husband, is her own separate property and she may not be compelled to convey it to the bankrupt's trustee under this section. And the fact that the success of such enterprises was largely due to her husband's management and skill does not affect her right to the property. *Rowe v. Drohen*, (C. C. A. 2d Cir. 1919) 262 Fed. 15.

Avoidance of conveyances executed beyond four months period.—The trustee is subrogated to the rights of the creditor and may avoid conveyances which a creditor may have avoided, although such conveyance was executed and delivered beyond the four months period immediately preceding the adjudication of bankruptcy. *Neuberger v. Felis*, (Ala. 1919) 82 So. 172.

Trustee vested with rights of creditor.—Trustee cannot recover when creditor could not do so.—To same effect as original annotation, see *Cobb v. Livonia First Nat. Bank*, (N. D. Ga. 1920) 263 Fed. 1000.

Rights are those of creditor only.—"When . . . the trustee seeks to avoid a fraudulent or any avoidable transfer by the bankrupt antedating the four months, he does so, not in the right conferred as a concomitant to the due operation of the system, but exclusively in the creditor's common-law right. He is, with relation to these anterior transfers, so to speak, subrogated to that right. Such of these anterior transfers as any creditor might have avoided he may avoid. Such as no creditor could have avoided he cannot avoid." *Scales v. Holje*, (Cal. App. 1919) 183 Pac. 308.

Sufficiency of evidence.—In *French v. Cunningham*, (C. C. A. 8th Cir. 1919) 261 Fed. 909, the evidence was held sufficient to sustain the findings of the bankruptcy court that certain transfers of property by the bankrupt were made with intent to hinder, delay and defraud his creditors and should be set aside at the suit of his trustee under this section.

Vol. I, p. 1220, sec. 72. [First ed., 1912 Supp., p. 848.]

Power of court.—"Where a duty is imposed upon a referee by the bankruptcy law, and compensation is also fixed by that law for the performance of that duty, no power or authority exists in the United States District Court sitting as a court of bankruptcy to allow him any other or further compensation for the performance of the duty than that fixed by the bankruptcy law, and it must be further conceded that where the duty to be performed is a duty clearly imposed by the bankruptcy law upon the referee as such, and no specific compensation is fixed for the performance of said duty, the compensation fixed by the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544) as a whole is the only compensation which the referee can receive or that the court has power to allow." *U. S. v. Ward*, (C. C. A. 8th Cir. 1919) 257 Fed. 372, 168 C. C. A. 412.

Recovery of unauthorized compensation—
Suit by United States.—Where a referee has collected, from parties or estates in bankruptcy proceedings, moneys as compensation that under no theory of the law was he entitled to, and these fees have been collected or withheld from parties who are numerous and the individual amounts small, the United States has the legal and moral right to bring one suit in behalf of all parties injured, to recover back compensation illegally exacted

by him. *U. S. v. Ward*, (C. C. A. 8th Cir. 1919) 257 Fed. 372, 168 C. C. A. 412.

1918 Supp., p. 69, sec. 16.

What fraud prevents bar by discharge.—The kind of fraud which exempts from a discharge is positive fraud or fraud in fact, involving moral turpitude or intentional wrong. *Sanger v. Barrett*, (Tex. Civ. App. 1920) 221 S. W. 1087.

BILLS OF LADING

1918 Supp., p. 73, sec. 3.

Effect of notation on interstate bill.—Where a bill of lading contains a notation to the effect that a receipt has been issued to a third party for that bill and the notation is made before the bill is made an interstate one and it is made without the knowledge or consent of the party intended to be protected by the notation, this section does not prevent the notice from being operative. *Rainbolt v.*

Lamson, (C. C. A. 8th Cir. 1919) 259 Fed. 546, 170 C. C. A. 508.

1918 Supp., p. 78, sec. 29.

Rights of assignee.—An assignee of a "straight" bill of lading stands in all respects in the shoes of his assignor. *Quality Shingle Co. v. Old Oregon Lumber, etc., Co.*, (Wash. 1920) 187 Pac. 705; *Getchell v. Northern Pac. R. Co.*, (Wash. 1920) 187 Pac. 707.

CENSUS

Vol. II, p. 39, sec. 7. [First ed., 1909 Supp., p. 716.]

Effect of disregard of restriction as to place of examination.—Where a resident of Oregon, wholly without fault on his part, was examined in Washington, D. C., and appointed to a position in the apportioned service after certification was inadvertently made by the Civil Service Commission, the disregard of the restriction as to place of examination, contained in the first proviso, was cured and the appointee should not be removed from the service. (1917) 31 Op. Atty.-Gen. 110.

1919 Supp., p. 16, sec. 6.

Preferential appointments in executive department.—In so far as the provision of this section which grants a preference in appointments to "honorably discharged soldiers, sailors, and marines, and the widows of such," relates to the executive departments, it affects only such appointments as shall be made for service at the seat of government or in the so-called field forces of executive departments which operate away from Washington but under immediate and direct orders therefrom, and not out of some local office or branch of the government, such as a local post office, customhouse, or office of an in-

ternal-revenue collector; and as to independent governmental establishments, this provision applies to all positions in all offices under the control of such establishments wherever located. Section 1754 of the Revised Statutes (see vol. II, p. 151) gives a preference in the matter of appointment to civil offices to persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty without regard to where these offices may be located, and while this section is more restricted than section 6 of the Census Act as to the persons in whose favor a preference is given, there is no conflict in so far as these provisions apply to the same appointments and the one does not give preference over the other. As there is nothing in the Census Act to indicate a purpose to adopt and make permanent the rules and regulations previously in force relating to section 1754 of the Revised Statutes and to apply them under that Act, the matter of making proper rules and regulations is left to the administrative officials, who may adopt those now in force or promulgate new ones as they may deem proper. (1919) 31 Op. Atty.-Gen. 406.

Civil service examination to determine qualifications of preferential appointees.—The proviso of this section gives to "honor-

ably discharged soldiers, sailors, and marines, and widows of such," a preference in appointments from among those duly qualified, but this proviso does not relate to the examination of a candidate, which is a preliminary step to his qualification for a civil service appointment. The Civil Service Commission may, in the exercise of its general power of control over examinations, find that the interests of good administration require special treatment in the reopening of examinations for those who were unable to compete in the original examinations because of their absence upon military or naval service, and, if the commission should so find, such examinations may be reopened to veterans only. (1919) 31 Op. Atty.-Gen. 489, wherein it was said:

"The proviso of section 6 of the Act of March 3, 1919, to which you have referred me relates to preference in making appointments from among those duly qualified. Examination of a candidate is a preliminary step to his qualification for a civil service appointment. In my opinion the proviso of section 6 does not relate to preference to be given in the steps which must be taken to qualify for a civil service appointment.

"Section 2, par. 2, cl. 1 of the Civil Service Act of Jan. 16, 1883 [see vol. 2, p. 150], requires 'open, competitive examinations for testing the fitness of applicants for the public service.' The word 'open' implies an ex-

amination in which all may compete. I am also inclined to think that reopened examinations are subject to the same requirement, and that as a general rule they should be reopened to all upon the same terms. The introductory sentence of section 2 provides, however, that rules contained in this section shall be in force 'as nearly as the conditions of good administration will warrant.' In paragraph 3 of section 2 the commission is given power, subject to the rules made by the President, to make regulations for and have control of civil service examinations. In the exercise of the general power of control over examinations which is given to it the Civil Service Commission may find that the interests of good administration require special treatment in the reopening of examinations for those who were unable to compete in the original examinations because of their absence upon military or naval service.

"If so, I am of the opinion that such examinations may be reopened to veterans only."

1919 Supp., p. 17, sec. 9.

Necessity of complying with civil service rules in appointments.—The appointment of supervisors is not subject to the Civil Service Act (see vol. II. p. 155) and rules. (1919) 31 Op. Atty.-Gen. 467.

CHINESE EXCLUSION

Vol. II, p. 67, sec. 1. [First ed., vol. I, p. 774.]

Merchant afterwards becoming laborer.—

The rule is that where a Chinese person has been regularly admitted, for instance, as a merchant, the fact that he subsequently becomes a laborer does not of itself destroy his right to remain; such a fact is important only as it may tend to show that in reality he entered as a laborer, or for the purpose of immediately becoming a laborer, and so procured his admission through fraud and in violation of the Exclusion Acts. *Lo Hop v. U. S.*, (C. C. A. 6th Cir. 1919) 257 Fed. 489, 168 C. C. A. 493.

Vol. II, p. 104, sec. 2. [First ed., vol. I, p. 760.]

Deportation of returning merchant, based on fraud in original entry.—A Chinese person claiming the right to re-enter the United States under this act, as a returning merchant, may not be deported by executive action on the ground that the original entry

was fraudulent, but he must be deemed to be entitled to a judicial inquiry and determination of his rights in view of the provision of that act that a Chinaman who applies for admission into the United States on the ground that he was formerly engaged therein as a merchant must establish the fact by two credible witnesses other than Chinese that he was such at least one year before his departure from the United States, and had not engaged during such year in any manual labor except such as was necessary in the conduct of his business. *White v. Chin Fong*, (1920) 253 U. S. 90, 40 S. Ct. 449, 64 U. S. (L. ed.) —, affirming *C. C. A.* (9th Cir. 1919) 258 Fed. 349, 169 C. C. A. 569.

Evidence — Sufficiency.—In the following cases the evidence was held to be insufficient to warrant the exclusion of Chinese from this country: *Ex p. Chan Wy Sheung*, (N. D. Cal. 1919) 262 Fed. 221; *Ex p. Young Toy*, (N. D. Cal. 1919) 262 Fed. 227; *Ex p. Lum You*, (N. D. Cal. 1919) 262 Fed. 451.

CITIZENSHIP

Vol. II, p. 116, sec. 1993. [First ed., vol. I, p. 786.]

Child of native born Chinaman.—To same effect as 1919 Supplement annotation, see *Jeong Quey How v. White*, (C. C. A. 9th Cir. 1919) 258 Fed. 618, 170 C. C. A. 72, wherein it was said:

"The appellant was first caused to be examined under the general immigration law, and was found admissible. He was then caused to be examined under the Chinese Exclusion Act, whereupon his application to enter the United States was denied, for want of sufficient proof that he was the son of Jeong Sun, his alleged father. The examination under the Chinese Exclusion Act was

had before the immigration inspector. In *Quan Hing Sun v. White*, 254 Fed. 402, 165 C. C. A. 622, this court held that the claim of right to enter the United States, made by a Chinese person alleging himself to be a citizen of the United States, must first be determined by a special board of inquiry appointed by the Commission of Immigration, consisting of three members selected from the immigration officials under Act Feb. 20, 1907, c. 1134, 34 Stat. 898. (See vol. III, p. 636.) This right was denied the appellant, and on the authority of that decision it follows that the judgment of the court below must be reversed, and the cause remanded for further proceedings."

CIVIL SERVICE

Vol. II, p. 148, sec. 169. [First ed., vol. I, p. 826.]

R. S. sec. 1799 (see vol. VIII, p. 1073) excludes positions in the office of Public Buildings and Grounds from the operation of the general provisions of this section. *Burnap v. U. S.*, (1920) 252 U. S. 512, 40 S. Ct. 374, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 605.

Vol. II, p. 151, sec. 1754. [First ed., vol. I, p. 828.]

Construction with reference to section 6 of Census Act of 1919.—See title **CENSUS** in this volume, *ante*, p. 463.

Vol. II, p. 162, sec. 9. [First ed., vol. I, p. 815.]

Ineligibility to appointment as cured by inadvertent overlooking of fact of two mem-

bers in service.—The appointment of a person to a position in the classified service, who at the time of appointment has two members of her family in the service, one of whom entered it since her examination, is in violation of this section, and this ineligibility to appointment is not cured by the appointing officer having inadvertently overlooked the statement in the "Declaration of appointee" that a second member of the family had entered the service subsequent to the date of her application for examination. (1918) 31 Op. Atty-Gen. 324.

Effect of removal of residence on validity of appointment of third member.—Where there are already two members of the same family in the classified service, the removal of residence of another member of the family after appointment for the purpose of evading the disability imposed by this section, will not validate the appointment. (1918) 31 Op. Atty-Gen. 324.

CLAIMS

Vol. II, p. 177, sec. 190. [First ed., vol. II, p. 6.]

Officer in War Department as including officer in Army.—An officer in the United States Army is not by virtue of that fact alone an officer in the War Department within the meaning of this section which relates to the prosecution of claims against the United States. Where, however, Congress creates an office or bureau in the De-

partment and authorizes the appointment of an Army officer to the office, or in the bureau, such Army officer, after receiving his new appointment, would fall within the reach of the section, for he would then be an officer in the Department. (1919) 31 Op. Atty-Gen. 471, wherein it was said:

"By the plain terms of this statute its prohibitions embrace only persons appointed 'as an officer, clerk, or employe in any of the departments'; that is to say, any of

the executive departments. Section 159, Revised Statutes [see vol. III, p. 249]. Thus the question propounded by you is narrowed to the query whether a person appointed an officer in the Army is thereby appointed an officer in the Department of War.

"The precise question appears not to have been judicially determined, but I find that some of my predecessors, and other Federal law officers, in construing analogous statutes, have laid down principles, which, applied to the statute you ask me to interpret, compel a negative response to your question.

"Thus in 28 Op. 95, the question dealt with involved, *inter alia*, the power of the President under section 179, Revised Statutes, to authorize or direct an officer of the Navy to act as the head of the Navy Department. That section permitted such designation only in the event the Navy officer could be regarded as an officer in the Navy Department. In holding that he was not an officer in the department, Attorney General Wickersham said:

"But the person who may be authorized and directed to perform the duties of a vacant office under section 179 must be an officer in a department. It is not sufficient that he has been appointed an officer by the President, by and with the advice and consent of the Senate; he must hold an office in a department which is established by law."

Vol. II, p. 179, sec. 3477. [First ed., vol. II, p. 7.]

Suit against Treasury officials to establish liens for attorney's fees upon funds in Treasury.—The restrictions imposed by this section, upon the assignment of claims against the United States, form no obstacle to a suit against Treasury officials to establish an equitable lien for attorney's fees upon a fund in the United States Treasury appropriated by Congress for payment to a specified person, also made a party defendant, in satisfaction of a finding of the Court of Claims. *Houston v. Ormes*, (1920) 252 U. S. 469, 40 S. Ct. 369, 64 U. S. (L. ed.) —, *affirming* (1918) 47 App. Cas. (D. C.) 364.

Contract making contingent attorney's fee lien on warrant issued in payment of claims.—A provision in a contract for the prosecution of a claim against the United States which purports to make the contingent attorney's fee therein provided for a lien upon any warrant which may be issued in payment of such claim is repugnant to this section, annulling assignments of such claims, or of any part or interest therein, made in advance of the allowance of the claim. *Calhoun v. Massie*, (1920) 253 U. S. 170, 40 S. Ct. 474, 64 U. S. (L. ed.) —, *affirming* (1918) 123 Va. 673, 97 S. E. 576.

Recovery under assignment against trustee in bankruptcy.—On a petition by a

company for an order requiring a trustee in bankruptcy to turn over a certain sum due by the bankrupt to the petitioner under a contract, it appeared that the petitioner had agreed to furnish to the bankrupt certain automobile bodies and fenders to be used by it in carrying out a contract with the United States government. The bankrupt agreed that the title to the bodies and fenders should remain in the petitioner until delivery to the government, the warrants to be issued therefor to become the property of the petitioner, and to be collected, indorsed and forwarded by the bankrupt to the petitioner as its agent, any sum over the contract price of the bodies and fenders to be applied to the payment of any balance then due by the bankrupt to the petitioner, the bankrupt assigning to the petitioner all its right, title and interest in its contract with the government and agreeing to give such further assurance to the petitioner as it might deem necessary to carry out the agreement. The petition was denied on the ground that the assignment of claims contravened this section. *In re Hudford Co.*, (C. C. A. 2d Cir. 1919) 257 Fed. 722, 169 C. C. A. 10. The court said: The referee denied the petition, with costs, on the ground that the agreement of August 28, 1917, made before allowance by the government of the Hudford Company's claims and before issue of any warrants, was in contravention of section 3477, Rev. St. U. S. . . . The H. H. Babcock Company having filed a petition for review in the District Court, the District Judge held that although the agreement of August 28, 1917, was forbidden by section 3477, nevertheless it constituted a conditional sale, binding the proceeds of the warrants for the goods in the hands of the trustee, and as the property belonged to the petitioner, and not to the bankrupt, the transfer within four months of the filing of the petition in bankruptcy was not a preference under section 60b of the Bankruptcy Act. [See vol. I, p. 1026.] *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. We think the learned judge erred. The Babcock Company knew that its title to the bodies, etc., could not be reserved, and was not intended to be reserved, as against the government, and that the only security it could expect was in the claim when allowed, and in the warrants to be issued by the government to the Hudford Company. But the Supreme Court has in the most explicit and unmistakable terms pronounced all such agreements, direct or indirect, absolutely void under section 3477. *National Bank of Commerce v. Downie*, 218 U. S. 345, 31 Sup. Ct. 89, 54 L. Ed. 1965, 20 Ann. Cas. 1116. In that case the bank had advanced money to the bankrupt upon the security of sixteen claims against the United States for materials furnished by the bankrupt, none of which claims had been allowed, and for none of which warrants had been issued. The court held that the assignments were absolutely

void, and the bankrupts were still the owners of the claims, which passed not to the bank, but to their general creditors, as if no assignments had been made."

Vol. II, p. 216, sec. 3466. [First ed., vol. II, p. 45.]

Restrictions by Bankruptcy Act.—The right of the United States to claim priority under this section for debts due to it is restricted in the case of insolvents by sec. 57j of the Bankruptcy Act (1 Fed. Stat. Ann. (2d ed.) 979) to the actual pecuniary loss suffered by it. *U. S. v. Birmingham Trust, etc., Co.*, (C. C. A. 5th Cir. 1919) 258 Fed. 562, 169 C. C. A. 502

Vol. II, p. 223, sec. 3468. [First ed., vol. II, p. 49.]

State laws are superseded by this section upon a distribution of assets coming within and affected by its provisions. *American Surety Co. v. Carbon Timber Co.*, (C. C. A. 8th Cir. 1919) 263 Fed. 295.

Equal priority of surety with United States.—Where a surety on the bond of a bankrupt to the United States pays the principal of the bond to the United States, he is entitled under this section to equal priority with the United States in his claim against the bankrupt's estate, regardless of the fact that other claims of the United States against the bankrupt's estate are unpaid. *U. S. v. National Surety Co.*, (C. C. A. 8th Cir. 1919) 262 Fed. 62. Regarding the effect of this section, the court said:

"When we come to section 3468, it is claimed by counsel for the United States that it must be so construed as to be of no force or effect, except in cases where the United States has no claim whatever to be satisfied, and it appearing in the present case that the United States has a claim against the estate of the bankrupt, said section is inoperative. The ground of this contention is that the priority granted by section 3466 still attaches to the claim of the United States, even as against the claims of respondent, and that no priority exists in favor of respondent until the claim of the United States is fully paid. If this contention is sound, we must read into section 3468 a proviso at the end of the last clause but one of the section, reading as follows: 'Provided that said United States has no claim against the insolvent estate.'

"We do not think we have any authority to interpolate such a proviso. We are of the opinion that, while the general priority of the United States is undoubted, it is within the power of Congress to qualify or limit this priority, and that by the enactment of section 3468 it has been provided that in the case mentioned in said section the priority of the United States has been transferred to a surety who has paid the penalty of a bond in full, notwithstanding

the latter still has a claim against the insolvent. It is claimed by counsel for the United States that the surety in a case like the one at bar has no priority, unless he pays all of the debt or debts due from the bankrupt to the United States. The section which we are endeavoring to construe does not provide that the surety shall pay all the debt or debts due from the bankrupt estate to the United States, but only the money due upon such bond, and it is conceded that the respondent did this. It paid all the debt for which it was obligated as surety. If it should pay any more, it would be a mere volunteer, and not entitled to the right of subrogation as to the excess. It is not material, if the contention of counsel for the United States is right, whether the claim of the United States arises out of the same transaction as that of respondent or not.

"It is contended and it is no doubt the law that the priority of the sovereign exists in full force and vigor, unless qualified by express words. But we have express words in section 3468. We think that sections 3466 and 3468 should be construed together, so as to give both force and effect; the United States retaining its priority as to the balance of its claims against the bankrupt estate, and the respondent standing on a level with them as to its claim. No case has been cited, nor have we found one, deciding the question involved. The cases cited simply establish the proposition that, where the title of the United States and the citizen concur, the title of the United States, except so far as the legislature has thought fit to interfere, shall be preferred, and that where the principal in any bond given to the United States is insolvent, and any surety on the bond pays to the United States the money due upon such bond, such surety shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent as is secured to the United States. These rights are all given by the sections quoted and citation of other authority is unnecessary. Respondent's rights must be determined by section 3468. What its rights would be under the equitable doctrine of subrogation is not involved. The unreasonableness of the contention of counsel of the United States is made to appear when we consider a case where different bonds have been given by an insolvent to the United States with different sureties. One surety pays the full penalty of the bond on which he is liable, but he can have no priority until he has paid all the other bonds on which he is not liable."

Vol. II, p. 229, sec. 1. [First ed., vol. II, p. 91.]

I. ACT OF JAN. 11, 1915 (p. 230)

Reinstatement of claim.—A claim for Indian depredations which was dismissed by the Court of Claims on the ground that the

band committing the depredations was not in amity with the United States was not reinstated by the Act of January 11, 1915, amending the Act of March 3, 1891, so that in all claims for property of citizens or inhabitants of the United States taken or destroyed by Indians belonging to any tribe in amity with and subject to the jurisdiction of the United States the alienage of the claimant will not be a defense, with a proviso that claims dismissed for want of proof of citizenship or alienage shall be reinstated. *Rex v. U. S.*, (1920) 251 U. S. 392, 40 S. Ct. 181, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 320, wherein the court said: "The claimant contends that the amendment had two purposes—not merely to give inhabitants the same rights as citizens, but also to admit claims for damage done by hostile bands from a tribe that maintained its amity, subject to a proviso that suit had been brought upon them theretofore in the Court of Claims. It is said that claims of that nature that still were pending in the court have been awarded judgment under the new jurisdiction. Another proviso in the Act is that claims that have been dismissed by the court for want of proof of citizenship or alienage shall be reinstated, and the petition prays that the former claim be consolidated with this suit, and that judgment be awarded upon the evidence filed in the former case. It is pointed out as an anomaly that the case of a neighbor of the intestate

who suffered damage from the same band on the same day was reinstated and passed to judgment, his claim having been dismissed at an earlier date because he was not a citizen at the time. But we are of opinion that the judgment of the Court of Claims was plainly right. The emphasis and primary intent, at least, of the Act of 1915 was to remove the defense of alienage. When it goes on by an express proviso to reinstate claims dismissed upon that ground and says nothing as to the other class it is impossible to extend the words. According to the claimant's necessary argument Congress had claims for damage by hostile bands before its eyes. On the face of the act it had before them also the matter of reinstatement. Yet it did not purport to reinstate claims of the present class. According to the claimant's account there was something for the act to operate on in the way of damage by hostile bands and the words cannot be carried further than they go."

Limitation of action.—Considered as a new claim, a suit brought since the amendment of January 11, 1915, to the Act of March 3, 1891, to recover for depredations committed by a hostile band from an Indian tribe in amity with the United States, is barred by the three years limitation in the original act. *Rex v. U. S.*, (1920) 251 U. S. 392, 40 S. Ct. 181, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 320.

COLLISIONS

Vol. II, p. 389, art. 16. [First ed., vol. II, p. 160.]

What constitutes moderate speed.—To same effect as first paragraph of original annotation, see *The Fjell*, (E. D. Va. 1919) 257 Fed. 478.

Rule absolute—Duty to stop.—To same effect as original annotation, see *The Suffolk*, (C. C. A. 2d Cir. 1919) 258 Fed. 219, 169 C. C. A. 287, wherein it was held that two vessels were mutually liable for a collision in a fog, one for proceeding at an excessive speed and the other for failure to stop on hearing the first vessel's signal ahead on her bow.

Excessive speed.—In *The Brabandier*, (E. D. Va. 1919) 260 Fed. 858, it was held that a steamer was solely at fault for a collision on a foggy night where she held to her course and failed to reduce her speed after she heard the fog signals of the vessel with which she collided.

Vol. II, p. 393, art. 18. [First ed., vol. II, p. 161.]

Rule applied.—In *The William P. Palmer*, (E. D. Va. 1919) 261 Fed. 925, it was held

that where two steam vessels met end on, the one failing to alter its course to the starboard was solely at fault for a collision.

Vol. II, p. 393, art. 20. [First ed., vol. II, p. 162.]

Burden of avoiding collision.—To same effect as original annotation, see *The Shawmut*, (E. D. Pa. 1919) 261 Fed. 616.

Rule applied.—In *The Shawmut*, (E. D. Pa. 1919) 261 Fed. 616, it appeared that the steamer and schooner sighted each other when they were nearly three miles apart and approaching on converging courses. It was held that the steamer was solely at fault for not keeping out of the schooner's way in accordance with the provisions of this article.

In *The Stimson*, (E. D. Va. 1919) 257 Fed. 702, it appeared that a steamship collided with a schooner at night. The lights of the schooner were set and burning and the steamship admitted having observed them about two and one-half minutes before the collision but claimed that the collision was the result of inevitable accident, in that, when it was too late to avoid the consequences thereof, the connecting shaft of the steering gear broke

and parted, through a latent defect, causing the injury. It was held that the steamship, being the burdened vessel, was bound to keep out of the schooner's way and was at fault for not doing so, and that she could not avail herself of the defense of inevitable accident since there was no excuse for her failure to see the schooner's lights earlier and take precautions to avoid the collision.

Burden of proof.—This article imposes upon the steamer the burden of showing why the collision occurred if the steamer observed the rule laid down herein. *The Shawmut*, (E. D. Pa. 1919) 261 Fed. 616.

Vol. II, p. 396, art. 24. [First ed., vol. II, p. 162.]

Violation of rule.—In *The Northland*, (C. C. A. 4th Cir. 1919) 262 Fed. 245, it was held that a steamship overtaking a schooner at night was solely at fault for collision with the latter, where it appeared that the schooner had all her lights burning and that the steamship did not maintain a proper lookout so as to discover the schooner in time to keep out of the way.

Vol. II, p. 397, art. 27. [First ed., vol. II, p. 163.]

Inevitable accident.—A steamship may not avoid liability for a collision in overtaking a schooner at night on the ground of inevitable accident, where it appears that, although her steering gear became disabled about the time she discovered the lights of the schooner a half mile distant, she had not maintained a proper lookout prior to that time which would have enabled her to observe the schooner when it was two miles distant. *The Northland*, (C. C. A. 4th Cir. 1919) 262 Fed. 245. The court said:

"The evidence as to when and how the steering gear was broken is far from satisfactory. The schooner was the favored vessel. Therefore it was the duty of the steamer to exercise such care as was necessary to avoid a collision with her. Not having by proper lookout observed the schooner when at least two miles away, the speed the steamer was making resulted in its coming in such close proximity to the schooner that it was well-nigh impossible to avoid hitting her, which places the steamer in the wrong. Therefore, if the steering gear really broke at the time as contended by appellant, it did not present a case of inevitable accident. There is evidence tending to show that they did not discover the break until after the accident, and in this connection it is significant that they displayed no signals to indicate this trouble for more than two hours after the collision."

Vol. II, p. 407, rule 15. [First ed., vol. II, p. 171.]

Rule applied.—In *The Martin Mullen*, (C. C. A. 6th Cir. 1919) 260 Fed. 916, two steam-

ers collided in a fog on Lake Superior. Both vessels were held at fault for a violation of this rule, one for traveling at a speed of eleven miles an hour in the fog and for not maintaining a sufficient lookout, and the other for traveling at a speed of eight miles an hour.

In *The J. J. Hill*, (C. C. A. 7th Cir. 1919) 260 Fed. 655, 171 C. C. A. 419, a libel was dismissed because of the fault of the libellant's vessel in proceeding at approximately her full speed after the signals of another vessel apparently not more than four points from right ahead.

Vol. II, p. 415, sec. 1. [Definitions.] [First ed., vol. II, p. 174.]

"Steam vessel."—A vessel which at the time of a collision is being propelled partly by sail and partly by steam is a steam vessel within the meaning of this section. *The Alice M. Guthrie*, (E. D. Va. 1919) 257 Fed. 472.

Vol. II, p. 416, art. 2 (a). [First ed., vol. II, p. 174.]

Absence of light contributory.—Since a vessel propelled in part by sail and in part by machinery is a steam vessel within section 1 of this act, it is required by this article to exhibit a white masthead light, as well as red and green running lights, and where it fails to exhibit the white light it will be held liable for a collision occasioned by such failure. *The Alice M. Guthrie*, (E. D. Va. 1919) 257 Fed. 472.

Vol. II, p. 423, art. 18, rule 1. [First ed., vol. II, p. 178.]

Mutual fault.—In *Border Line Transp. Co. v. Canadian Pac. R. Co.*, (W. D. Wash. 1919) 262 Fed. 989, it was held that both vessels were at fault in a collision, the one for answering a signal and failing to maneuver in accordance therewith, and the other for failure to reverse its engine when the collision appeared to be inevitable.

The two-blast signal provided for by this article should not be sounded unless both side-lights of the approaching vessel are visible. *Com. v. Seaboard Transp. Co.*, (D. C. Mass. 1919) 258 Fed. 707.

Tug at rest—other tug passing.—In *The John D. Dailey*, (E. D. N. Y. 1919) 260 Fed. 241, it appeared that a tug was at rest and engaged in lashing her tow alongside, when another tug approaching blew a one-whistle signal and shortly thereafter collided with her. It was held that the moving tug was solely at fault, since she had initiated the navigation by her signal, and was bound to keep out of the way of the tug and tow at rest, and that, since the moving tug had sufficient room to pass between the shore and the tug at rest, the latter was under no duty to do anything except remain stationary until the former had passed by.

Tugs with tows passing—effect of tide.—In *The Aurora*. (C. C. A. 2d Cir. 1919) 258 Fed. 439, 169 C. C. A. 455, it was held that a tug with a long tow was solely at fault for a collision with the tow of another tug while passing it, where it appeared that the collision was due to the effect of the tide in swinging the end of the first tug's tow against that of the second tug, and because the first tug did not have sufficient power to keep her tow in line.

Vol. II, p. 428, art. 19. [First ed., vol. II, p. 180.]

Both vessels at fault.—In *The Comport*. (C. C. A. 2d Cir. 1919) 260 Fed. 151, 171 C. C. A. 187, it appeared that the steam lighter *Bettie Lee*, coming up East river, bound to Manhattan, and bearing diagonally across the river to a point above the Brooklyn bridge, collided with the steam lighter *Comport*, which was crossing the river diagonally from the foot of Wall street, Manhattan, to Brooklyn. The vessels were concededly on crossing courses, the *Comport*, having the *Lee* on her starboard side, being bound to keep out of the way, and the *Lee* being bound to hold her course and speed. The *Comport*, when about 200 feet distant from the *Lee*, blew one whistle and ported, so as to head more down the stream. The master of the *Lee* blew an alarm and reversed full speed astern, and the *Comport* did likewise, but the vessels collided. It was held that both lighters were at fault, the *Lee* for failure to maintain a lookout and for improper navigation when the collision was imminent, and the *Comport* for failure to maintain a lookout and for not keeping out of the *Lee's* way as required by this article.

Vol. II, p. 430, art. 20. [First ed., vol. II, p. 180.]

Rule applied.—In *The Manaway*, (E. D. Va. 1919) 257 Fed. 476, it was held that a steamship was at fault in colliding with a schooner. Regarding this article, the court said:

"The steamship was the burd-ned vessel, and the one against whom presumptions of fault, if any, are to be solved. She was charged, not only with avoiding collision, but the risk thereof, with this sailing vessel (article 20, Inland Rules of Navigation), and it was incumbent on her not to take chances. The danger of collision was sufficiently present when the schooner, whose course was unascertained, was observed 150 yards away, to admonish the steamship to take no chances. Observing the loom of the schooner within that close proximity on the steamship's starboard, her navigator should have immediately stopped and reversed, giving the appropriate signals to that end, and to have first starboarded, without slackening speed, and then hard a-starboarded before stopping and reversing, was a manifest and gross fault of

navigation, sufficient in itself to account for, and in the judgment of the court did bring about, the collision."

Vol. II, p. 433, art. 22. [First ed., vol. II, p. 180.]

Rule applied.—In *The North America*, (C. C. A. 2d Cir. 1919) 258 Fed. 923, 169 C. C. A. 643, a tug with a barge in tow was held, on the evidence, solely in fault for a collision between her tow and that of another tug in New York harbor at night, on the ground that she held her course directly toward the other tug until they were so close that there was danger of collision, and then attempted to cross its bow with her tow.

Vol. II, p. 434, art. 23. [First ed., vol. II, p. 180.]

Nature of duty imposed.—"The rules of navigation for preventing collisions at sea (article 23) impose on steamers, in the presence of impending danger, the duty to slacken speed, or stop or reverse, if necessary, and mean that such precaution shall be timely taken; and to delay action in that respect, or fail promptly and seasonably to take the necessary steps to avoid risk of collision, must be at the peril of the steamship. *Nelson v. The Leland*, 22 How. 48, 55, 16 L. Ed. 269; *The New York*, 175 U. S. 187, 201, 22 Sup. Ct. 67, 44 L. Ed. 126; *The State of Alabama* (D. C.) 17 Fed. 847, 853, and cases cited." *The Manaway*, (E. D. Va. 1919) 257 Fed. 476.

Vol. II, p. 434, art. 24. [First ed., vol. II, p. 180.]

"Finally past and clear."—Where a ferryboat, proceeding down Hudson river, overtook and passed a steam lighter, a half or three-quarters of a mile from the place where the boats later collided, it was held she was "finally past and clear" of the lighter at the time of the collision, and hence was not the overtaking vessel within the meaning of this section. *The New York Central No. 28*, (C. C. A. 2d Cir. 1919) 258 Fed. 553, 169 C. C. A. 493.

Attempting to pass between vessels.—In *The Thomas J. O'Brien*, (C. C. A. 2d Cir. 1919) 257 Fed. 728, 169 C. C. A. 16, a tug with tow bound into New York harbor entered a channel at the same time as a tug with tow going in the opposite direction. As the two tugs were passing each other, a third tug with tow, also outward bound, attempted to pass between them and collided with the first tug. It was held, under the evidence, that the first tug was at fault for not giving the other tugs more room in passing, and that the third tug was at fault in attempting to pass between the first and second tugs.

Overtaken vessel changing its course.—An overtaken vessel is at fault under this article for changing its course so as to bring it in

the path of the overtaking vessel, when there is no occasion for its doing so. *The New York Central* No. 28, (C. C. A. 2d Cir. 1919) 258 Fed. 553, 169 C. C. A. 493.

Overtaking vessel drifting backward on tide.—In *The Winfield S. Cahill*, (C. C. A. 2d Cir. 1919) 258 Fed. 318, 169 C. C. A. 334, it appeared that a tug with a number of barges in tow overtook a steamship being towed by several barges off Governor's Island in New York harbor. The tug had been proceeding down North river and attempted to turn into East river, but was swept downstream by the tide and one of the barges collided with the steamship. It was held that the tug, being the overtaking vessel, was solely at fault for failing to keep out of the steamship's way.

Vol. II, p. 436, art. 25. [First ed., vol. II, p. 180.]

Rule not inflexible.—To same effect as original annotation, see *The C. Gallagher*, (C. C. A. 2d Cir. 1919) 262 Fed. 97, wherein the court said regarding the application of this article: "Article 25 requires steamers to keep the starboard side of a narrow channel 'when it is safe and practicable.' The testimony is quite convincing that hawser tows west bound, in approaching North Brothers Island on a flood tide, navigate on the port side of the channel in order to give east bound hawser tows room to round North Brothers Island and pass the railroad piers on the north side in safety. The flood tide in the main channel sets on Oak Bluff and the New York side opposite the northern end of North Brothers Island, and is then deflected slightly toward Riker's Island; this set being somewhat counteracted by the direction of the weaker tide coming through the shallow channel between North Brothers Island and South Brothers Island. We regard this as a reasonable practice, justifying a departure from the general rule described in article 25 and have recognized similar practices at other points. *The Three Brothers*, 170 Fed. 48, 95 C. C. A. 322; *The Transfer* No. 21, 248 Fed. 459, 160 C. C. A. 469.

"The proctors for the Spartan cite two decisions of the late Judge Adams in the District Court that at this particular point steamers must conform to article 25. *The Transfer* No. 10 (D. C.) 138 Fed. 221; *The Abram F. Skidmore* (D. C.) 160 Fed. 265. In those cases there was no evidence of the practice proved in this case, and the decision of the same judge arising out of a collision at a bend in the Harlem river in the later case of *The Three Brothers* (D. C.) 162 Fed. 388, was reversed (170 Fed. 48, 95 C. C. A. 322), on the ground that local conditions justified a departure from article 25."

Burden of proof arising from violation.—A vessel which violates this article has the burden of showing that such violation was not one of the causes of the collision. *Com.*

v. Seaboard Transp. Co., (D. C. Mass. 1919) 258 Fed. 707. Regarding this question, the court said:

"The presumption of fault from a violation of statute is not conclusive; the burden of proof which it throws upon the offending vessel, though heavy, may be met. A vessel may be so established in her course on the wrong side of a narrow channel, and may so clearly and seasonably indicate to an approaching vessel her intention to stay there, that, if the other vessel have ample opportunity to size up the situation and avoid her, and does not do so, but brings about a collision through her own negligence, the statutory violation is regarded as a mere condition, and the accident as due wholly to the negligence of the vessel which failed to avoid it when she had a clear chance to do so by the exercise of reasonable care. *The Clara & Reliance*, 55 Fed. 1021, 5 C. C. A. 390.

"Such severe requirements for exculpation can, however, but seldom be met. If the approaching vessel acted not unreasonably on the assumption that the other vessel would give way and maneuvered accordingly, or was confused and embarrassed by the other vessel holding to its wrongful course, exculpation is not made out."

Passing vessel at fault.—In *The Van*, (S. D. Fla. 1919) 258 Fed. 268, it appeared that a steamship, while under way in the narrow channel of the Miami river, cast off a line from the bow of a motor barge alongside, by which such barge was fastened to the steamer. As a result thereof the steamer struck the stern of the barge, and the force of the contact caused the bow of the barge to collide with a yacht lying at a nearby dock. It was held that the steamship was at fault for making such a maneuver in a narrow channel.

Vineyard Sound, in the vicinity of West Chop lighthouse, is a "narrow channel" within the meaning of this article. *Com. v. Seaboard Transp. Co.*, (D. C. Mass. 1919) 258 Fed. 707.

Vol. II, p. 440, art. 27. [First ed., vol. II, p. 181.]

Special circumstances.—In *The Dorset*, (C. C. A. 4th Cir. 1919) 260 Fed. 32, 171 C. C. A. 68, a steamer, while backing from her slip in charge of a tug, collided with a barge moving down the channel of the harbor in tow of another tug. It was held that the situation was one of special circumstances under this article, that the steamer was at fault in not giving the proper signals and in not reversing her engines so as to avoid the collision, and that the second tug was at fault for continuing her course and speed down the channel and failing to take reasonable precautions after the danger of collision became apparent.

Steamer leaving slip.—This rule applies to a steamer leaving its slip preparatory to getting on its definite course. *The Edouard*

Alfred, (E. D. N. Y. 1919) 261 Fed. 680, wherein it was held that both vessels were at fault for failure to avoid danger, where greater care would have prevented the collision.

Vol. II, p. 442, art. 29. [First ed., vol. II, p. 181.]

Duty to have lookout.—In the following cases vessels were held to be in fault for a collision because of failure to maintain a proper and efficient lookout: *The O'Brien*, (C. C. A. 2d Cir. 1919) 258 Fed. 614, 170 C. C. A. 68; *The M. J. Rudolph*, (E. D. N. Y. 1920) 262 Fed. 780.

Evidence to show negligent navigation.—See *The Alice M. Guthrie*, (E. D. Va. 1919) 257 Fed. 472.

Vol. II, p. 452, sec. 4233, rule six.
[First ed., vol. II, p. 186.]

Presumption arising from breach of statutory duty.—On a libel against a vessel to recover damages caused by her colliding with and sinking another vessel, where it appears from the evidence that she did not have her stack lights burning in accordance with the provisions of this rule, she has the burden of proving that this breach of statutory duty could not have been the cause of the collision, and if she fails to sustain such burden, the presumption, arising from the breach, that the collision was due to this fault, remains. *The Duquesne*, (C. C. A. 3d Cir. 1920) 262 Fed. 1; *The Duquesne*, (C. C. A. 3d Cir. 1920) 262 Fed. 5.

CONGRESS

Vol. II, p. 533, sec. 105. [First ed., vol. II, p. 239.]

In an action against the clerk of the House of Representatives to recover damages because of an alleged failure of defendant, as such clerk, to print testimony in an election contest in which the plaintiff was the contestant, a demurrer to the declaration was

properly sustained where the latter did not show, by a statement of facts, compliance with every substantial requirement of this section and of R. S. sec. 127, as amended, 2 Fed. Stat. Ann. (2d ed.) 538, but merely averred compliance in the form of a conclusion of law. *Prioleau v. Trimble*, (App. Cas. D. C. 1919) 261 Fed. 454.

COPYRIGHT

Vol. II, p. 544, sec. 1. [First ed., 1909 Supp., p. 81.]

Abandonment.—The public performance of a dramatic or musical composition is not an abandonment of the composition to the public. Only a publication of the manuscript will amount to an abandonment of the rights of the author and a transfer of them to the public domain. Hence, it is not such a publication to give a song to a limited number of vaudeville artists to sing prior to the date of its copyright, where there is no evidence or probability that any of the copies were sold, or that they were given out for any other purpose. *McCarthy v. White*, (S. D. N. Y. 1919) 259 Fed. 364.

Vol. II, p. 548, sec. 1 (e). [First ed., 1909 Supp., p. 81.]

Rights of foreigners under subdivision.—Regarding the rights of foreigners under this subdivision, *Manton J.*, said in *Ricordi v. Columbia Graphophone Co.*, (S. D. N. Y. 1919) 258 Fed. 72:

"I think it is clear that Congress intended

that domiciled foreigners are entitled to the benefit of the provisions of subdivision (e) section 1, of the act, and that it intended only to exclude subjects or citizens of countries denying similar protection to our citizens. In other words, it intended that domiciled foreigners should receive the same protection and have the same rights as American citizens. An infringement is admitted if it be held that the copyright is good and should be protected. The correspondence indicates clearly that the defendant took the position that the copyright was void and afforded no protection to plaintiff. As indicated above, I think the position assumed by the defendant was erroneous, and a decree is granted for the plaintiff."

Effect of joint authorship by citizen and alien.—A song which is the result of joint authorship by a citizen of the United States and an alien domiciled in this country, is entitled to be copyrighted under this section. In such case it should be treated as if the United States citizen was the sole author thereof. *Ricordi v. Columbia Graphophone Co.*, (S. D. N. Y. 1919) 258 Fed. 72.

Effect of giving notice of use pending ac-

tion.—An appeal by the defendant in an infringement suit will be dismissed where after the decree the defendant, without the knowledge of his counsel, gave the notice of use provided by this section. *Ricordi v. Columbia Graphophone Co.*, (C. C. A. 2d Cir. 1920) 283 Fed. 354.

Vol. II, p. 553, sec. 5. [First ed., 1909 Supp., p. 83.]

What may be copyrighted.—A *trade catalogue*.—To same effect as original annotation, see *Wireback v. Campbell*, (D. C. Md. 1919) 261 Fed. 391.

Vol. II, p. 562, sec. 8. [First ed., 1909 Supp., p. 83.]

"Domiciled within the United States."—In *Ricordi v. Columbia Graphophone Co.*, (S. D. N. Y. 1919) 258 Fed. 72, it was held that a joint author of a song, who was a Canadian by birth but who came to New York with the intention of making that city his home, brought all his personal belongings with him, opened a bank account there, joined various clubs, and engaged in activities consistent with his intention of making that city his permanent home, was "domiciled within the United States" within the meaning of this section.

Vol. II, p. 609, sec. 42. [First ed., 1909 Supp., p. 91.]

Grant of right to produce copyrighted play as including moving picture rights.—The right to represent a copyrighted play in moving pictures cannot be deemed to have been embraced in a grant by a playwright of the sole and exclusive license and liberty to produce, perform, and represent the play within the territorial limits stated, subject to the other terms and conditions of the con-

tract, under which the play is to be continued for seventy-five performances for each ensuing theatrical season for five years, the royalties provided for are adapted only to regular stage presentation, and the play is to be presented in first-class theaters with a competent company, and with a designated actress in the title role, there being stipulations against alterations, eliminations, or additions, and that the rehearsals and production of the play shall be under the direction of the author, and a further provision that the play may be released for stock if it fails in New York city and on the road, or in case the net profits fall below a stipulated amount. *Manners v. Morosco*, (1920) 252 U. S. 317, 40 S. Ct. 335, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 2d Cir. 1919) 258 Fed. 557, 169 C. C. A. 497.

Implied covenants in lease of right to use copyright.—There is implied a negative covenant on the part of the lessor of the right to use a copyright not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensee's estate. *Manners v. Morosco*, (1920) 252 U. S. 317, 40 S. Ct. 335, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 2d Cir. 1919) 258 Fed. 557, 169 C. C. A. 497.

Injunctive relief to prevent copyrighted play from being presented in moving pictures, how conditioned.—Injunctive relief to the owner of the copyright in a play against the unauthorized representation of such play by his licensee in moving pictures will only be granted upon condition that the former shall also abstain from presenting or authorizing the representation of the play in moving pictures during the life of the license agreement within the territorial limits therein stated. *Manners v. Morosco*, (1920) 252 U. S. 317, 40 S. Ct. 335, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 2d Cir. 1919) 258 Fed. 557, 169 C. C. A. 497, (S. D. N. Y. 1918) 254 Fed. 737.

CORPORATIONS

1918 Supp., p. 108, sec. 7.

Limitation on account of advances.—The ten per cent limitation imposed by section 16 applies to advances made to banks under this section. (1918) 31 Op. Atty-Gen. 332.

1918 Supp., p. 110, sec. 10.

Advances to banks.—The ten per cent limitation imposed by this section applies to advances made to banks under the authority of section 7. (1918) 31 Op. Atty-Gen. 332.

1918 Supp., p. 114, sec. 200.

Consent of committee as essential to public contract.—The powers of the capital issues committee are advisory only. Accordingly, mandamus to compel the execution of a municipal contract will not be withheld because the consent of the committee to the necessary bond issue has not been obtained. *Hayes v. Handley*, (Cal. 1920) 187 Pac. 952.

COSTS

Vol. II, p. 628, sec. 824. [First ed., vol. II, p. 278.]

Docket fee on remand of removed causes to state court.—An order remanding a cause which has been removed from a state court is a final disposition thereof in the federal court, and may be regarded as a judgment rendered without a jury, for which a docket fee of \$10 may be allowed. *Jones v. Delta Land, etc., Co.*, (D. C. Nev. 1918) 258 Fed. 761.

Vol. II, p. 641, sec. 974. [First ed., vol. II, p. 289.]

Violation of laws of Alaska.—A defendant who is convicted of a violation of the Session Laws of Alaska 1913, pp. 120, 121, in that he willfully permitted his wife to practice prostitution, may be subjected to the payment of the costs of the prosecution under this section. *Johnson v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 783, 171 C. C. A. 509, wherein the court said:

"The remaining point on behalf of the plaintiff in error relates to the inclusion in the judgment against the defendant of the costs of the prosecution. The record shows that the bail bond executed by and on behalf of the defendant provided for the payment of such costs in the event of the affirmance of the judgment. Section 974 of the Revised Statutes is as follows:

"When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution."

"By section 3 of the Act of Congress of August 24, 1912 (37 Stat. 512, c. 387), it is provided: 'That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory, [Alaska] as elsewhere in the United States.'

"And the amendatory Act of August 29, 1914 (38 Stat. 710, c. 292), declares that: 'In the prosecuting of all crimes denounced by territorial laws the costs shall be paid the same as is now or may hereafter be provided by Act of Congress providing for the prosecution of criminal offenses in said territory.'

"This court held in the case of *Nagle v. United States*, 191 Fed. 141, 111 C. C. A. 621, that all laws of Congress of general application, not locally inapplicable, are in effect in Alaska. That being so, we think

the decisions in the cases of *American Surety Co. v. United States*, 239 Fed. 680, 152 C. C. A. 514, *Fidelity & Deposit Co. of Maryland v. Expanded Metal Co., et al.*, 183 Fed. 568, 106 C. C. A. 114, and *Hardesty v. United States*, 184 Fed. 269, 106 C. C. A. 411, apply and are a sufficient answer to the point under consideration."

Vol. II, p. 644, sec. 983. [First ed., vol. II, p. 291.]

Compensation of auditor and stenographer in reference as taxable costs in favor of prevailing party.—While the compensation of auditor and stenographer, in a reference of an action at law involving complicated issues of fact to such auditor to simplify and clarify the issues and make tentative findings of fact, may be taxed as costs, in the absence of any statute, federal or state, or rule of court to the contrary, such costs must, in view of this section, be taxed to the prevailing party, and may not be taxed in whole or in part against the prevailing party, in the discretion of the trial court. *Ex p. Peterson*, (1920) 253 U. S. 300, 40 S. Ct. 543, 64 U. S. (L. ed.) —.

Vol. II, p. 647, sec. 1. [First ed., vol. II, p. 294.]

Appellate proceedings in forma pauperis.—In *Crane v. U. S.*, (1919), 40 S. Ct. 117, 64 U. S. (L. ed.) — (opinion below, *see* (C. C. A. 9th Cir. 1919) 259 Fed. 480, 170 C. C. A. 456) the court denied a motion to direct the clerk of the Circuit Court of Appeals to certify and forward the original transcript of record in the cause and a motion for leave to prosecute the cause in forma pauperis.

In *McKnight v. U. S.*, (1920) 251 U. S. 543, 40 S. Ct. 180, 64 U. S. (L. ed.) —, the per curiam is as follows: "The prayer to be allowed to proceed in forma pauperis for the purpose of an application for certiorari to review the judgment below, as well as for the purpose of an appeal asked to review a refusal to release on habeas corpus, made to the Chief Justice and by him submitted to the court for its action, is hereby denied."

In *Kisin v. California*, (1920) 251 U. S. 547, 40 S. Ct. 480, 64 U. S. (L. ed.) —, a motion for leave to proceed in forma pauperis in the case and that the clerk of the federal Supreme Court be directed to file the petition for a writ of certiorari was denied.

In *Holbert v. Patrick*, (1920), 40 S. Ct. 481, 64 U. S. (L. ed.) —, a motion for leave to proceed in forma pauperis was denied.

CRIMINAL LAW

Vol. II, p. 654, sec. 1014. [First ed., vol. II, p. 321.]

Rights and liabilities of sureties.—The surety on a forfeited bail bond cannot charge a fund held in trust as security against liability on such bond with his expenses in defending the trust and establishing its priority over the claims of the United States, nor with the poundage fees of a clerk of court having possession of such fund. *Leary v. U. S.*, (1920) 253 U. S. 94, 40 S. Ct. 446, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 4th Cir. 1919) 257 Fed. 246, 168 C. C. A. 330.

Validity of indictment as question for committing magistrate.—Any reasonable doubt as to the validity of an indictment charging the commission of an offense against the United States is to be resolved, not by the committing magistrate in another federal district, but by the court which found the indictment after the accused had been removed to that district for trial. *Stallings v. Splain*, (1920) 253 U. S. 339, 40 S. Ct. 339, 64 U. S. (L. ed.) —, *affirming* 49 App. Cas. (D. C.) —.

Arrest without warrant in another district.—A person charged with a felony by an indictment found in one federal district, who has fled to another district, may be arrested without warrant by a peace officer in the latter district, and be detained a reasonable time to await the institution of proceedings for his removal to the district where the indictment was found. The arrest being lawful without warrant is none the less so because the peace officer was possessed of a bench warrant issued in the federal district where the indictment was found. *Stallings v. Splain*, (1920) 253 U. S. 339, 40 S. Ct. 339, 64 U. S. (L. ed.) —, *affirming* 49 App. Cas. (D. C.) —.

Pendency of habeas corpus proceedings as affecting jurisdiction of commissioner to entertain application for arrest of accused for same offense.—The pendency of a habeas corpus proceeding raising the question of the legality of an arrest and detention to await proceedings for the removal to another federal district of a person there charged with an offense against the United States did not deprive a United States commissioner of jurisdiction to entertain a subsequent application for the arrest of the accused on an affidavit of complaint setting forth the same offenses charged in the indictment. *Stallings v. Splain*, (1920) 253 U. S. 339, 40 S. Ct. 339, 64 U. S. (L. ed.) —, *affirming* 49 App. Cas. (D. C.) —.

Vol. II, p. 675, sec. 1021. [First ed., vol. II, p. 336.]

Power of grand jury to investigate.—The power and duty of the grand jury to investi-

gate is original and complete, susceptible of exercise upon its own motion, and upon such knowledge as it may derive from any source which it may deem proper, and is not, therefore, dependent for its exertion upon the approval or disapproval of the court, and such power is continuous, and is therefore not exhausted or limited by adverse action taken by a grand jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury. *U. S. v. Thompson*, (1920) 251 U. S. 407, 40 S. Ct. 289, 64 U. S. (L. ed.) —.

Vol. II, p. 675, sec. 1022. [First ed., vol. I, p. 802.]

Violation of provision of Selective Service Act relating to keeping of house of ill fame.—In *Blanc v. U. S.*, (C. C. A. 9th Cir. 1919) 258 Fed. 921, 169 C. C. A. 641, it was held in a prosecution for keeping a house of ill fame in violation of section 13 of the Selective Service Act (9 Fed. Stat. Ann. (2d. ed.) 1163), that as the imprisonment for violation of the section could not be more than one year in the penitentiary, the crime was not infamous and the prosecution could be begun by information of the district attorney. See to the same effect *De Four v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 596, 171 C. C. A. 360; *Pollard v. U. S.*, (C. C. A. 5th Cir. 1919) 261 Fed. 336.

Power of district attorney to present information without previous approval of court.—The United States district attorney, in virtue of his official duty, and to the extent that criminal charges are susceptible of being preferred by information, has the power to present such informations without the previous approval of the court, and his duty to direct the attention of the grand jury to crimes which he thinks have been committed is co-terminous with the authority of the grand jury to entertain such charges. *U. S. v. Thompson*, (1920) 251 U. S. 407, 40 S. Ct. 289, 64 U. S. (L. ed.) —.

A federal district attorney may, without first obtaining leave of court, present to one grand jury charges which a previous grand jury has ignored. *U. S. v. Thompson*, (1920) 251 U. S. 407, 40 S. Ct. 289, 64 U. S. (L. ed.) —.

Vol. II, p. 676, sec. 1024. [First ed., vol. II, p. 337.]

Constitutionality.—This section is constitutional. *Showalter v. U. S.*, (C. C. A. 4th Cir. 1919) 260 Fed. 719, 171 C. C. A. 457, wherein the court said:

"He [the defendant] asserts by the first that the Constitution of the United States, properly construed, requires that each indictment shall be passed on by a separate jury, and that therefore the consolidation

statute is itself invalid. If a statement of the contention is not its own sufficient answer, it would still be true that there must come a time when a question must be treated as finally settled. In view of the hundreds of cases in which like consolidations have been made and sustained by all courts, including the highest, it came many years ago. There is nothing to show that in making the order in this case the court below abused its discretion."

Offenses held to have been properly joined.—In *Balbas v. U. S.*, (C. C. A. 1st Cir. 1919) 257 Fed. 17, 168 C. C. A. 229, it was held that counts charging various violations of section 3 of the Espionage Act (1918 Supp. Fed. Stat. Ann. 122) through the publication of editorials in a newspaper, could be properly joined in one indictment under this section.

Various offenses arising out of a conspiracy in violation of the provisions of the Espionage Act may be joined in separate counts in the same indictment under this section. *Reeder v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 36.

Offenses against the Espionage Act (1918 Supp. Fed. Stat. Ann. 120), the Trading with the Enemy Act (1918 Supp. Fed. Stat. Ann. 846) and section 211 of the Penal Laws (7 Fed. Stat. Ann. (2d ed.) 788), all arising from the same transaction, wherein the defendants conspired in the writing, publication and depositing in the mails of certain articles, may all be joined in the same indictment under the provisions of this section. *Magon v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 811, 171 C. C. A. 537.

Charges that the defendants converted to their own use, in violation of section 36 of the Penal Laws (7 Fed. Stat. Ann. (2d ed.) 533), property of the United States which had been placed in their possession to enable them to perform a government contract, may be joined in separate counts in one indictment. *Horowitz v. U. S.*, (C. C. A. 2d Cir. 1919) 262 Fed. 48, wherein the court said: "The several charges were connected together and were of the same class of offenses. The same persons were charged in each count with acts connected together, viz. applying to their own use, etc., property of the same person which was to be used in the same contract at the same place and about the same time, and they were charged with exactly the same offense in each count."

A count in an indictment charging the defendant with the introduction of intoxicating liquors in the Indian country, may be properly joined with one charging him with having possession of intoxicating liquors in the Indian country. *U. S. v. Luther*, (E. D. Okla. 1919) 260 Fed. 579.

Indictments held to have been properly consolidated.—Where the same defendants are included in two indictments, the first of which is for conspiracy to defraud the government of taxes like those of which it is alleged in the second indictment the govern-

ment was actually defrauded, the indictments involve transactions of the same character, "transactions connected together," and "of the same class of crimes or offenses" within the meaning of this section, and indictments may be properly ordered to be consolidated. *Kelly v. U. S.*, (C. C. A. 6th Cir. 1919) 258 Fed. 392, 169 C. C. A. 408.

Vol. II, p. 681, sec. 1025. [First ed., vol. II, p. 340.]

Allegations of time.—To same effect as third paragraph of original annotation, see *Bryant v. U. S.*, (C. C. A. 5th Cir. 1919) 257 Fed. 378, 168 C. C. A. 418.

The conclusion of an information is purely formal, and though it be technically incorrect the defect is cured by this section. *Pollard v. U. S.*, (C. C. A. 5th Cir. 1919) 261 Fed. 336.

Failure to negative exceptions of act.—The failure of an indictment under section 1 of the Harrison Act (4 Fed. Stat. Ann. (2d ed.) 177) to negative the exceptions set forth in the act, is a harmless defect under this section. *U. S. v. Loewenthal*, (N. D. Ohio 1919) 257 Fed. 444.

Failure to allege making of report.—An indictment under R. S. sec. 5209 (6 Fed. Stat. Ann. (2d ed.) 770), which charges the defendant, a bank president, with aiding and abetting the making of false entries in a report to the Comptroller of the Currency, and which after such charge contains in parenthesis the words: "(Which said report then and there purported to be made to the Comptroller of the Currency of the United States, etc.)," is not defective on the ground that it fails to charge that the report was made, but only that it purported to be made. Such a defect is cured by this section. *Boone v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 963, 169 C. C. A. 113, wherein it was said:

"What the pleader of the count meant was that the report, being false, only purported to be a report. In what manner this tended to the prejudice of the defendant we cannot conceive. It is therefore clearly within the provisions of section 1025 Rev. Stat. The court committed no error in overruling the demurrer or the motion in arrest of judgment."

Failure to allege character of public use of land.—Where in a prosecution for murder, jurisdiction is claimed by the government under the third paragraph of section 272 of the Penal Laws (7 Fed. Stat. Ann. (2d ed.) 890), the indictment is sufficient under this section if the defendant is fully informed as to the locus of the alleged offense and the claim of exclusive federal jurisdiction arising from it, although it fails to allege the character of public use for which the parcel of land was acquired and used by the government. *Brown v. U. S.*, (C. C. A. 5th Cir. 1919) 257 Fed. 46, 168 C. C. A. 258.

Indictment held sufficient—Conversion of property of United States.—An indictment

charging that the defendants knowingly applied to their own use and sold certain property of the United States in violation of section 36 of the Penal Laws (7 Fed. Stat. Ann. (2d ed.) 533), is sufficient under the provisions of this section without alleging how the property came into the possession of the defendants. *Horowitz v. U. S.*, (C. C. A. 2d Cir. 1919) 262 Fed. 48.

Vol. II, p. 687, sec. 1032. [First ed., vol. II, p. 343.]

Necessity of plea.—Where after a jury is impaneled and sworn, the clerk of the court reads the indictment to the jury, and in the presence of the defendant and his counsel states that the defendant has entered a plea thereto of not guilty, to which statement no objection is made by the defendant, he may not urge such objection for the first time in the appellate court. *Shidler v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 620, 168 C. C. A. 570, wherein it was said:

"It is said that the court erred in denying motion in arrest of judgment. This assignment rests upon the contention that defendant never was arraigned and never was called upon to plead. The transcript shows that, when the bill of exceptions was presented to the District Court for allowance and settlement, the words 'and no issue of not guilty has ever been joined in said cause' were stricken out, and the following inserted: 'The indictment was presented May 25, 1918. May 29th it was ordered that defendant appear for arraignment June 3d. A demurrer to the indictment was filed and argued June 8th, and on the 11th the demurrer was overruled. June 12th, both Mr. Woodburn, the District Attorney, and Mr. Scanlan, attorney for the defendant, were present in court. At that time this arrangement and colloquy occurred: Mr. Woodburn: 'Both counsel for the government and for Shidler have received notice that the demurrer was overruled, and I would like to fix a date for trial; and I am willing to stipulate with counsel that he may enter his plea on the day of the trial so as to save a trip here. That is the understanding?' Mr. Scanlan replied, 'Yes;' and at that time the trial was set for July 8th. Prior to the trial, and on June 24th, the defendant filed an affidavit to procure the attendance of witnesses in his behalf at the expense of the government. An order was made in accordance with the prayer of his petition, and the witnesses were subsequently produced on the day of the trial. At that time both parties appeared, and both announced they were ready for trial. After the jury was impaneled and sworn, the clerk of this court read the indictment to the jury, and in the presence of the defendant and his counsel stated that defendant had entered a plea thereto of not guilty. No objection was made to proceeding with the cause because the arraignment had not been had, and no plea of not guilty

was entered. The objection was not raised until the conclusion of the trial, and after verdict was rendered.'

"Under R. S. sec. 1032 it is provided in effect that when a person indicted for an offense, upon his arraignment, stands mute or refuses to plead, it shall be the duty of the court to enter a plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto, and when a person pleads not guilty, and such plea is entered as aforesaid, the cause shall be deemed to be at issue, and shall proceed without further formal ceremony and be tried by a jury. In *Garland v. State of Washington*, 232 U. S. 642, 34 Sup. Ct. 456, 58 L. Ed. 772, the court adopted the view which had been expressed by Justice Peckham in his dissenting opinion written in *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097, wherein Justice Peckham said that a waiver should 'be conclusively implied, where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until . . . the record was brought to the appellate court for review.' It would be inconsistent with the due administration of justice to permit a defendant, under such circumstances, to lie by, say nothing as to such an objection, and then for the first time urge it in this court.' The court expressly overruled the *Crain* case in so far as it was not in accord with the views expressed in the *Garland* case. See also *State v. Klasner*, 19 N. M. 474, 145 Pac. 679, Ann. Cas. 1917D, 824, where it was held, upon the authority of the *Garland* case, that appellant could not raise in the appellate court the question that she was not arraigned, where she had proceeded with the trial as if she had been duly arraigned, and failed to object or in any manner call to the attention of the trial court the fact she had not been arraigned."

1918 Supp., p. 122, sec. 3.

Constitutionality.—The freedom of speech and press guaranteed by the Federal Constitution was not violated by the provisions of the Espionage Act under which convictions may be had for publishing in the German language, during the war with Germany, articles derisively contemptuous of the war activities of the United States, and intended to convey the idea that the war was not demanded by the people, was the result of the machinations of the executive power, and which in effect justified the German aggressions. *Schaefer v. U. S.*, (1920) 251 U. S. 466, 40 S. Ct. 259, 64 U. S. (L. ed.) —, affirming in part and reversing in part (*E. D. Pa.* 1918) 254 Fed. 135.

In *Hickson v. U. S.*, (C. C. A. 4th Cir. 1919) 258 Fed. 867, 169 C. C. A. 587, commenting on the decisions of the Supreme Court on this subject, the court said:

"This question was decided by the Supreme Court of the United States in the case of *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. —. In that case the court held that the law was constitutional. Justice Holmes in speaking for the court, among other things, said:

"But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in *Patterson v. Colorado*, 205 U. S. 454, 462, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. *Aikens v. Wisconsin*, 195 U. S. 194, 205, 206, 25 Sup. Ct. 3, 49 L. Ed. 154. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck Stove & Range Co.*, 221 U. S. 419, 439, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The question in every case is whether the words are used in such circumstances as are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in section 4 . . . punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime. *Goldman v. United States*, 245 U. S. 474, 477, 38 Sup. Ct. 166, 62 L. Ed. 410. Indeed that case might be said to dispose of the present contention if the precedent covers all media *concludendi*. But as the right to free speech was not referred to specially, we have thought fit to add a few words."

"This point was also decided March 10, 1919, in *Jacob Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 240, 63 L. Ed. —, (advanced sheets). Mr. Justice Holmes, in speaking for the court, said:

"With regard to that argument we think it necessary to add what has been said in *Schenck v. United States*, only that the First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language. *Robertson v. Baldwin*, 165 U. S. 275, 281, 17 Sup. Ct. 326, 41 L. Ed. 715. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."

The validity of the Espionage Act was sustained as against the contention (1) that the crime there defined is treasonable, and is punishable as treason or not at all, under section 3 of article 3 of the Federal Constitution; and (2) that it is violative of the First Amendment to the Federal Constitution in that it abridges freedom of speech and of the press. *Equi v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 53, 171 C. C. A. 649.

See further on the subject of the constitutionality of this section the following cases: *Heynacher v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 61, 168 C. C. A. 273; *Schumann v. U. S.*, (C. C. A. 8th Cir. 1919) 258 Fed. 233, 169 C. C. A. 299; *U. S. v. Burleson*, (App. Cas. D. C. 1919) 258 Fed. 282; *Dodge v. U. S.*, (C. C. A. 2d Cir. 1919) 258 Fed. 300, 169 C. C. A. 316, 7 A. L. R. 1510.

"Whoever" as including corporation.—A corporation may be convicted of a violation of this section, since it comes within the scope of the word "whoever" as used herein. *U. S. v. American Socialist Soc.*, (S. D. N. Y. 1919) 260 Fed. 885, wherein it was said:

"Preliminarily, it is contended that the word 'whoever' refers only to human beings and not to corporations. This point may be speedily disposed of (1) because the word has been construed by courts as including corporations (40 Cyc. 928, and cases cited); and (2) because the obvious intent of the Congress was to reach corporations as well as individuals who did the acts prohibited by the Espionage Law. It is difficult to imagine that, in enacting a statute deemed necessary and vital for the protection of the country when at war, and in realizing that dangerous violations could be accomplished by publications issued and distributed by persons operating in corporate form, the Congress intended to let such corporations escape the consequences of their acts, while it held individuals to strict responsibility for precisely similar acts.

"It is contended, further, that a corporation cannot be guilty of a specific intent where such intent involves an evil purpose to do a wrongful act; but that contention successfully made in the earlier history of the law and, indeed, until comparatively recent times, has now been fully discarded, and it is sufficient to refer to three decisions,

one by the Supreme Court of the United States, and the other two by courts of high authority, which effectually dispose of the argument that a corporation cannot form and manifest the intent to violate a statute such as that now under consideration. *N. Y. Central R. R. Co. v. United States*, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613; *People v. Rochester Ry. & L. Co.*, 195 N. Y. 102, 88 N. E. 22, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837; *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280."

"**Military and naval forces**"—*Men enrolled under draft act*.—"That men, of military age, who have been registered and enrolled under the Selective Service Act, are part of the military forces of the United States, has been substantially held by the Supreme Court. *Debs v. U. S.*, 249 U. S. 217, 39 Sup. Ct. 252, 63 L. Ed. 566." *White v. U. S.*, (C. C. A. 6th Cir. 1920) 263 Fed. 17.

Acts directed against persons not in the military service and designed to cause disloyalty or refusal of duty are within the Act if the persons affected are within the provisions of the Selective Draft Act and subject to call. *Howenstine v. U. S.*, (C. C. A. 9th Cir. 1920) 263 Fed. 1, wherein it was further held that an indictment charging that the persons to whom disloyal statements were made were persons "who were subject to and might be subject to" military service, was sufficient.

American Red Cross.—Interference with the American Red Cross by utterances intended to obstruct its operations is a violation of this section. *Granzow v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 172, where, though a conviction was reversed on other grounds, the court said:

"While the Red Cross is not itself within the term 'military and naval forces,' as used in the statute, yet to cripple the Red Cross as operated in this war is to interfere with such forces. One effectual way of crippling the Red Cross is to destroy confidence in its administration, and thus reduce its income through the usual source of voluntary contributions. These statements of defendant were calculated to have that effect, would certainly do so if believed by those who heard them, and it was proper for the jury to say with what intent they were made."

Making false reports or statements.—To same effect as 1919 Supplement annotation, p. 506, see *Hickson v. U. S.*, (C. C. A. 4th Cir. 1919) 258 Fed. 867, 169 C. C. A. 587.

A construction cannot be given to the provision of the Espionage Act, making it criminal, when the United States is at war, willfully to make or convey false reports or false statements with intent to interfere with the success of the military or naval forces of the United States, or to promote the success

of its enemies, which will exclude statements that on their face, to the common understanding, do not purport to convey anything new, but only to interpret or comment on matters pretended to be facts of public knowledge, or will excuse statements, however false, and with whatever evil purpose circulated, if accompanied with a pretense of comment upon them as matters of public concern. *Pierce v. U. S.*, (1920) 252 U. S. 239, 40 S. Ct. 205, 64 U. S. (L. ed.) —.

In a prosecution under this section for making false reports or statements with intent to interfere with the operation or success of the military or naval forces of the United States, it is not essential that the false reports or statements must have been made to persons in the military or naval service of the United States. *Mead v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 639, 168 C. C. A. 589, wherein the court, in holding that certain false statements made to recruits in the Canadian Expeditionary Forces, were violations of this section, said: "In view of the terms of the act of Congress and the obvious purposes of the enactment, we are unable to hold that in order to constitute a violation of its provisions it is essential that the false reports or statements must have been made to persons in the military or naval service of the United States. In the consideration of such cases it should never be forgotten that war is a matter of life or death, and that a nation in such circumstances is no more powerless to protect its life than is an individual to save his, when attacked, by the use of such force as is necessary. It was in the exercise of that power that Congress passed the act which is the basis of the present indictment. Free speech in times of war is by no means the same thing as free speech in times of peace. The false reports and statements inhibited by the statute under consideration are such as are willfully made or conveyed 'with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies.' . . . Congress by its act made it criminal for any one, while this country is at war, to willfully make false statements or convey false reports, 'with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies.' And by act approved May 7, 1917 (40 Stat. 39, c. 11), expressly authorized its allies, England and Canada, to open recruiting offices in the various cities of the United States. That any interference with such recruiting service necessarily interfered with the success of the military and naval forces of the United States and tended to promote the success of its enemies we consider too plain for argument."

Statements made in the course of private conversation, to a friend or traveling companion, and in no instance in the presence

of any third party, and which are merely expressions of opinion, do not come within the provisions of this section. *Sandberg v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 643, 168 C. C. A. 593.

Words alone may constitute a violation of this section by interfering with the operation or success of the military or naval forces of the United States. *Wolf v. U. S.*, (C. C. A. 8th Cir. 1919) 259 Fed. 388, 170 C. C. A. 364, wherein the court said:

"Words which in their very nature, or which under the circumstances of their utterance, could not apparently have a tendency to cause such interference, are without the statute. The intent with which they are uttered cannot alone make them harmful. This law was intensely practical; it sought the utilitarian result of preventing actual interference or attempted interference. It did not concern itself about mere intentions, no matter how reprehensible. It comes fairly within the expression of Pollock, C. B., in *Attorney-General v. Sillem*, 2 H. & C. 431, 525, that 'human laws are made, not to punish sin, but to prevent crime and mischief.' Therefore it is necessary that the words should be of a character and uttered under such circumstances as would apparently result in such interdicted interference. These two elements are essential to the offense, and therefore to a proper charge of the offense. The effective way of pleading the character of the words is by setting them forth literally or substantially, as here done. If they carried to the hearers any hidden or special meaning, that should be alleged. The effective way of pleading the circumstances of utterance is by alleging such as show that the utterance was made to actual or possible members of such military forces, or under conditions where it would apparently reach or operate upon such persons."

Attempting to cause insubordination and refusal of military duty.—In a prosecution for attempting to cause insubordination, disloyalty and refusal of military duty, it is not necessary to show that the defendant succeeded in his efforts. The mere attempt constitutes a violation of this section. *Wessels v. U. S.*, (C. C. A. 5th Cir. 1920) 262 Fed. 389.

In *Shidler v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 620, 168 C. C. A. 570, wherein the defendant was charged with willfully, unlawfully, and feloniously attempting to cause insubordination, disloyalty, and refusal of duty in the military forces of the United States by making certain remarks in the presence of men who had registered under the Selective Service Act (9 Fed. Stat. Ann. (2d ed.) 1136), it was argued that the alleged statements could be construed as the honest expression of an individual citizen, or a reckless statement of opinion. Answering this contention, the court said:

"Assuming, for the purposes of argument, that a man might express such opinions and

still be loyal to his country, still, if willfully and with evil mind he uttered the language with the intention of bringing about insubordination, disloyalty, and refusal of duty in the military forces of the land, he has violated the law and is subject to punishment and should be brought to trial. His acts, his speech, and the state of his mind become matters for the consideration by a jury under proper instructions upon the law of attempt to commit crime."

"Obstructing recruiting or enlistment service"—**"Obstruct."**—To same effect as first and third paragraphs of annotation in 1919 Supplement, p. 504, see *Heynacher v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 61, 168 C. C. A. 273.

To same effect as third paragraph of 1919 Supplement annotation, see *Beeder v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 36.

To same effect as second paragraph of 1919 Supplement annotation, see *Schumann v. U. S.*, (C. C. A. 8th Cir. 1919) 258 Fed. 233, 169 C. C. A. 299.

"The statute does not make it a crime to intend to obstruct, or to attempt to obstruct, but to intentionally obstruct. Where the utterance is calculated to result in obstruction, and is uttered under conditions which would naturally so result, there is a presumption that such a result followed, but that presumption is rebuttable." *Granzow v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 172.

Acts which tend to hinder.—To same effect as 1919 Supplement annotation, see *Schumann v. U. S.*, (C. C. A. 8th Cir. 1919) 258 Fed. 233, 169 C. C. A. 299.

Conspiracy to obstruct the draft.—"The draft is comprehended within the expression 'recruiting or enlistment service' as used in section 3 of the Espionage Act. Therefore the conspiracy here charged falls within section 4 of the Espionage Act." *Enfield v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 141.

"Support or favor."—To same effect as 1919 Supplement annotation, see *Schulze v. U. S.*, (C. C. A. 9th Cir. 1919) 259 Fed. 189, 170 C. C. A. 257, *affirming* (S. D. Cal. 1918) 253 Fed. 377, in 1919 Supplement annotation.

"To the injury of the service of the United States."—In *Shidler v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 620, 168 C. C. A. 570, it was held that the phrase "to the injury of the service of the United States" (since omitted by the amendment of this section by the Act of May 16, 1918, ch. 75, § 1) qualified only its immediate antecedent, that is, the third subdivision of this section which reads, "or shall willfully obstruct the recruiting or enlistment service of the United States," and did not relate back and become an essential element of all three of the offenses created by this section.

"In the military forces."—Men registered in accordance with the provisions of the Selective Service Law (9 Fed. Stat. Ann. (2d ed.) 1136) are in the military forces of

the United States within the meaning of this section. *Seebach v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 885.

Conspiracy to obstruct recruiting and enlistment service.—This section makes criminal a conspiracy to obstruct the recruiting and enlistment service of the United States by inducement or persuasion. *O'Connor v. U. S.*, (1920) 253 U. S. 142, 40 S. Ct. 444, 64 U. S. (L. ed.) —.

As to necessity of overt act for conspiracy.—Referring to sections 6 and 37 of the Criminal Code in *PENAL LAWS*, 7 Fed. Stat. Ann. (2d ed.) 423, 534, the court said: "The fact that the Espionage Act requires an overt act to complete the crime, which is made punishable up to 20 years' imprisonment, is not inconsistent with the declaration of the Penal Code that the bare conspiracy to use force, with no overt act, is also a crime, and punishable up to 6 years' imprisonment. The result is that section 6 is fully applicable to bare conspiracies to forcibly oppose the enforcement of the Selective Service Act, and that where an overt act has followed, section 4 of the Espionage Act is also applicable." *Enfield v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 141.

Publications after termination of hostilities designed to produce industrial dissatisfaction.—In *U. S. v. Strong*, (W. D. Wash. 1920) 263 Fed. 789; *U. S. v. Listman*, (W. D. Wash. 1920) 263 Fed. 798, and *U. S. v. Ault*, (W. D. Wash. 1920) 263 Fed. 800, sundry publications issued after the termination of active hostilities and designed in the main to produce industrial dissatisfaction were held not to be within the act.

Conduct sufficient to warrant conviction.—In *White v. U. S.*, (C. C. A. 6th Cir.) 263 Fed. 17, it was held that a conviction was sustained by proof of the following statements by the accused:

"(1) That the soldiers in the camps were being mistreated, were not fed, were not getting proper medical attention, and were dying off like flies; (2) that the army trucks, under construction in that vicinity, would never get across, as they would be sunk by the submarines; and (3) that the murder of innocent women and children by the German soldiers was no worse than the United States soldiers did in the Philippines; (4) that the United States was never a neutral nation; (5) that the people lost on the Lusitania had no right to be there, because German officials had warned them to stay off; and (6) that this government had no business going into the war."

Circulation of handbills representing brutal punishments alleged to have been inflicted on "conscientious objectors" and calling a mass meeting has been held to sustain a conviction. *U. S. v. Steene*, (N. D. N. Y. 1920) 263 Fed. 130.

Indictment—In general.—"An indictment which follows the language of the statute, and gives a statement of facts and circumstances sufficient to identify the acts charged

as an offense, is good. *Armour Packing Co. v. U. S.*, 209 U. S. 56, 52 U. S. (L. ed.) 681, 28 S. Ct. 428; *Rhuberg v. U. S.*, 255 Fed. 865." *Kumpula v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 49, 171 C. C. A. 645.

As pointed out in *Kumpula v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 49, 171 C. C. A. 645, there is a distinction between the crime of libel and the crime defined by this section; and an indictment charging the willful use of language well calculated to produce the different results condemned by the statute, informing the defendant of the nature of the accusation against him, and sufficiently definite to enable him to take advantage of a former conviction or acquittal, and to enable the court to determine whether the facts charged, if proved, constitute a crime under the law—is sufficient. *Equi v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 53, 171 C. C. A. 649.

Necessity of averment that United States was at war.—An indictment under this section need not allege that the United States was at war when the acts charged were done, since the courts will take judicial notice of the joint resolution of Congress declaring the existence of a state of war. *Stephens v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 590; *Bouldin v. U. S.*, (C. C. A. 5th Cir. 1919) 261 Fed. 674; *Hamm v. U. S.*, (C. C. A. 9th Cir. 1920) 261 Fed. 907.

False statements.—An indictment under this section for willfully making false statements with intent to interfere with the operation or success of the military or naval forces of the United States, should allege that the statements made by the defendant were false and willfully made. But, as to the last two offenses in this section, it is immaterial whether the statements made by the defendant were false or not. It is only necessary to allege that they caused, or were an attempt to cause, insubordination, etc., or that they obstructed the enlistment or recruiting service of the United States, and that they were willfully made with such intent. *Balbas v. U. S.*, (C. C. A. 1st Cir. 1919) 257 Fed. 17, 168 C. C. A. 229.

Incorporation of previous count by reference.—Where the second count of an indictment charges a violation of the Espionage Act by alleging that the defendant, in the aid of the German government, had control of and was willfully using a certain motion picture film as a means to violate this section in the manner fully described in the first count of the indictment, the first count is incorporated by reference into the second count, and if the first count is sufficient, the second is, too. *Goldstein v. U. S.*, (C. C. A. 9th Cir. 1919) 258 Fed. 908, 169 C. C. A. 628.

Supporting or favoring enemy country.—In a prosecution for a violation of this section by supporting or favoring the cause of a country with which the United States is at war, the intent need not be alleged in the indictment, since the offense is one whose

very definition necessarily includes intent. *Schulze v. U. S.*, (C. C. A. 9th Cir. 1919) 259 Fed. 189, 170 C. C. A. 257, *affirming* (S. D. Cal. 1918) 253 Fed. 377.

Circumstances under which statements were made.—A defendant who has been convicted of making certain seditious statements with the intent to violate this section, may raise the objection in an appellate court for the first time that the indictment is fatally defective for want of averments setting forth the circumstances under which the seditious utterances were made and the persons to whom they were made. *Shilter v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 724, 169 C. C. A. 12. Regarding the nature of such objections, the court said: "*Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390, is authority for the proposition that a defendant who waits until after verdict before taking an objection to the sufficiency of the indictment waives all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn. We take that decision as expressing in full the nature of the objections to an indictment which may be waived by nonaction in a trial court, objections to the form in which the elements of the crime are stated, and objections to the fact that the indictment is inartificially drawn; and it follows that objections which affect the substantial rights of the defendant are not thus waived, and they may be presented for the first time on writ of error. 'Defects in substance are not cured by verdict' (22 Cyc. 485), nor is a failure to state facts sufficient to constitute an offense cured by verdict (22 Cyc. 487). The most that can be claimed in the way of waiver is that it is too late to urge an objection in an appellate court, 'unless it is apparent that it affected the substantial rights of the accused.' . . . There is nothing in the indictment here to connect the acts of the accused directly or indirectly or in any way with the military or naval forces of the United States, and therefore there is nothing to advise a court that an offense has been committed against the United States. All that the indictment charges is that the defendant in a named city and at some time between January and May made certain seditious statements, with the intent denounced by the Espionage Act (Act June 15, 1917, c. 30, 40 Stat. 217), and thereby unlawfully, willfully, and knowingly attempted to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States. Such an indictment is insufficient, we think, to sustain a judgment of conviction." To same effect, see *Guggolz v. U. S.*, (1920) 262 Fed. 764, which was decided on the authority of the above case.

Attempting to cause insubordination, etc.—An indictment for willfully attempting to cause insubordination, disloyalty and refusal of duty in the military forces, which sets

forth statements alleged to have been made by the defendant which clearly have that tendency, and which states that they were made in willful attempt to cause that result, charges an offense against this section. See *Bach v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 885.

In *Goldstein v. U. S.*, (C. C. A. 9th Cir. 1919) 258 Fed. 908, 169 C. C. A. 628, the indictment charged the defendant with exhibiting to the general public a certain motion picture play designed to arouse hatred against the people of Great Britain, with the intent to cause insubordination and refusal of duty in the military and naval forces of the United States during war with Germany. In holding that the truth or falsity of the representation was immaterial, and that it need not actually be seen by soldiers and sailors already enlisted, the court said:

"The question of the truth or falseness of the thing done by the person who, when the state of war exists, attempts to cause disloyalty or any of the other conditions enumerated, is not the essence of the inquiry. Enacted as the statute was while the country was at war, the evident, underlying purpose of its language was to prevent any willful attempt to engender feelings of lack of fidelity to the United States among the military or naval forces or any attempt made with evil mind to cause any disobedience to lawful authority in the military or naval forces: and the statute should always be read in the light of the purpose of its enactment.

"It is clear that an attempt to create disloyalty may be by showing a picture to the public, as well as by uttering speech or publishing a writing. The picture might be a truthful representation of an historical fact, and yet the nature of it, the circumstances surrounding the exhibition thereof, the time, the occasions when the public exhibitions are had, may well tend to show whether the picture would naturally, in the light of great events, be calculated to foment disloyalty or insubordination among the naval or military forces. In time of peace, a picture purporting to show incidents of a war fought more than a hundred years before, and exhibiting soldiers of a foreign country bayoneting helpless American women and children, might arouse but ordinary interest. But, if it has come about that a war is being fought by the United States and in the war the cause of the United States is allied with that of the foreign country whose soldiers are pictured as murdering American women and children, and if at the time the United States is enforcing draft laws and raising a large army and navy to fight the common enemy of the two allied countries, it seems but reasonable to say that the exhibition of such a picture is calculated to arouse antagonisms and to raise hatred in the minds of some who see it against the ally of the United States, and as a probable effect put obstruction in the way of the necessary co-operation between the allied countries

against the enemy, and to undermine an undivided sentiment for the United States and to encourage disloyalty and refusal of duty or insubordination among the military and naval forces. *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247, 63 L. ed. —.

"Nor, in an attempt of the character indicated, is it necessary that the picture exhibited should actually be seen by soldiers and sailors already enlisted. Millions of men within the provisions of the conscription act and subject to call were in the military and naval forces throughout the country and were part of the public. The exhibition to the public at a public place, if given with the evil intent described, is sufficient. In *Coldwell v. United States*, 256 Fed. 805, — C. C. A. —, the Court of Appeals for the First Circuit considered an objection to an indictment wherein it did not appear that the persons whom the defendant was alleged to have addressed were in the military or naval forces of the United States. The court said: 'The act makes it an offense to willfully "attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States," or to "willfully obstruct the recruiting or enlistment service of the United States," and its language is broad enough to include statements calculated to produce these results, when made in the presence of persons, who are not in the military or naval force of the United States, provided they are willfully made and with the intent set out in the act.'"

See as following the foregoing decision, *Stephens v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 590.

An allegation in the indictment that the defendant caused insubordination, etc., and one that he attempted to cause it, charge simply different modes of committing the same offense, and both may be alleged in one count. *Balbas v. U. S.*, (C. C. A. 1st Cir. 1919) 257 Fed. 17, 168 C. C. A. 229.

An allegation in an indictment under this section that defendant knowingly, willfully, unlawfully, and feloniously did attempt to cause and create insubordination and disloyalty in the military and naval forces, by doing the things charged, sufficiently charges that the attempt was done with willful and unlawful purpose. *Henkin v. Fousek*, (C. C. A. 8th Cir. 1920) 262 Fed. 957.

Insufficient description of offense.—An indictment charging that at a certain place on or about a specified date the defendant made certain specified statements with intent to interfere with the operation and success of the military and naval forces of the United States and to cause insubordination therein, and with intent to obstruct the recruiting and enlistment service of the United States, is defective as failing clearly to advise the defendant of the charge against him so as to give him reasonable opportunity to prepare his defense. *Foutana v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 283. In discussing the

sufficiency of the indictment, the court said: "The averment in the indictment that the defendant made these statements on or about December 19, 1917, was a mere formal jurisdictional allegation, which permitted the introduction of evidence of any of them at any time before the indictment was filed within the statute of limitations, and there was nothing but that formal statement and the allegation that the statements were made at New Salem to indicate at what time, under what circumstances, on what occasions, to whom, in whose presence, or by what persons the government would attempt to prove that the defendant had made any of these statements, nothing to indicate to him whether he was to be tried for making all of them at one time, on one occasion, or for making some of them at one time to one person, and others at other times and on other occasions to other persons. . . . It is essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction. *United States v. Britton*, 107 U. S. 665, 669, 670, 2 Sup. Ct. 512, 27 L. Ed. 520; *United States v. Hess*, 124 U. S. 483, 488, 8 Sup. Ct. 571, 31 L. Ed. 516; *Miller v. United States*, 133 Fed. 337, 341, 66 C. C. A. 399, 403; *Armour Pkg. Co. v. United States*, 153 Fed. 1, 16, 17, 82 C. C. A. 135, 150, 151, 14 L. R. A. (N. S.) 40; *Etheredge v. United States*, 186 Fed. 434, 108 C. C. A. 356; *Winters v. United States*, 201 Fed. 845, 848, 120 C. C. A. 175, 178; *Horn v. United States*, 182 Fed. 721, 722, 105 C. C. A. 163, 167. If the pleader had set forth in this indictment any fact or facts, such as the time, place, occasion, circumstances, persons present, or any other distinctive earmark whereby the defendant could have found out or identified the occasion or occasions when the government intended to attempt to prove that the defendant uttered any of the nine sayings charged, he might have been able to investigate the basis of the charges, to learn who were or were not present on the occasions referred to, hence who were possible witnesses, and to prepare his defense; but there is nothing of that kind in the indictment. As it reads, he might have been called to meet on each of the nine charges testimony that at any time of day or night, at any place in New Salem, on any occasion, public or private, before the indictment was filed, and after the Espionage Act was passed on June 15, 1917, he had uttered to any one whomsoever any of the statements charged in the indictment. These considerations compel the conclusion

that this pleading signally failed to state the facts which the government claimed constituted the alleged offense in this case, so distinctly as to give the defendant a fair opportunity to prepare his defense to meet any of them, and that he could not and did not have that notice of them required to give him a fair trial.

"Nor were the charges in this indictment so certain and specific that upon conviction or acquittal thereon it or the judgment upon it constitutes a complete offense to a second prosecution of the defendant for the same offense. In determining this question the evidence on the trial may not be, and the indictment and the judgment alone can be considered, because the evidence does not become a part of the judgment, and as the indictment states no facts from which the time, places, or occasions on which the respective statements therein were alleged to have been made can be identified, the indictment and judgment failed to identify the charges so that another prosecution therefor would be barred thereby. *Florence v. United States*, 186 Fed. 961, 962, 964, 108 C. C. A. 577, 578, 580, and cases there cited; *Winters v. United States*, 201 Fed. 845, 848, 120 C. C. A. 175, 178."

Obstructing enlistment service.—In *Wolf v. U. S.*, (C. C. A. 8th Cir. 1919) 259 Fed. 388, 170 C. C. A. 364, it was held that counts in an indictment sufficiently charged an obstruction of the enlistment service where they alleged in substance that the defendant made a statement that the war with Germany was an unjust war, and that such statement was made with unlawful intent and under circumstances where it would apparently accomplish the forbidden results. The court said:

"We are not concerned with the truth or falsity of such statement (*U. S. v. Equi*, Charge to Jury, Bul. 172), but only with the effect it would apparently have upon the obstruction of recruiting and enlistment. Enlistment is a voluntary act, and anything which would tend to prevent a state of mind favorable thereto would be deterrent, and therefore an obstruction to such action. Certainly the belief that a war was unrighteous would ordinarily be a decided barrier to a resolution voluntarily to risk life in its prosecution. This has been recognized in the *Doe* Case and many other cases. Therefore, as to those two counts, the language, as alleged, is sufficient to constitute the offense, if uttered with the unlawful intent and under circumstances where it would apparently accomplish the forbidden results. The intent is properly alleged. The circumstances, as alleged, are that the statements were 'publicly' made to certain named person or persons and 'to other persons to the grand jurors unknown.' 'Publicly' means in public, well known, open, notorious, common, or general, as opposed to private, secluded or secret. The clear inference from the allegation would seem to be that the statement

was uttered in the presence of a number of persons. There is no allegation that any of the immediate listeners were within the enlistment ages. The doctrine of the *O'Hare* and *Doe* Cases [253 Fed. 538, 903] is that a statement to which wide publicity was given by the defendant would apparently reach men who might become recruits, and that it is unnecessary to prove, and therefore to allege, that such were actually present or actually were reached by the statements. Naturally the extent of publicity would be an important consideration and, within certain limits, decisive. The extent and character of the publicity must be such that the apparent result of the utterance would be obstruction of the recruiting and enlistment service. But these may be generally stated, subject to a bill of particulars in proper instances. No such bill was filed here, and the general allegations that the statements were publicly made to certain persons and to others unknown is sufficient."

To same effect, see *Hamm v. U. S.*, (C. C. A. 9th Cir. 1920) 261 Fed. 907, wherein the court, in distinguishing the case of *Shilter v. U. S.*, in this annotation, said:

"Reliance is placed upon the decision of this court in *Shilter v. United States*, 257 Fed. 724, 169 C. C. A. 12; but that case is clearly distinguishable from this. In that case there was no allegation in the indictment that the statements made by the accused were made to or in the presence or hearing of any person or persons, or that the spoken words were ever conveyed to the human ear. In the present case the indictment charged that the books were sold to various and divers persons, one of whom was named."

Effect of error in indorsement.—Where an indictment sufficiently charges a violation of this section, the fact that the indorsement thereon erroneously states that the defendant is charged with violating section 3 of the Selective Service Act (9 Fed. Stat. Ann. (2d ed.) 1157), does not render the indictment defective. *Wessels v. U. S.*, (C. C. A. 5th Cir. 1920) 262 Fed. 389. Regarding the effect of such an error the court said:

"In returning the indictment there was indorsed on it:

"Charge: Obstructing the recruiting and enlistment service of the U. S.; violation section 3 of Act of May 18, 1917."

"This was undoubtedly a clerical error, as the offense that is set out is cognizable under section 3 of the Act of June 15, 1917, known as the Espionage Act [1918 Supp. Fed. Stat. Ann. 122], and not under the Selective Draft Act. It is well settled that the indorsement on an indictment is no part of the indictment. It is also well settled that if the prosecution be mistaken as to the particular law violated, nevertheless, if the indictment charges a crime under any law of the United States, it is sufficient to support the verdict."

Sufficiency.—In *Reeder v. U. S.*, (C. C. A.

8th Cir. 1919) 262 Fed. 36, an indictment for a violation of this section was held to be sufficient.

Evidence—Other words or acts.—Evidence that the accused made statements to other persons similar to those set forth in an indictment under this section, is admissible to show intent. *Seebach v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 885.

In a prosecution for supporting or favoring the cause of a country with which the United States is at war, evidence may be received of acts or words of the defendant other than those alleged in the indictment for the purpose of showing his attitude of mind and his intent or purpose. *Schulz v. U. S.*, (C. C. A. 9th Cir. 1919) 259 Fed. 189, 170 C. C. A. 257, *affirming* (S. D. Cal. 1918) 253 Fed. 377.

In a prosecution for interfering with the operation and success of the military and naval forces of the United States, letters of the defendant to various persons, in which he stated that he was opposed to the Selective Service Act (9 Fed. Stat. Ann. (2d ed.) 1136) are admissible in evidence as showing the defendant's state of mind and the intention with which he posted a certain printed circular, on which act the indictment was based. *Herman v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 601, 168 C. C. A. 551. To same effect, see *Parton v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 515.

Statement made prior to act.—Prior statements and declarations of the accused made at a time when such statements and declarations were not prohibited by law are admissible against him for the purpose of enabling the jury to determine his purpose or intent in making the statements imputed to him in the indictment and proved. *Equi v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 53, 171 C. C. A. 649.

Statements regarding loyalty.—Evidence of loyal declarations by a person charged with simulating disability to escape military service are not admissible on his behalf. *Howenstine v. U. S.*, (C. C. A. 9th Cir. 1920) 263 Fed. 1.

In a prosecution for a violation of this section it is error for the trial court to exclude evidence proving the truthfulness of an important statement made by the defendant, bearing directly on his loyalty. *Caughman v. U. S.*, (C. C. A. 4th Cir. 1919) 258 Fed. 434, 169 C. C. A. 450.

Evidence of declarations not charged in the indictment tending to show disloyal intent is admissible. *White v. U. S.*, (C. C. A. 6th Cir. 1920) 263 Fed. 17. See to the same effect *Albers v. U. S.*, (C. C. A. 9th Cir. 1920) 263 Fed. 27, wherein the court said:

"In admitting the testimony the court distinctly ruled that it was admitted as tending to show the bent of the defendant's mind and his attitude as between the United States and Germany, with a view to enabling the jury to determine the defendant's real intention in saying and doing the things

with which he was charged, and for that purpose only, and in its charge to the jury the court also specifically and clearly so limited it. There can be no doubt that the testimony had a tendency to establish the vital question of intent in the case. The question is: Was it too remote?

"In the recent case, decided by this court, of *Equi v. United States*, 261 Fed. 53, 171 C. C. A. 649, a like question was presented and was strenuously argued. There, the record showed, testimony was admitted of what the defendant to the indictment had said and done June 3, 1916, as bearing upon the intent with which he was alleged to have committed, on June 27, 1918, the offense there involved, in violation of the same Espionage Act—a period of more than two years between the two dates. This court there distinctly adjudged the testimony not too remote, the purpose being properly limited, and the Supreme Court on petition for a writ of certiorari has just denied the petition. It is manifest that a like ruling must be made in the present case, unless the *Equi* case is to be overruled, which we are not prepared to do."

Disloyal utterances prior to language charged in the indictment were properly admitted in evidence as bearing upon the intent of defendant, where the theory of the defense was that the defendant was so intoxicated that he was incapable of entertaining the necessary criminal intent. *Stenzel v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 161.

In a prosecution for violation of this section it was assigned as error that a witness, on objection, was not permitted to answer the question, "Did you ever hear him [defendant] make any remarks against this government before that time?" But "if there was any error in this ruling, it was harmless to defendant, since the most favorable answer to him would have produced purely negative evidence of a general character." *Stenzel v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 161.

Threats against President.—In a prosecution under this section for attempting to cause insubordination, disloyalty and refusal of military duty, evidence that the defendant, about the time of the commission of the acts alleged in the indictment, made threats against the President, is admissible on the question of his intent. *Wessels v. U. S.*, (C. C. A. 5th Cir. 1920) 262 Fed. 389.

Records of draft boards showing the physical condition of a person called for military service are admissible on his trial for simulating disability to escape military service. *Howenstine v. U. S.*, (C. C. A. 9th Cir. 1920) 263 Fed. 1.

Irrelevant matters.—Evidence regarding whether a certain person was present at the preliminary examination of the defendant before a commissioner is irrelevant matter and inadmissible in a prosecution under this section. *Caughman v. U. S.*, (C. C. A. 4th Cir. 1919) 258 Fed. 434, 169 C. C. A. 450.

Interfering with Red Cross.—In a prosecution for interfering with the operation of the military and naval forces by interfering with the Red Cross, it was error to admit in evidence a report of the American Red Cross Society to the public of its war work as of March 1, 1918, the witness producing the report not claiming to know anything concerning the truth of the matters shown by the report, and no one connected with its preparation or the statements it contained being offered, and both sides regarding the report as important evidence. *Granzow v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 172, the court saying: "The Red Cross is a national corporation, and its services, volunteered, have been used during the war virtually as an auxiliary to the armed forces. The statute of incorporation (Act Jan. 5, 1905, c. 23, sec. 6, 33 Stat. L. 602 [2 Fed. Stat. Ann. (2d ed.) 64]) requires annual reports by such society to the Secretary of War, who audits the same, transmitting a copy to Congress. This report is required to contain an itemized report of receipts and expenditures. The report offered was not of this character, and came from no official source."

False reports or statements.—A conviction of making or conveying false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, contrary to the Espionage Act, is sustained by evidence which warranted the jury in finding that the statements in a pamphlet distributed by defendants during the war with Germany were false in fact, and known to be so by the defendants, or else were distributed recklessly without effort to ascertain the truth, and were circulated wilfully in order to interfere with the success of the forces of the United States. *Pierce v. U. S.*, (1920) 252 U. S. 239, 40 S. Ct. 205, 64 U. S. (L. ed.) —.

Causing insubordination and obstructing recruiting.—In *Rietz v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 731, 169 C. C. A. 19, it was held that the evidence was sufficient to sustain a conviction for a violation of this section by the use of certain language for the purpose of causing insubordination and mutiny in the military forces, and with the intent of willfully obstructing the recruiting and enlistment service.

Obstructing recruiting or enlistment service.—In a prosecution under this section for obstructing the recruiting or enlistment service, a letter written by the accused to the president of the German-American Alliance of his state and an inclosed newspaper clipping, which contained statements regarding German cruelty made by a German soldier who had escaped to this country, on which clipping the accused wrote a criticism of the soldier, are admissible in evidence. *Heynacher v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 61, 168 C. C. A. 273.

In *Wolf v. U. S.*, (C. C. A. 8th Cir. 1919) 259 Fed. 388, 170 C. C. A. 364, it was held

that the evidence was insufficient to establish an intention on the part of the defendant to obstruct the enlistment service. The court said:

"The sufficiency of the evidence is, in our judgment, properly challenged. There is no substantial testimony in either instance of the slightest intention to obstruct the service. The intention necessary to be shown is willfulness—deliberate purpose. Defendant is a merchant in a town in South Dakota. The statement covered by count 2 occurred during a discussion of the war between defendant on one side and three acquaintances on the other. The other three approved the war; one of them had three sons then enlisted. It is very evident that the sole result which occurred, or really was to be expected, was that each of the four remained firm in his own conviction. The statute, as originally enacted, was not framed to prevent free discussion or expression of opinion, so long as such was not deliberately employed for the purpose of interfering with the creation and operation of the armed forces of the nation. The statement covered by count 6 was made in the defendant's home, in the presence of his wife, to a chore woman. It was an ill-natured, intemperate outburst, brought on by seeing Red Cross pictures in a magazine. The woman properly resented his language, and stated that she had a son who had enlisted, and that she was proud of it. The evidence in the entire case clearly shows an instance of a headstrong, willful man, who felt strongly about the war, and who insisted, in and out of season and in intemperate and sometimes scurrilous language, on voicing his views."

Sufficiency.—In the following cases the evidence was held to be insufficient to sustain the conviction of the defendants for a violation of this section: *Elmer v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 646, 171 C. C. A. 410; *Harshfield v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 659, 171 C. C. A. 423; *Fontana v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 283; *Kammann v. U. S.*, (C. C. A. 7th Cir. 1919) 259 Fed. 192, 170 C. C. A. 260.

In *U. S. v. American Socialist Soc.*, (S. D. N. Y. 1919) 260 Fed. 885, it was held that the evidence was sufficient to sustain the conviction under this section of the publisher and distributor of certain pamphlets, and that the fact that the author was acquitted on the same counts of the indictment on which they were convicted was not sufficient ground for setting aside the verdict.

Questions for jury—Meaning of statements contained in pamphlet.—Whether statements contained in a pamphlet, the distribution of which is charged to amount to a violation of the Espionage Act, had a natural tendency to produce the forbidden consequences as alleged, is a question to be determined by the jury and not by the court. *Pierce v. U. S.*, (1920) 252 U. S. 239, 40 S. Ct. 205, 64 U. S. (L. ed.) —.

What interpretation ought to be placed upon a pamphlet, the distribution of which by the defendants is alleged to have violated the Espionage Act, and what would be the probable effect of distributing it in the mode adopted, and what were defendants' motives in doing this, were questions for the jury, not the court, to decide. *Pierce v. U. S.*, (1920) 252 U. S. 239, 40 S. Ct. 205, 64 U. S. (L. ed.) —.

Whether printed words of a pamphlet, the distribution of which was alleged to have violated the Espionage Act, would in fact produce as a proximate result a material interference with the recruiting or enlistment service, or the operation or success of the United States forces, was a question for the jury to decide in view of all the circumstances of the time, and considering the place and manner of distribution. *Pierce v. U. S.*, (1920) 252 U. S. 239, 40 S. Ct. 205, 64 U. S. (L. ed.) —.

Knowledge and intent.—In a prosecution under this section for an attempt to cause insubordination, disloyalty, mutiny and refusal of duty in the military forces of the United States by the publication of an article in a newspaper of which the defendant was editor and manager, the questions of the defendant's knowledge of the article and his intent in publishing it are for the jury. *Bouldin v. U. S.*, (C. C. A. 5th Cir. 1919) 261 Fed. 674.

Instructions to jury.—No valid objection can be urged against that part of a charge to the jury, in a prosecution for publishing and conspiring to publish false news despatches with intent to interfere with the military and naval success of the United States and promote the success of its enemies, to cause insubordination in the military or naval forces, and to obstruct the recruiting or enlistment service, in which the minds of the jurors were directed to the gist of the case, which was despatches received and then changed to express falsehood, to the detriment of the success of the United States, and they were told that, in passing upon the questions of the falsity of these publications and of whether the United States was at war, and any other questions which were, in like manner, a matter of public knowledge and of general information, they might call upon the fund of general information which was in their keeping. *Schaefer v. U. S.*, (1920) 251 U. S. 466; 40 S. Ct. 259, 64 U. S. (L. ed.) —, affirming in part and reversing in part (*E. D. Pa.* 1918) 254 Fed. 135.

In a prosecution for a violation of this section by making a speech to a public meeting with intent to willfully obstruct the recruiting and enlistment service of the United States, the court may properly instruct the jury that the constitutional guaranty of the right of freedom of speech cannot be successfully resorted to as a protection in time of war, where the statements that are made are not honest criticisms, based upon truth,

but are false and uttered with the willful intent to injure the interests of the United States and disobey its statutes. *Dodge v. U. S.*, (C. C. A. 2d Cir. 1919) 258 Fed. 300, 169 C. C. A. 316, 7 A. L. R. 1510.

An instruction in a prosecution under this section that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt and "from that time the burden is on him to establish his innocence," is erroneous. *Caughman v. U. S.*, (C. C. A. 4th Cir. (1919) 258 Fed. 434, 169 C. C. A. 450. Regarding the correctness of this instruction, the court said:

"We cannot doubt, that the concluding clause of this instruction, the last word from the court to the jury, was seriously misleading and prejudicial. It is clearly at variance, in our opinion, with the rule laid down in the familiar cases of *Coffin v. United States*, 156 U. S. 432, 458, 15 Sup. Ct. 394, 39 L. Ed. 481 and *Cochran v. United States*, 157 U. S. 286, 299, 15 Sup. Ct. 628, 39 L. Ed. 704, and frequently since repeated. For example, in *Davis v. United States*, 160 U. S. 469, 487, 16 Sup. Ct. 353, 358 (40 L. Ed. 499), the Supreme Court says:

"Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime."

"The point needs no discussion. In the light of the cited cases it seems plain that the instruction under review gave to the jury an erroneous impression as to the continuing presumption of innocence, which, as said in *Coffin v. United States*, *supra*, 'is an instrument of proof created by the law in favor of one accused.'"

Where the indictment was based upon language of defendant constituting obstruction of the enlistment service and actual and attempted causation of insubordination, disloyalty, and refusal of duty in the military forces, and the defense was intoxication, depriving defendant of the necessary criminal intent, it was reversible error to instruct the jury that it could not be rightly considered as a defense but might be a circumstance in mitigation which was for the court to find. *Stenzel v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 161, where the court said: "While there was conflict in the evidence as to the fact or degree of intoxication at the time of the alleged statements by Stenzel, yet there was distinct and positive evidence that Stenzel was so drunk at that time that he did not know what he was saying. In this state of the evidence he was entitled to have the jury pass upon the question of whether or not he was at the time so drunk that he was incapable of entertaining the specific criminal intent required by the Espionage Act."

In *Kumpula v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 49, 171 C. C. A. 645, a judgment of conviction for violation of this section was reversed because the court gave a positive instruction that the I. W. W., with which defendant had been in some way connected, is a disloyal and unpatriotic organization and that adherents thereof owe no allegiance to any organized government, while the evidence, though of sufficient strength to go to the jury, did not warrant such conclusive determination by the court. The court said:

"True, the court told the jury that even if defendant did belong to the I. W. W. that of itself would not condemn him under the charge. But we are not satisfied that this qualification could relieve defendant of the feeling, and especially in time of war, that naturally must have arisen in the minds of the jury by the declaration of the court."

Sentence.—A defendant who has been convicted of a violation of this section may not be sentenced to imprisonment in a state penitentiary for a shorter period than one year. *Hickson v. U. S.*, (C. C. A. 4th Cir. 1919) 258 Fed. 867, 169 C. C. A. 587, wherein the court said:

"It appears that the defendant was sentenced to the penitentiary for a term of six months. We think this was unauthorized. This question was passed upon in the case of *In re Bonner*, Petitioner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. ed. 149. The court in discussing this phase of the question, said:

"Section 5356 of the Revised Statutes of the United States, under which the defendant was indicted and convicted, prescribes as a punishment for the offenses designated fine or imprisonment—the fine not to exceed \$1,000 and the imprisonment not more than one year, or by both such fine and imprisonment. Such imprisonment cannot be enforced in a state penitentiary. Its limitation, being to one year, must be enforced elsewhere. Section 5541 of the Revised Statutes provides that: "In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose." And section 5542 provides for a similar imprisonment in a state jail or penitentiary where the person has been convicted of any offense against the United States and sentenced to imprisonment and confinement at hard labor. It follows that the court had no jurisdiction to order an imprisonment, when the place is not specified in the law, to be executed in a penitentiary when the imprisonment is not ordered for a period longer than one year or at hard labor. The statute is equivalent to a direct denial of any authority on the part

of the court to direct that imprisonment be executed in a penitentiary in any cases other than those specified. Whatever discretion, therefore, the court may possess, in prescribing the extent of imprisonment as a punishment for the offense committed, it cannot, in specifying the place of imprisonment, name one of these institutions. This has been expressly adjudged in *Re Mills*, 135 U. S. 263, 270 [10 Sup. Ct. 762, 34 L. ed. 107], which, in one part of it, presents features in all respects similar to those of the present case."

1918 Supp., p. 124, sec. 4.

Failure to agree upon precise method of violation as material.—A conspiracy to violate the Espionage Act, made criminal by this section, provided one or more of the conspirators do any act to effect the object of the conspiracy, is none the less criminal, if thus attempted to be carried into effect, merely because the conspirators failed to agree in advance upon the precise method in which the law shall be violated. *Pierce v. U. S.*, (1920) 252 U. S. 239, 40 S. Ct. 205, 64 U. S. (L. ed.) —.

Pleading.—While the averment of a conspiracy cannot be aided by allegations respecting the overt acts, and while under section 4, as under the Criminal Code, § 37 (see vol. 7, p. 534), a mere conspiracy without overt act done in pursuance of it is not punishable criminally, yet the overt act need not be, in and of itself, a criminal act, still less need it constitute the very crime that is the object of the conspiracy. *Pierce v. U. S.*, (1920) 252 U. S. 239, 40 S. Ct. 205, 64 U. S. (L. ed.) —.

In *Enfield v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 141, the court said: "Each count charges conspiracy between certain dates, to procure arms and ammunition, and to offer armed resistance to the induction into the army of men qualified therefor and registered under the Selective Service Act. This is sufficient so far as particularity of statement is concerned."

Averments in an indictment that defendants, charged with committing and conspiring to commit acts forbidden by the Espionage Act, unlawfully, wilfully, or feloniously committed such forbidden acts, fairly import an unlawful motive. *Pierce v. U. S.*, (1920) 252 U. S. 239, 40 S. Ct. 205, 64 U. S. (L. ed.) —.

Judicial notice.—No prejudice could arise in a prosecution for conspiring to violate the Espionage Act, from an instruction that the jury might be supposed to know the fact that the United States was at war. *Stilson v. U. S.*, (1919) 250 U. S. 583, 40 S. Ct. 28, 64 U. S. (L. ed.) —, *affirming* (E. D. Pa. 1918) 254 Fed. 120.

The constitutional freedom of speech and press was not infringed by the provisions of the Espionage Act of June 15, 1917, as amended by the Act of May 16, 1918, under which convictions may be had for conspiring

when the United States was at war with Germany, unlawfully to utter, print, write, and publish disloyal, scurrilous, and abusive language about the form of government of the United States, or language intended to bring the form of government of the United States into contempt, scorn, contumely and disrepute, or intended to incite, provoke, and encourage resistance to the United States in said war, or unlawfully and wilfully, by utterance, writing, printing, and publication, to urge, incite, and advocate curtailment of production of things and products necessary and essential to the prosecution of the war. *Abrams v. U. S.*, (1919) 250 U. S. 616, 40 S. Ct. 17, 64 U. S. (L. ed.) —.

Sufficiency of evidence.—A conviction of conspiring, contrary to the Espionage Act, as amended by the Act of May 16, 1918, to publish language intended to incite, provoke, and encourage resistance to the United States in the war with Germany and by writing, printing and publication to urge, incite, and advocate curtailment of production of things and products necessary and essential to the prosecution of the war—is sustained by evidence that defendants united to print and distribute circulars intended to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution in the United States, for the purpose of embarrassing, and, if possible, defeating, the military plans of the government in Europe, and plainly urging and advocating resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordinance and munitions necessary and essential to the prosecution of the war. *Abrams v. U. S.*, (1919) 250 U. S. 616, 40 S. Ct. 17, 64 U. S. (L. ed.) —.

Evidence that defendants, acting in concert, with full understanding of its contents, distributed publicly a highly colored and sensational pamphlet fairly to be construed as a protest against the further prosecution by the United States of the war with Germany, is sufficient to support convictions of conspiring, contrary to the Espionage Act, to cause insubordination, disloyalty, and refusal of duty in the military or naval forces, and to obstruct the recruiting and enlistment service of the United States. *Pierce v. U. S.*, (1920) 262 U. S. 239, 40 S. Ct. 206, 64 U. S. (L. ed.) —.

Convictions of conspiring to violate the Espionage Act are supported by the evidence if there was substantial evidence inculcating the defendants, which, if believed by the jury, would justify the submission of the issues to it. *Stilson v. U. S.*, (1919) 250 U. S. 583, 40 S. Ct. 28, 64 U. S. (L. ed.) —, *affirming* (E. D. Pa. 1918) 254 Fed. 120.

On the trial of an indictment for conspiracy to oppose by force the enforcement of the Selective Service Act it was reversible error to admit in evidence against defendants, over objection, the fact that a brother of defendant Enfield had deserted from the service, and a speech by one Hicks, an ex-convict under indictment at the time of the trial for some of his utterances in that speech, and not shown to be connected with the alleged conspiracy, the court saying: "A portion of Hicks's extended speech had been taken by a stenographer. Upon the above slender basis this portion was introduced against Enfield. It was a vicious, scurrilous, seditious outburst against the government, which would naturally inflame the righteous anger of every patriotic man upon the jury. Enfield was not shown to be in any way responsible for this speech, nor was it properly shown that he in any wise approved the highly intemperate passages introduced." *Enfield v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 141.

Charge to jury.—There is no well-founded objection to that part of the charge to the jury in a prosecution for conspiring, contrary to the Espionage Act, to cause insubordination in the military or naval forces of the United States, and to obstruct the recruiting or enlistment service, in which the jury were told to look at all the evidence, including the character of the publications complained of, and determine from them, assisted by all the other evidence, whether there was an attempt to cause insubordination, and a wilful obstruction of enlistment, although this language was used in connection with observations concerning judicial notice to be taken by the jury as to the country being in a state of war, where, taking the charge together, the determination as to whether the facts made a case coming within the denunciation of the statute was fairly left to the jury upon the evidence. *Stilson v. U. S.*, (1919) 250 U. S. 583, 40 S. Ct. 28, 64 U. S. (L. ed.) —, *affirming* (E. D. Pa. 1918) 254 Fed. 120.

1918 Supp., p. 132, sec. 1.

Mandamus to compel admission to mails.—Where the settled policy of a newspaper has been such as to brand it as a hostile or enemy publication, and the Postmaster General has refused it the privilege of the mail on the ground that it violates the Espionage Act, he will not be compelled by mandamus to admit it to the mails as "mailable matter of the second class." *U. S. v. Burlison*, (App. Cas. D. C. 1919) 258 Fed. 282.

CUSTOMS DUTIES

Vol. II, p. 724, sec. 1. [First ed., 1914 Supp., p. 59.]

Classification for duty determined as of what time.—Although the rate of duty applicable to imported goods at the time they come into customs may or may not be the rate lawfully assessed against them (*United State v. Cronkhite Co.*, 9 U. S. Cust. App. 129; T. D. 37980), their classification for duty is determined by their condition at that time. *Minneapolis Cold Storage Co. v. U. S.*, (1919) 9 U. S. Cust. App. 225.

"Not specially provided for."—The general rule that the presence of the "Not specially provided for" clause in one of two competing provisions and its absence from the other may affect the classification of the merchandise under the provision which lacks it applies only where the goods are equally included within each of the competing provisions. *Drankenfeld & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 124.

Classification by use.—A designation according to a specific use prevails over a competing description of a general character, without special limitation as to use or other qualification. *Drankenfeld & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 124.

Authority of Treasury Department to limit statute.—The Treasury Department has no authority to engraft upon a statute a term or limitation not placed there by Congress. *Saji, etc., Co. v. U. S.*, (1919) 9 U. S. Cust. App. 78.

Ex nomine designation as governing classification for duty.—An *ex nomine* designation of an article, nothing appearing to indicate a contrary legislative intent, should govern its classification for duty. *Burr v. U. S.*, (1919) 9 U. S. Cust. App. 71.

Giving benefit of doubt to importer.—When there is doubt as to the construction of a provision of law levying duty upon imported merchandise, it is the duty of the court to resolve that doubt in favor of the importer. *Aetna Explosives Co. v. U. S.*, (1919) 9 U. S. Cust. App. 298; *U. S. v. Golden Co.*, (1919) 9 U. S. Cust. App. 229.

Vol. II, p. 726, par. 5. [First ed., 1914 Supp., p. 59.]

"Chemical mixtures" as including nitric acid mixed with sufficient sulphuric acid to prevent corroding of tanks.—The provision of this paragraph for "chemical . . . mixtures" imports mixtures susceptible of commercial use as they exist, or at least such as are purposely started on their way toward adaptation to such use. *Aetna Explosives Co. v. U. S.*, (1919) 9 U. S. Cust. App. 298, wherein it appeared that nitric acid was imported in tank cars with a sufficient addition

of sulphuric acid to prevent it from corroding the tanks, in accordance with the regulations of the Interstate Commerce Commission. It was shown that it was commercially impracticable at that time to ship nitric acid in any other way; that the mixture had no commercial use; that no commercial advantage was gained by the importation of either acid in this manner; that there was no chemical union of the two acids; and that, before being used by the importer in manufacturing explosives, it was necessary to add more sulphuric acid. It was held that this was not a "chemical . . . mixture" within the meaning of that term in this paragraph. What was imported was nitric acid, admissible free of duty under paragraph 387 (see vol. II, p. 848). The sulphuric acid (also admissible free of duty under paragraph 387) should be treated as a part of the packing of the goods for shipment.

Homatropine hydrobromide is not composed of a single element, nor is it natural or uncombined. It is a product of chemical reactions, and is composed of various chemical elements. This constitutes the article a chemical compound as distinguished from a chemical mixture, and brings it within the classification "chemical . . . compounds" in this paragraph. *U. S. v. Mallenckrodt Chemical Works*, (1919) 9 U. S. Cust. App. 252.

Vol. II, p. 728, par. 15. [First ed., 1914 Supp., p. 60.]

"Suitable for medicinal or toilet purposes."—A thing to be suitable, as that term is commonly understood, must be fit and appropriate for the end to which it is to be devoted. In the tariff law the term "suitable" means actually, practically, and commercially fit. The provision of this paragraph, "chalk, precipitated, suitable for medicinal or toilet purposes," will be so construed. *U. S. v. Amerman*, (1919) 9 U. S. Cust. App. 244, wherein it appeared that chalk which had been precipitated from municipal water in order to make the water fit for use was imported. While it was shown to meet the requirements of the United States Pharmacopeia for use as a medicine and to be capable of use in tooth powder, it was also shown that it was bolted in this country to separate it from impurities before being so used and to be quite largely devoted to uses other than medicinal and toilet. It was held that it should not be regarded as "suitable for medicinal or toilet purposes" under this paragraph; and the decision of the Board of United States General Appraisers classifying it as "chalk, ground or bolted," under paragraph 60 (see vol. II, p. 739) was affirmed.

Vol. II, p. 730, par. 17. [First ed., 1914 Supp., p. 60.]

Weight as sole test.—The language of this paragraph, "put up in individual packages of two and one-half pounds or less gross weight," is unambiguous, unmistakable, and unqualified; it should therefore be free from extraneous construction. The sole and single test is that of weight; no reference is made, either directly or indirectly, to any other consideration, such as price, quality, origin, method of manufacture, character of container, suitability for use or sale, or any other matter. Nor does any distinction between wholesale and retail packages appear, the only line of demarkation being weight. *U. S. v. Mallinckrodt Chemical Works*, (1919) 9 U. S. Cust. App. 252, wherein it was held that ten ounces of homatropine hydrobromide contained in a single glass bottle, which was packed in a small wooden box, the entire parcel weighing less than 2½ pounds, was dutiable under this paragraph "chemical . . . compounds . . . put up in individual packages of two and one-half pounds or less gross weight"—notwithstanding that this is so large a quantity as to suffice a wholesale house for several months' stock.

Vol. II, p. 734, par. 34. [First ed., 1914 Supp., p. 62.]

Gelatin.—A physical (not chemical) solution of gelatin with acetic acid, water, and coloring matter, the gelatin being the component material of chief value and still possessing its natural inherent qualities, known as "Red Top roller varnish" or "roller varnish," used to dress the surfaces of leather rollers in woolen mills to keep the wool from sticking to them, is not a varnish under paragraph 58 (see vol. II, p. 738) or a nonenumerated manufacture under paragraph 385 (see vol. II, p. 839) but a manufacture of gelatin under this paragraph. *U. S. v. Vandegrift*, (1918) 9 U. S. Cust. App. 30.

Vol. II, p. 734, par. 36. [First ed., 1914 Supp., p. 62.]

Chicle, the sap having been drawn from the tree and coagulated by artificial heat into hard chunks in Mexico, shipped to Canada, and there ground and dried, the grinding and drying bearing no relation to transportation and being a process in the manufacture of chewing gum, known commercially as desiccated chicle, is dutiable under this paragraph as chicle "advanced in value by drying, straining, or any other process or treatment whatever beyond that essential to the proper packing," and not as "chicle, crude." *American Chicle Co. v. U. S.*, (1918) 9 U. S. Cust. App. 1.

Vol. II, p. 736, par. 46. [First ed., 1914 Supp., p. 63.]

Distilled oil.—The presumption of correctness attaching to the collector's classification of certain merchandise as distilled oil under this paragraph, aided by the testimony of a competent witness, is not overcome by the testimony to the contrary of a witness who admitted that his testimony was based on what people told him. *U. S. v. Vandegrift*, (1918) 9 U. S. Cust. App. 25.

Vol. II, p. 738, par. 49. [First ed., 1914 Supp., p. 63.]

Synthetic coumarin.—Synthetic coumarin, a coal-tar product which closely resembles a natural product obtained from the tonka bean, shown to be substantially used in the manufacture of perfumery, though chiefly used in the manufacture of flavoring extracts, concededly odoriferous or aromatic, is dutiable under the provision of this paragraph for "all natural or synthetic odoriferous or aromatic substances, preparations, and mixtures used in the manufacture of, but not marketable as, perfumes or cosmetics." The decision of the Board of United States General Appraisers classifying it under the provision for "all similar products," section 500, (see 1918 Supp., p. 140) is reversed. The provision of section 502, revenue act of September 8, 1916, (see 1918 Supp., p. 142) that laws inconsistent therewith are thereby repealed, does not operate upon the provision of this paragraph for "all natural or synthetic odoriferous or aromatic substances, preparations, and mixtures used in the manufacture of, but not marketable as, perfumes or cosmetics" sufficiently (if at all) to prevent classification of synthetic coumarin under it. *U. S. v. Lehn*, (1919) 9 U. S. Cust. App. 309.

Substantial "use" as sufficient.—The language of this paragraph "used in the manufacture of, but not marketable as, perfumes or cosmetics," does not require that the chief use of an article must be in the manufacture of perfumes or cosmetics in order that it may be dutiable under the paragraph. A substantial use is sufficient. *U. S. v. Lehn*, (1919) 9 U. S. Cust. App. 309.

Vol. II, p. 738, par. 58. [First ed., 1914 Supp., p. 64.]

Gelatin as varnish.—See annotation under par. 46 of this title, *supra*, this page.

Vol. II, p. 739, par. 60. [First ed., 1914 Supp., p. 64.]

"Chalk, ground or bolted."—See annotation under par. 15 of this title, *supra*, p. 480.

Vol. II, p. 739, par. 63. [First ed., 1914 Supp., p. 64.]

Ceramic colors.—The context of this paragraph (as also that of its ancestor para-

graph 56, tariff act of 1909) evinces Congress's unmistakable purpose to select from all colors those colors which are used in the ceramics and expressly rate them for dutiable purposes. *Drakenfeld & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 124, wherein it was held that merchandise invoiced as "dunkelpurpur" (German for dark purple), conceded to be a ceramic color and also a mixture of which gold constituted the element of chief value, was dutiable under this paragraph, as a ceramic color, and not under paragraph 65 as a mixture of which gold constitutes the element of chief value.

Vol. II, p. 742, par. 78. [First ed., 1914 Supp., p. 66.]

Ornament or toy answering description of both this and the following paragraph.—Merchandise which answers the description of paragraph 78, "common yellow, brown, or gray earthenware made of natural unwashed and unmixed clay," and also that of paragraph 79, "earthenware and crockery ware composed of a nonvitrified absorbent body . . . and stoneware, including . . . ornaments, toys . . .," is, by reason of its being an ornament or toy, more specifically described by paragraph 79, and, therefore, dutiable under it. *Butler Bros. v. U. S.*, (1919) 9 U. S. Cust. App. 90.

Vol. II, p. 742, par. 79. [First ed., 1914 Supp., p. 66.]

Earthenware garden ornaments.—Diminutive earthenware figures of birds, plants, houses, and people, designed to be exposed for amusement or ornament and not intended or suitable for any utilitarian purpose, are dutiable as earthenware ornaments or toys under this paragraph and are not to be classified as earthenware articles under paragraph 78. *Butler Bros. v. U. S.*, (1919) 9 U. S. Cust. App. 90.

Article when "ornamented" or decorated.—Whether or not an article is "ornamented" or "decorated" within the meaning of those terms in this paragraph, is a question of fact to be determined with reference to the particular article; and it is not every minute appearance of ornamentation or decoration upon an article that will bring it within the paragraph. Certainly neither every deviated line nor undulated surface can be held an ornamentation or decoration, although pleasing to the eye. *U. S. v. Mutual China Co.*, (1919) 9 U. S. Cust. App. 232, which affirmed the Board of United States General Appraisers' decision directing classification of cups, saucers, and plates, with slightly fanciful outlines and raised lines produced with the mold or a stylus, under this paragraph, as "plain white," rather than as "ornamented or decorated."

Vol. II, p. 743, par. 80. [First ed., 1914 Supp., p. 66.]

Chinaware semivitrified and nonabsorbent.—When Congress provided in paragraph 79 for a nonvitrified absorbent body and in paragraph 80 for a vitrified nonabsorbent body with the further provision that the latter, when broken, must show a vitrified or semivitrified or vitreous or semivitreous fracture, it understood that such wares as are dealt with in the paragraphs, if entirely vitrified are nonabsorbent, if entirely nonvitrified are absorbent; and that when partially vitrified they may be absorbent or nonabsorbent, depending upon the degree of vitrification. "Vitrified" means substantially converted into glass. "Vitreous" means consisting of or resembling glass in its important characteristics. The words "semivitrified" and "semivitreous," in paragraph 80, do not require the bodies of the wares to be 50 per cent or more vitrified in order to warrant classification under the paragraph; vitrification to an appreciable extent, and not to a negligible degree only, is sufficient. Any power of absorption whatever is not sufficient to exclude merchandise from paragraph 80. *Vantine & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 291, wherein it was held that chinaware known as "banko ware," shown to be about half vitrified and wholly nonabsorbent, was correctly classified accordingly under paragraph 80, rather than under paragraph 79, and that a showing that chinaware, when permitted to stand immersed in water, or when boiled in water, absorbed some water, but less than half of the quantity absorbed by some such wares, with no other showing as to the quantity absorbed, was not sufficient to support a protest against the collector's classification as "nonabsorbent" (par. 80), claiming classification as "absorbent" (par. 79).

Vol. II, p. 744, par. 81. [First ed., 1914 Supp., p. 66.]

Plates composed wholly or in chief value of carbon.—The provision in this paragraph for "plates . . . composed wholly or in chief value of carbon," should, in view of the fact that the provisions of the paragraph associated with it relate plainly to articles of electrical use and construction, be limited in application to carbon plates as known and used in those arts and industries, and should not be extended so as to include all flat and relatively thin slabs of carbon whatsoever. *Knott v. U. S.*, (1919) 9 U. S. Cust. App. 92.

Manufacture of carbon not specifically provided for.—Merchandise invoiced as carbon blocks consisting of carbon which has been molded into rectangular pieces, running in size from 1 $\frac{1}{8}$ to 8 $\frac{1}{4}$ inches in length, from 1 $\frac{1}{2}$ to 3 $\frac{5}{8}$ inches in width, and from 3 $\frac{1}{16}$ to 1 $\frac{5}{8}$ inches in thickness, was shown to be devoted, by means of considerable

further processing, to the manufacture of brushes and plates for electrical machinery. Since they are so far advanced as to be appropriated to a particular use, they must be regarded as manufactures, but, since they may not be put to that use until after substantial further manufacturing processes, they cannot be regarded as the finished articles. They are accordingly classifiable under this paragraph, as "manufactures of carbon not specifically provided for," and not as brushes or plates of carbon. *Knott v. U. S.*, (1919) 9 U. S. Cust. App. 92.

Vol. II, p. 745, par. 84. [First ed., 1914 Supp., p. 67.]

Glass tray bottoms, made of two plain panes of common window glass with decorative threads, leaves, and butterflies between them, not attached to either of the two panes but held there by pressure when the panes are fastened into the frame of the tray, cannot be regarded as glass "ornamented or decorated" or processed in any of the ways specified in this paragraph, nor in any manner ejusdem generis therewith. *U. S. v. Bush & Co.*, (1919) 9 U. S. Cust. App. 160.

Trays with glass bottoms and bamboo frames.—Trays, the rims of which are of stained bamboo and the bottoms of two panes of common flat window glass, between which are natural butterflies with paper bodies, leaves, and silk threads so arranged as to give the effect of a decoration on glass, the decoration not being attached to either pane of glass but held in position by the fastening of the panes of glass into the rims of the trays, are not classifiable under this paragraph, as articles in chief value of glass "ornamented or decorated" or processed in any of the ways specified therein. *U. S. v. Bush & Co.*, (1919) 9 U. S. Cust. App. 160.

Vol. II, p. 749, par. 93. [First ed., 1914 Supp., p. 68.]

Mountings for opera glasses.—The word "mountings" refers to opera and field glasses as well as to optical instruments. This is shown by the wording of the ancestor paragraphs 111 of the act of 1897 and 108 of the act of 1909. *U. S. v. Sheldon*, (1919) 9 U. S. Cust. App. 153, which held that mother-of-pearl staves and name rings for mountings or embellishments of opera glasses were classifiable as mountings for opera glasses rather than as manufactures of mother-of-pearl under par. 369.

Mountings for optical instruments.—The word "mountings" employed in this paragraph with reference to "opera and field glasses and optical instruments," when used in connection with optical instruments such as the microscope and polariscope, is used in the sense of accessories, adjuncts, or parts

thereof. *U. S. v. International Forwarding Co.*, (1919) 9 U. S. Cust. App. 156.

Optical instruments.—An instrument is or is not an "optical instrument" within the meaning of that expression in this paragraph, according to whether or not it is designed directly or indirectly as an aid to vision, or to produce for optical inspection the picture of some object. *U. S. v. International Forwarding Co.* (1919) 9 U. S. Cust. App. 156, following *U. S. v. Bliss*, 6 U. S. Cust. App. 433.

Polariscope as "optical instrument."—A polariscope, being an instrument used to enable the observer to view the phenomena of polarized light, and particularly to examine objects under polarized light, is classifiable as an optical instrument rather than as a metal manufacture under par. 167. *U. S. v. International Forwarding Co.*, (1919) 9 U. S. Cust. App. 156.

Vol. II, p. 757, par. 127. [First ed., 1914 Supp., p. 72.]

Containers of hydrosulphite of soda.—Hydrosulphite of soda was imported packed in tin containers about the size of an ordinary barrel, some of the containers being packed in close-fitting wooden drums which are fortified by iron, and some of them in barrels or casks, the space between the container and the barrel or cask being packed with straw. It was shown that it was necessary to protect the merchandise from moisture; that such containers are the usual ones for such merchandise; that they are not heavy, but sufficiently strong for their purpose; and that the contents of only one-fourth of them could be removed without destroying them. As to those whose contents cannot be removed without destroying them, the decision of the Board of United States General Appraisers sustaining a protest against the collector's classification as "cylindrical or tubular tanks of vessels," under this paragraph, and claiming dutiability at the same rate as the merchandise in accordance with paragraph R of section 3 (see vol. II, p. 1086), is affirmed. As to those whose contents can be removed without destroying them, there being no evidence that they are useless commercially, the presumption of correctness attendant upon the collector's action is not overcome, and the decision of the board sustaining the protest is reversed. *U. S. v. Murphy*, (1919) 9 U. S. Cust. App. 248.

Vol. II, p. 763, par. 157. [First ed., 1914 Supp., p. 75.]

Combination penholders.—The provision of this paragraph that pens and penholders shall be assessed separately does not qualify the provision for combination penholders in the second clause of the paragraph, but relates to the general provision for penholders

in the first clause. This paragraph provides a rate of 25 per cent ad valorem for combination penholders, comprising penholder, pencil, rubber eraser, automatic stamp, or other attachment, treating such combination penholders as distinct entities. The Board of United States General Appraisers having construed the provisions of the tariff act of 1909 which correspond essentially to those of paragraph 157, and Congress having reenacted the provision, legislative adoption of the board's construction is to be inferred. *U. S. v. Illfelder*, (1918) 9 U. S. Cust. App. 40.

Vol. II, p. 763, par. 161. [First ed., 1914 Supp., p. 75.]

Watch movement and cases.—Where watches and wrist straps for them were imported together but packed separately, a concession that the movements were properly held dutiable *eo nomine* under this paragraph, carries with it a concession that the cases were also properly held dutiable *eo nomine* under the same paragraph. *U. S. v. Strasburger & Co.*, (1919) 9 U. S. Cust. App. 138.

Vol. II, p. 765, par. 165. [First ed., 1914 Supp., p. 76.]

Embroidery and sewing machines.—The provision of this paragraph for "embroidery machines" refers to a class of machines which is imported, designed, constructed, and adapted for embroidering only. A machine that is primarily constructed and designed for sewing fabrics is still a sewing machine although used for the purpose of embroidery work; and, on the other hand, a machine primarily constructed and designed to do embroidering would remain such, even assuming that it might be used for ordinary machine sewing. The provision of this paragraph for "embroidery machines" and that of paragraph 441 for "sewing machines" will be so construed. The question is not so much what the machine does as what it was primarily constructed and designed to do. *Durbrow, etc., Mfg. Co. v. U. S.*, (1919) 9 U. S. Cust. App. 148.

Vol. II, p. 765, par. 167. [First ed., 1914 Supp., p. 76.]

Sewing machines shuttles.—See annotation under par. 441, *infra*, p. 490.

Watch bracelets.—Wristlets or straps for holding wrist watches, in chief value of metal, are classifiable, not under paragraph 356, tariff act of 1913, as articles worn on the person for comfort, convenience, or adornment, as like articles, or as parts of such articles or like articles, but under paragraph 167 as miscellaneous articles in chief value of metal. *U. S. v. Strasburger & Co.*, (1919) 9 U. S. Cust. App. 138.

Polariscope tubes, specially designed glass

tubes with brass fittings for holding liquids to be examined in polarized light, are dutiable as mountings for optical instruments (par. 93) rather than as metal manufactures under this paragraph. *U. S. v. International Forwarding Co.*, (1919) 9 U. S. Cust. App. 156.

Plated with gold or silver.—To meet the requirement of the word "plated" in this paragraph, it is not necessary that an article be wholly covered with gold or silver, nor can any hard and fast mathematical line of distinction be drawn in the application of the provision. The classification includes all such metallic articles as have a substantial portion of their surface, that is to say, more than an insignificant or negligible portion, covered with gold or silver. *Cloisonné* vases of beautiful and artistic appearance, their value being materially enhanced by the plating with gold or silver of certain ornamental and artistic parts and decorations, are "plated with gold or silver," notwithstanding that only about 10 per cent of their surfaces are plated, and notwithstanding the violation by the collector of customs of the instructions of the Secretary of the Treasury that articles, to be classified as plated under the paragraph, must have at least 15 per cent of the exposed surface plated. *Saji, etc., Co. v. U. S.*, (1919) 9 U. S. Cust. App. 78.

Vol. II, p. 769, par. 170. [First ed., 1914 Supp., p. 76.]

"Poles" as including what.—The provision of this paragraph, for "telephone, trolley, electric-light, and telegraph poles" was intended by Congress as a comprehensive one and includes all poles of a character adapted to the uses indicated. In order that a pole may answer the description of this paragraph, it is not necessary that it have attached any cross arm or even that it be notched to receive any. Nor is it necessary that it should be drawshaved, creosoted, squared, or roofed, or far advanced in manufacture as to be devoted to some one of the particular uses designated. The fact that certain poles may be and are used to some extent as piles is not sufficient to prevent their classification under this paragraph as "telephone, trolley, electric-light and telegraph poles." Cedar poles of a kind shown to be mainly used as "telephone, trolley, electric-light, and telegraph poles" are classifiable accordingly under this paragraph, notwithstanding that they may be and are used also for other purposes, notwithstanding that before being used as designated they are usually draw-shaved, painted, notched, squared, creosoted, and roofed, and notwithstanding that they answer also to the call of free-list paragraph 647 for "logs, timber, round, unmanufactured," and that of free-list paragraph 648 for "cedar . . . in the log, rough, or hewn only." *U. S. v. Baxter*, (1919) 9 U. S. Cust. App. 99.

Vol. II, p. 770, par. 174. [First ed.,
1914 Supp., p. 77.]

"Wood" as embracing what.—In common parlance wood is the tough, hard substance of all trees and shrubs, and it includes not only the hard fiber bundles of trees and shrubs in general but also the tougher fibrous components of some herbaceous plants. It is a very broad term and includes not only material obtained from exogenous plants but also like substances obtained from palms, from bamboo (which is a giant grass), and from some ferns (which are herbaceous plants). The word "wood" in this paragraph will be so construed. *Steinhardt v. U. S.*, (1919) 9 U. S. Cust. App. 62.

Baskets made of raffia, wood, cane and willow, and lined with silk, the silk being greater in value than any one of the other component materials, but less than all, are classifiable, not under paragraph 318 as miscellaneous manufactures in chief value of silk, but under this paragraph as baskets "in chief value of . . . wood" or "like material." This is true notwithstanding that the silk lining may be greater in value than the wood, cane, and willow, since raffia is held to be wood within the meaning of that term as used in this paragraph. *Steinhardt v. U. S.*, (1919) 9 U. S. Cust. App. 62.

Vol. II, p. 771, par. 177. [First ed.,
1914 Supp., p. 77.]

Sugar cane.—The results effected by steaming sugar cane and packing it with sugar and water in hermetically sealed tins are not within the judicial knowledge; and the court is unable to say that such merchandise is either sugar cane in its natural state or sugar cane unmanufactured, within the meaning of those expressions in this paragraph. The only evidence as to the nature of the commodity being the classification of the merchandise by the collector as "sweet-meats" under paragraph 217, the decision of the Board of United States General Appraisers sustaining the protest of the importers is reversed. *U. S. v. Brown & Co.*, (1919) 9 U. S. Cust. App. 146.

Vol. II, p. 776, par. 194. [First ed.,
1914 Supp., p. 78.]

"Confectionery" as covering coating on surface of baked loaf.—A thin, glazed coating on the surface of a baked loaf, possibly composed of water and the white of an egg or of sugar and water and applied with a brush, cannot be regarded as "confectionery" under this paragraph. *U. S. v. Menzel*, (1918) 9 U. S. Cust. App. 16.

Sponge rusks.—Merchandise known as "sponge rusks"—toasted slices of sponge cake—is not dutiable under this paragraph, since it does not contain chocolate, nuts, fruit, or confectionery. There is nothing in

the record to show that its components are the same as those employed in making sweetened breads, crackers, or biscuits, so that it cannot be held free of duty under paragraph 417 as "biscuits, bread, and wafers." It is a manufacture of sponge cake and dutiable as a miscellaneous manufactured article under paragraph 385. *U. S. v. Hermanos*, (1919) 9 U. S. Cust. App. 66.

Similitude.—Biscuits, bread, wafers, cakes, and other baked articles not containing chocolate, nuts, fruit, or confectionery are excluded from the operation of this paragraph, and, having been excluded, they cannot be subjected to its provisions by similitude without violating the expressed will of Congress. *U. S. v. Hermanos*, (1919) 9 U. S. Cust. App. 66.

Vol. II, p. 776, par. 200. [First ed.,
1914 Supp., p. 79.]

"Vegetables" as including canned grapevine leaves.—Canned grapevine leaves, used to flavor roulades of meat and rice, which are rolled up and cooked in them, served with the roulades, sometimes eaten and sometimes not, are not vegetables, prepared, under this paragraph. The decision of the Board of United States General Appraisers sustaining the claim of the protest for classification under paragraph 385 as a nonenumerated manufactured article is affirmed. *U. S. v. Caroneos Bros.*, (1919) 9 U. S. Cust. App. 220.

Vol. II, p. 777, par. 201. [First ed.,
1914 Supp., p. 79.]

"Sauces" as including flavoring materials used in kitchen.—Flavoring materials which are used exclusively in the kitchen for the cooking or preparation of foods are not sauces within the meaning of this paragraph, because that term as now understood does not include relishes which are not served on the table for individual use. It is not true, however, that sauces cease to be sauces if they are used in greater quantity in the kitchen than on the table. *Yuen & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 108.

Chinese soy as "sauce."—Thin Chinese soy, made by mixing cooked soy beans with wheat flour, salt, and water and exposing to the sun for about three months, used to flavor and color soups, fish and meats, about 80 per cent being used in the kitchen and about 20 per cent on the table, is dutiable as a sauce under paragraph 201, tariff act of 1913, and not as a miscellaneous manufacture under paragraph 385. *Yuen & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 108.

Vol. II, p. 778, par. 212. [First ed.,
1914 Supp., p. 79.]

Quince seed.—See annotation under par. 477, *infra*, p. 490.

Vol. II, p. 785, par. 235. [First ed., 1914 Supp., p. 81.]

Paprika is a capsicum or red pepper.—*Vandegrift & Co. v. United States*, 8 U. S. Cust. App. 1; T. D. 37121. The evidence as to a contrary commercial designation being insufficient, the decision of the Board of United States General Appraisers so classifying it under this paragraph is affirmed. *Littlejohn & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 207.

Vol. II, p. 795, par. 258. [First ed., 1914 Supp., p. 85.]

The language "all other Jacquard figured manufactures of cotton," in this paragraph, was employed as a precautionary measure rather than as indicating an intention to defeat or invade the specific *eo nomine* designations of paragraph 358. *Burr v. U. S.*, (1919) 9 U. S. Cust. App. 71.

Vol. II, p. 796, par. 262. [First ed., 1914 Supp., p. 86.]

Ladder tape.—See annotation under par. 266, next following.

Vol. II, p. 797, par. 266. [First ed., 1914 Supp., p. 86.]

"Manufactures of cotton" as including ladder tape.—Merchandise known as "ladder tape," woven as an entirety of cotton, used in the manufacture of Venetian blinds, identical with that in *United States v. Burlington Venetian Blind Co.* (3 Ct. Cust. App. 378; T. D. 32967), consisting of two longitudinal fast-edge woven pieces about 1½ inches wide, connected at intervals of about 2 inches by similar transverse pieces about three-eighths of an inch wide and 2½ inches long, are dutiable as "manufactures of cotton" and not as "fabrics with fast edges" (par. 262). While the tapes, if produced and imported as separate entities, might be dutiable under paragraph 262, the fact that they have never had an existence separate from that of the finished article is sufficient to exclude them from the operation of this paragraph. *Western Blind, etc., Co. v. U. S.*, (1919) 9 U. S. Cust. App. 68.

Vol. II, p. 801, par. 284. [First ed., 1914 Supp., p. 88.]

"Manufactures of vegetable fibre" as including jute paddings.—Plain woven fabrics called "paddings," the warp being single yarns of cotton and the weft being single yarns of jute, are not classifiable under paragraph 408, as "plain woven fabrics of single jute yarns," notwithstanding that jute may be 60 per cent of the value of the fabrics. They are woven, not of jute yarns but of jute yarns and cotton yarns. The decision

of the Board of United States General Appraisers sustaining the collector's classification of them as a manufacture of vegetable fiber under paragraph 284 is affirmed. *Simiansky v. U. S.*, (1919) 9 U. S. Cust. App. 288.

Vol. II, p. 801, par. 288. [First ed., 1914 Supp., p. 88.]

Effect given collector's classification as to half hose.—The court cannot take judicial notice that exhibits of half hose are not "selvaged, fashioned, narrowed, or shaped wholly or in part by knitting machines or frames, or knit by hand," or "commercially known as seamless"; and, in the absence of other evidence, the collector's classification of them as such under this paragraph, must be sustained and the decision of the Board of United States General Appraisers sustaining a protest claiming them dutiable as knitted wolen half hose not specially provided for under the paragraph reversed. *U. S. v. Lee & Co.*, (1919) 9 U. S. Cust. App. 111.

Vol. II, p. 803, par. 289. [First ed., 1914 Supp., p. 88.]

Flannels.—While paragraph 379, tariff act of 1909, was limited to flannels for underwear, its successor, this paragraph, covers all flannels, regardless of use. *Connor v. U. S.*, (1919) 9 U. S. Cust. App. 312, wherein the court said that with conflicting testimony as to the meaning of the term "flannels," the Government could not be said to have established a commercial designation different from the common meaning, in the face of harmonious testimony by the importers' witnesses that the merchandise is flannels, supported as to much of it by the finding of a Government appraiser and examiners to the same effect. The decision of the Board of United States General Appraisers sustaining the collectors' classifications as cloths composed wholly or in chief value of wool under paragraph 288, or as women's and children's dress goods composed wholly or in chief value of wool under paragraph 290, and overruling protests claiming classification as "flannels" under this paragraph was reversed except as to certain items admitted by importers' witnesses not to be flannels. The decision was predicated upon the stipulation of counsel that goods covered by various protests are substantially of the same kind.

Vol. II, p. 805, par. 294. [First ed., 1914 Supp., p. 89.]

Wilton rugs.—Machine-made Wilton rugs are not dutiable under paragraph 300 ("Oriental, Berlin, Anbusson, Axminster, and similar rugs"), but are dutiable under this paragraph by virtue of paragraph 303.

Beuttell v. U. S., (1919) 9 U. S. Cust. App. 38.

Machine-made Wilton rugs are dutiable, by virtue of paragraph 303, at the rate imposed by this paragraph upon Wilton carpets. *Beuttell & Sons v. United States*, 8 Ct. Cust. App. 409; *T. D.* 37686. They are not classifiable under paragraph 300 as "carpets woven whole for rooms." *U. S. v. Snellenburg*, (1919) 9 U. S. Cust. App. 59, wherein the court said that it would not take judicial notice that a sample was a Wilton rug as claimed, and not a moquette carpet as assessed, and, in the absence of testimony, must affirm the collector's classification.

Pleading protest.—Paragraph 303 provides that rugs for floors not specially provided for shall be subjected to the rate of duty imposed upon carpets or carpeting of like character or description. A protest claiming classification for such merchandise under this paragraph as Wilton carpets is not rendered insufficient by the lack of a reference to paragraph 303. The collector is presumed to understand the provisions of the law, and the record shows that he was not misled. *U. S. v. Snellenburg*, (1919) 9 U. S. Cust. App. 59.

Vol. II, p. 805, par. 300. [First ed., 1914 Supp., p. 89.]

"Carpets woven whole for rooms."—The provision in this paragraph for "carpets woven for rooms" does not include all rugs which are woven whole; nor can the question of whether or not a rug is classifiable under this provision be determined by the size of the rug. It refers to a carpet which has been specially woven for a particular room. *U. S. v. Snellenburg*, (1919) 9 U. S. Cust. App. 59.

Wilton rugs.—See annotation under par. 294, *supra*, p. 486.

Vol. II, p. 815, par. 332. [First ed., 1914 Supp., p. 92.]

Water color designs for gowns.—See annotation under par. 652, *infra*, p. 491.

Paper cartons.—Merchandise consisting of a paper carton or box, fitted with small boxes and baskets, intended for counter display after children's handkerchiefs have been put into the small boxes and baskets, is not an entirety. The decision of the Board of United States General Appraisers refusing to sustain the collector's classification thus and assessment of duty as being in chief value of surface-coated paper under paragraph 324 and directing classification of the carton under this paragraph as a manufacture in chief value of paper, and the smaller containers some as articles in chief value of surface-coated paper under paragraph 324 and some as manufactures in chief value of wood under paragraph 176, is affirmed. *U. S. v. Thomsen & Co.*, (1919) 9 U. S. Cust. App. 223.

Vol. II, p. 816, par. 333. [First ed., 1914 Supp., p. 93.]

Beads and spangles and articles composed thereof.—It has been the constant and continuing purpose of Congress in this paragraph, and its ancestor paragraphs in other tariff acts, to regard beads and spangles and articles composed thereof as a separate and distinct subject of tariff classification and duty, but this paragraph should not be regarded as invading the field of the subject matter of paragraph 357 (jewelry and jewelry material) unless manifestly so intended. *U. S. v. Battiloro*, (1919) 9 U. S. Cust. App. 180.

Beads of all kinds.—The term "beads of all kinds," in this paragraph, does not include any of that class of beads constituting jewelry or the materials for, or suitable for, use in making jewelry. *U. S. v. Bartiromo*, (1919) 9 U. S. Cust. App. 183.

Coral beads.—See the annotation to par. 357, *infra*, p. 488.

Vol. II, p. 818, par. 335. [First ed., 1914 Supp., p. 93.]

What constitutes blocking of hats.—Hats which have been shaped in part as an incident only to the forming of their brims, or partly shaped by hand pressure or manipulation only, without any treatment for the purpose or with the effect of bringing them to their final shape by blocking, are "not blocked" within the meaning of that language in this paragraph. Thus straw hats of "Alpine" shape, known as "bodies," which have been placed upon a zinc brim form and subjected to slight hydraulic pressure in order to bring their brims to the proper widths according to style and demand, but which must yet be subjected to a blocking process by which they are stiffened with suitable sizing and pressed into permanent shape and conventional sizes, are entitled to claim classification as "not blocked," under this paragraph. *Donat & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 162.

Vol. II, p. 820, par. 342. [First ed., 1914 Supp., p. 94.]

Jew's-harps are not "toys" under this paragraph. *U. S. v. Sears, Roebuck & Co.*, (1918) 9 U. S. Cust. App. 33.

Vol. II, p. 822, par. 347. [First ed., 1914 Supp., p. 94.]

"Of whatever material composed."—This paragraph indicates very clearly a congressional purpose to make it exclusive in the field of its application. "Artificial . . . fruits, grains, leaves and stems or parts thereof," are of necessity made of materials presumptively covered elsewhere in the act, and it is hardly conceivable that the paragraph can have operation at all without

invading some other paragraph. The effect of the phrase "of whatever material composed" is to make the paragraph invasive of others, and to suspend the force of a particular material as a factor in determining the question of specificity, as, whatever the material, the paragraph has provided for certain specific articles composed of it. If the phrase may be likened to "by whatever name known" in relative comprehensiveness, its use amounts to an *eo nomine* designation of the material. *U. S. v. American Bead Co.*, (1919) 9 U. S. Cust. App. 193.

"Artificial" as meaning exact imitation.—An exact imitation is not necessary to bring an article within the meaning of the word "artificial" as used in this paragraph. If an article is in size, shape, and color like "fruits, grains, leaves, flowers and stems or parts thereof," it falls within the provision. The association of the word "artificial" with the words "suitable for use as millinery ornaments" would indicate that an imitation close enough to render an article suitable for such use would bring it within the provision. *U. S. v. American Bead Co.*, (1919) 9 U. S. Cust. App. 193.

Artificial flowers, leaves, and stems, made of beads with the aid of wires and silk threads, having the size, form, color, and outline of natural flowers, are dutiable under this paragraph as "artificial and ornamental . . . leaves, flowers, and stems or parts thereof, of whatever material composed," rather than as beaded articles under paragraph 333. *U. S. v. American Bead Co.*, (1919) 9 U. S. Cust. App. 193.

Crude feathers.—The covering, and with it the shorter lateral growth on one side of goose quills, was stripped by hand and imported, to be used, after having received appropriate treatment, for making millinery and other ornaments, for trimming Christmas trees, and for various other purposes. Conceding the merchandise to be feathers, it is classifiable under this paragraph as "crude" and not as "advanced" feathers. In this paragraph such treatment as dressing or coloring was deemed an advancement by Congress, indicating that some processing of the feathers by which their condition was improved or their value enhanced was the advancement which Congress intended to be necessary to an increased rate of duty. *U. S. v. Massece*, (1919) 9 U. S. Cust. App. 268.

Vol. II, p. 823, par. 348. [First ed., 1914 Supp., p. 95.]

Goat skin articles as including kid skin articles.—With proof that kid skins and goatskins are different things commercially, the provisions for goatskin articles in this paragraph will be held not to include kid-skin articles. *Seward v. U. S.*, (1918) 9 U. S. Cust. App. 4.

Kid-skin crosses.—Crosses made of dressed kid skins sewed together are dutiable under this paragraph, not as "plates and mats of

. . . goatskins," but as "manufactures of fur . . . , when prepared for use as material, joined or sewed together . . ." *Seward v. U. S.*, (1918) 9 U. S. Cust. App. 4.

Vol. II, p. 825, par. 356. [First ed., 1914 Supp., p. 95.]

"Part thereof"—An article not an actual constituent of a manufacture cannot be considered as a part thereof unless it has been advanced to a point which definitely commits it to that specific class and kind of manufacture. An article commercially suitable and commercially used for the making of different things is a material which is just as much adapted to the production of any of them as to any other of them, and until it has been finally appropriated to some definite manufacturing use and has been given the distinguishing characteristics which clearly identify it as one of the components ultimately to be assembled into a completed whole, it cannot be regarded as a part of any specified manufacture. *U. S. v. American Bead Co.*, (1918) 9 U. S. Cust. App. 27.

Base metal snaps, clasps, and swivels which have been dipped in acid and lacquered, employed in the manufacture of bead necklaces and neck, fan, vest, and eyeglass chains, are not classifiable under paragraph 356 as parts of chains, or under paragraph 167 as miscellaneous metal articles, but under paragraph 356 as metal materials suitable for use in the manufacture of the articles named in the paragraph. *U. S. v. American Bead Co.*, (1918) 9 U. S. Cust. App. 27.

Watch bracelets.—See annotation under par. 167, *supra*, p. 484.

Vol. II, p. 826, par. 357. [First ed., 1914 Supp., p. 96.]

Beads and spangles and articles composed thereof.—See annotation under par. 333, *supra*, p. 487.

Coral beads which have been cut to final globular shape, pierced, graded, and temporarily strung in final relation from large to small, for use and wear as coral necklaces, are classifiable not as beads or articles in chief value of beads under the last part of paragraph 333, but as "coral . . . cut but not set, and suitable for use in the manufacture of jewelry" under this paragraph. *U. S. v. Bartiromo*, (1919) 9 U. S. Cust. App. 183.

Coral beads, graduated and temporarily strung loosely on strings for facility in transportation, suitable for use in the manufacture of jewelry, are classifiable not as beads or articles in chief value of beads under paragraph 333, but as "coral . . . cut but not set, and suitable for use in the manufacture of jewelry" under this paragraph. *U. S. v. Battiloro*, (1919) 9 U. S. Cust. App. 180.

"Not set" as applied to coral beads.—Coral beads which have been graduated as to

size and temporarily strung are "not set" within the meaning of that language in this paragraph. *U. S. v. Bartiromo*, (1919) 9 U. S. Cust. App. 183.

Vol. II, p. 827, par. 358. [First ed., 1914 Supp., p. 96.]

Jacquard figured cotton laces and nets.—Jacquard figured cotton edgings, insertings, flouncings, and nettings are dutiable *ex nomine* under this paragraph. They are not to be classified under paragraph 258 within the provision for "all other Jacquard figured manufactures of cotton." *Burr v. U. S.*, (1919) 9 U. S. Cust. App. 71.

Vol. II, p. 835, par. 373. [First ed., 1914 Supp., p. 97.]

Article capable of producing complete tune.—It is not necessary that an article be capable of producing a complete tune to warrant its classification as a musical instrument under this paragraph. *U. S. v. Sears, Roebuck & Co.*, (1918) 9 U. S. Cust. App. 33.

Jew's-harps are "musical instruments" under this paragraph. *U. S. v. Sears, Roebuck & Co.*, (1918) 9 U. S. Cust. App. 33.

Vol. II, p. 838, par. 384. [First ed., 1914 Supp., p. 98.]

Waste bagging.—See annotation under par. 566, *infra*, p. 491.

Vol. II, p. 839, par. 385. [First ed., 1914 Supp., p. 98.]

"Reibkuchen," a baked loaf composed mainly of some kind of flour, about 2 feet long by 1½ feet wide and 2 inches thick, covered with a thin glaze probably applied with a brush and composed of water and the white of an egg or sugar and water, the sole use of which is in making sauces for boiled fish, is classifiable not under paragraph 417 as bread, or paragraph 194 as containing confectionery, but under paragraph 385 as an unenumerated manufactured article. *U. S. v. Menzel*, (1918) 9 U. S. Cust. App. 16.

Bleached wheat.—See annotation under par. 552, *infra*, p. 491.

Canned grapevine leaves.—See annotation under par. 200, *supra*, p. 485.

Chinese soy.—See annotation under par. 201, *supra*, p. 485.

Sponge rusks.—See annotation under par. 194, *supra*, p. 485.

Vol. II, p. 848, par. 387. [First ed., 1914 Supp., p. 99.]

Nitric acid in transit mixed with sulphuric acid to prevent corroding of tanks as "chemical mixture" under par. 5.—See *supra*, this title, p. 480.

Vol. II, p. 848, par. 391. [First ed., 1914 Supp., p. 99.]

Ensilage cutter.—An implement used exclusively for the purpose of cutting corn raised on the farm and storing the product to be fed on the same farm to cattle raised and fed on the same farm, is an instrument employed in supplying sustenance to cattle and, in even a very narrow sense, is used as an agricultural implement. Such an implement is an ensilage cutter; and it is admissible free of duty under the provision for "agricultural implements" in this paragraph. *Tower & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 307.

Vol. II, p. 850, par. 404. [First ed., 1914 Supp., p. 100.]

Custom regulation affecting free entry of goods of domestic origin.—This paragraph entitles certain goods of domestic origin to free entry provided proof of the identity of such goods shall be made under regulations to be prescribed by the Secretary of the Treasury. Article 333, Customs Regulations of 1915, sets out such regulations. Merchandise was exported from Malone, N. Y., and subsequently imported and entered at Malone for immediate transportation without appraisement to New York city, where it was entered for consumption and bond given for production of evidence of outward shipment. The certificate of exportation by the collector at Malone was not furnished by the importer to the collector at New York. In view of the provision of article 333 that such certificate "will be issued on application of the importer or collector," and of the fact that the papers in the case set forth the facts necessary for such inquiry, it was the duty of the collector at the port of New York to satisfy himself by application to the collector at Malone as to whether or not the goods had been exported. *U. S. v. Golden Co.*, (1919) 9 U. S. Cust. App. 229.

Tungstic acid and tungsten scrap.—Tungstic acid having been exported from the United States to Canada and the tungsten having been there recovered from it, the insoluble residue, when brought back to the United States for the purpose of reclaiming the tungstic acid in it, is entitled to claim identity as between what was exported from and imported to the United States, within the meaning of this paragraph, granting free entry to certain American goods returned. *United States v. Rubelli's Sons et al.*, 8 Ct. Cust. App. 399; *T. D. 37645*. Scraps or clippings of tungsten ingots and wire are not entitled to claim such identity. The insoluble residue is a part of what was exported, while the scraps or clippings are manufactures from what was exported. *U. S. v. Tower & Son*, (1919) 9 U. S. Cust. App. 135.

"Exported for repairs."—An American vessel, outward bound, was wrecked. Later she was salvaged and her engine sold to a firm in British Columbia. This firm repaired it and shipped it back to the United States. It was "exported . . . for repairs" within the meaning of this paragraph. It was manifestly impossible to comply with the Treasury regulations as to the manner of proving the identity of American goods returned, and other proof was properly received. The merchandise was dutiable under this paragraph, to the extent of the value of the repairs, and not as a steam engine under paragraph 165. *U. S. v. Coastwise Steamship, etc., Co.*, (1919) 9 U. S. Cust. App. 216.

Vol. II, p. 852, par. 408. [First ed., 1914 Supp., p. 101.]

"Woven fabrics of single jute yarns."—The yarns of which a woven fabric is composed are both warp and weft, and if one is composed of jute and the other of cotton the fabric is not woven of jute yarns within the meaning of the language "woven fabrics of single jute yarns" in this paragraph. *Simianaky & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 288.

Jute paddings.—See annotation under par. 284, *supra*, p. 486.

Vol. II, p. 852, par. 417. [First ed., 1914 Supp., p. 101.]

"Reibkuchen" a baked loaf composed mainly of flour as "bread."—See annotation to par. 385, *supra*, p. 489.

"Bread" as including article sole use of which is making fish sauce.—While remnants and dried portions of ordinary bread are used in making a fish sauce or other sauces or dressings, the word "bread" in the free-entry, this paragraph, does not include an article the sole use of which is in making a fish sauce. The word bread is used to designate a baked product the predominant use of which is as an independent article of food. *U. S. v. Menzel*, (1918) 9 U. S. Cust. App. 16.

Sponge rusks.—See annotations under par. 194, *supra*, p. 485.

Vol. II, p. 855, par. 441. [First ed., 1914 Supp., p. 102.]

A sewing machine imported for use in embroidering, and for that reason lacking the presser foot and feed as being unnecessary, this lack making no change in the stitch made by the machine, is still a sewing machine, entitled to free entry as such, or part of such, under paragraph 441, tariff act of 1913, and not dutiable as an embroidery machine under paragraph 165. *Durbrow, etc., Mfg. Co. v. U. S.*, (1919) 9 U. S. Cust. App. 148.

Parts of sewing machines used on embroidery machines.—From the fact that the tariff act of 1913 makes no provision for parts of

embroidery machines, it is concluded that the provision of this paragraph for parts of sewing machines should cover such parts no matter whether or how much they might be used on embroidery machines. *Durbrow, etc., Mfg. Co. v. U. S.*, (1919) 9 U. S. Cust. App. 177.

Sewing-machine shuttles are classifiable as parts of sewing machines rather than as manufactures of metal (par. 167), even though they be imported for use in embroidery machines. *Durbrow, etc., Mfg. Co. v. U. S.*, (1919) 9 U. S. Cust. App. 177.

Vol. II, p. 858, par. 477. [First ed., 1914 Supp., p. 103.]

Quince seeds being shown to be a drug, and the court judicially knowing them not to be garden seeds, are entitled to free entry under this paragraph, as "drugs, such as barks, beans, berries, . . . seeds (aromatic, not garden seeds)" and are not dutiable under paragraph 212 as "seeds not specially provided for." *Ross & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 235.

Garden seeds.—The expression "garden seeds," in this paragraph, tariff act of 1913, means seeds for kitchen gardens, and does not include orchard seeds, fruit seeds, nut seeds, agricultural seeds, grass seeds, berry seeds, or flower seeds. *Ross & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 235.

Vol. II, p. 860, par. 497. [First ed., 1914 Supp., p. 104.]

Bleached wheat.—See annotation under par. 552, *infra*, p. 491.

Vol. II, p. 860, par. 498. [First ed., 1914 Supp., p. 104.]

Similar provisions in previous acts contrasted.—This paragraph eliminated from its predecessors in the acts of 1897 and 1909 (568 and 580) the words "and which are fit only for such uses." The purpose of this change was to broaden the scope of the provisions and include not alone those solely so used but also those commonly so used. *U. S. v. Seward*, (1918) 9 U. S. Cust. App. 18.

"Such as."—The use of the expression "such as" in this paragraph is as a similitude provision, classifying merchandise of the kinds named which is like or similar to those substances which "are commonly used in soap making or in wire drawing, or for stuffing or dressing leather." *U. S. v. Seward*, (1918) 9 U. S. Cust. App. 18.

Tea oil, being shown to be not compounded, suitable for use in the soap and textile industries, and similar to commercial olive oil, which is shown to be commonly used in these industries, is classifiable accordingly under this paragraph. *U. S. v. Seward*, (1918) 9 U. S. Cust. App. 18.

Vol. II, p. 866, par. 552. [First ed., 1914 Supp., p. 107.]

Natural sun-bleached wheat stems and heads tied into small bundles for use as semifloral ornaments or emblems are admissible free of duty under this paragraph, as crude or unmanufactured vegetable substances, or under paragraph 497 as textile grasses or fibers, and are not dutiable under paragraph 385 as nonenumerated manufactured articles. *U. S. v. Rice Co.*, (1919) 9 U. S. Cust. App. 165, wherein it was said that the issue being whether or not certain wheat stems with heads on were sun bleached, testimony by government chemists that they contained a certain percentage of a chemical bleaching agent and that sun-bleached wheat usually contained a much smaller percentage or none at all is not sufficient to overcome the finding of the Board of United States General Appraisers supported by testimony that they were sun bleached, by the admission of one of the government chemists that they were identical in appearance with sun-bleached wheat, by the testimony of the importers contrasting the appearance of chemically bleached wheat with that of the merchandise in controversy, and by testimony that some chemical powder is sprinkled upon such wheat when sun bleached in order to protect it from insects during shipment.

Vol. II, p. 868, par. 566. [First ed., 1914 Supp., p. 107.]

Waste bagging.—Upon the testimony of a competent, undiscredited, and uncontradicted witness that half of a certain lot of pieces of old bags was of a kind chiefly used in paper making, the protest claiming classification as paper stock under this paragraph, should have been sustained as to 50 per cent. The rest of the importation was properly classified by the collector as waste not specially provided for under paragraph 384. *U. S. v. Downing Co.*, (1919) 9 U. S. Cust. App. 84, which further held that testimony that merchandise could not be used for paper making does not sustain a protest claiming classification under this paragraph as being "used chiefly for paper making."

Vol. II, p. 872, par. 586. [First ed., 1914 Supp., p. 109.]

"Rags" as including waste bagging.—Pieces of old bags of comparatively large size, frequently entire bags cut open at one end or side, the fabric in most cases being still sound, cannot be regarded as rags under this paragraph. *U. S. v. Downing Co.*, (1919) 9 U. S. Cust. App. 84.

Vol. II, p. 876, par. 627. [First ed., 1914 Supp., p. 110.]

Containers of tea.—Baskets imported which are admittedly containers of tin pack-

ages of tea which weigh less than 5 pounds, are made dutiable by the express terms of the proviso to this paragraph. *U. S. v. Brown*, (1919) 9 U. S. Cust. App. 45.

Vol. II, p. 879, par. 648. [First ed., 1914 Supp., p. 112.]

Round cedar timber.—While the free-list provisions of this paragraph for "logs, timber, round, unmanufactured," and of paragraph 648 for "cedar . . . in the log, rough, or hewn only" are sufficiently comprehensive to include round cedar timber of any length or diameter, there can be no doubt that the provision of paragraph 170 for telephone, trolley, electric-light, and telegraph poles is more specific. *U. S. v. Baxter*, (1919) 9 U. S. Cust. App. 99.

Vol. II, p. 880, sec. 652. [First ed., 1914 Supp., p. 112.]

"Replicas or reproductions."—In *U. S. v. Twenty-five Pictures*, (S. D. N. Y. 1919) 260 Fed. 851, regarding the meaning of the words "replicas" and "reproductions," as used in this section, the court said:

"It has been urged by counsel for the claimant that all of the merchandise should have been classified under section 652, which covers, not only original paintings, but original drawings and sketches in pen and ink, 'including not more than two replicas or reproductions of the same.' It is contended that the words 'replicas' and 'reproductions' mean any copies, and that this statute is intended to place on the free list all works of art of this kind, whether wrought by the original artist or another. In other words, an importer could bring in free an original and two copies by any one of the same thing. A 'replica' is defined by the Standard Dictionary as a 'duplicate executed by the artist himself and regarded equally with the first as an original.' I think a 'reproduction,' while it is sometimes loosely used as meaning a copy, does not really differ from a replica, within the meaning of the above section. It suggests the idea of a second effort by the same artist. Any other interpretation would make the word 'original,' as well as the clause 'providing for replicas or reproductions,' though not strictly meaningless, entirely unnecessary.

"Moreover, the Tariff Act, under paragraph 376, subjected 'works of art, including paintings in oil, or water colors, pastels, pen and ink drawings, or copies, replicas or reproductions of any of the same,' to a duty of 15 per cent ad valorem. Here it is to be noticed the word 'copies,' a word of much broader significance than 'replicas' or 'reproductions,' is added. I think this shows that any of the paintings which were not originals, or were not reproductions made by the same artist, were subject to duty, unless they had been 'produced more than 100

years prior to the date of importation'; but in the last case the free importation was 'subject to such regulations as to proof of antiquity as the Secretary of the Treasury may prescribe.' The prescribed regulations were not complied with and they therefore became dutiable. When paragraph 376 provides that works of art, including paintings, water colors, and pen and ink drawings, or copies, are in general subject to a duty of 15 per cent. ad valorem, it cannot be contended that the court can take judicial notice of the fact that the merchandise may be on the free list if the real facts were known, because it may be an original painting or a replica. If such is the law, the government would have to prove a negative in the case of the importation of any painting."

Water color designs for gowns.—Pen-and-ink or pencil drawings colored with water colors, made on heavy paper or cardboard by artists working with the assistance or under the direction of a master artist, imported to serve as originals for making plates to illustrate women's wearing apparel in dress catalogues and magazines, are classifiable as "original drawings and sketches in pen and ink or pencil and water colors" under this paragraph, and not as manufactures of paper under paragraph 332. *American Colortype Co. v. U. S.*, (1919) 9 U. S. Cust. App. 212.

Articles of utility.—The provision of this paragraph excluding from the operation of the paragraph certain articles of utility, applies only to the enumerations of the provision, viz., "'painting' and 'sculpture' and 'statuary.'" It does not exclude "original drawings and sketches in pen and ink or pencil and water colors" which serve a utilitarian purpose. *American Colortype Co. v. U. S.*, (1919) 9 U. S. Cust. App. 212.

"Original drawings" and "original paintings."—The provision of this paragraph for "original drawings and sketches in pen and ink or pencil and water colors" is narrower than the provision in the same paragraph for "original paintings in . . . water or other colors." *American Colortype Co. v. U. S.*, (1919) 9 U. S. Cust. App. 212.

"Original."—A sketch or drawing is not taken without the meaning of the word "original" in this paragraph, by the fact that it is the result of the combined concurrent efforts of several artists. *American Colortype Co. v. U. S.*, (1919) 9 U. S. Cust. App. 212.

Vol. II, p. 884, par. 656. [First ed., 1914 Supp., p. 113.]

Sufficiency of certificate as to antiques.—One purpose of article 395, Customs Regulations of 1915, is to furnish the customs officers facts upon which an investigation may be based. *United States v. Thomas* (3 Ct. Cust. App. 142; T. D. 32385). That purpose is not accomplished by a certificate

stating that antiquities were purchased from "various persons" on different days of the years 1914 and 1915, without stating what persons, what days, for which years. Such certificate is insufficient to support a claim for free entry under this paragraph. *U. S. v. Tsai*, (1919) 9 U. S. Cust. App. 42.

Vol. II, p. 884, par. J, subsec. 4.

[First ed., 1914 Supp., p. 129.]

Models of women's wearing apparel.—When women's wearing apparel, which had been entered in bond under subsection 4 of paragraph J of section 4, as being for use as models and not for sale, was presented for exportation showing that the seals affixed in accordance with article 383, Customs Regulations of 1915, had been tampered with and the cords attached pursuant to the same article had been cut, it must be presumed that the identification marks had been designedly interfered with to facilitate the use of the apparel for some purpose other than as models. *Bergdorf, etc., Co. v. U. S.*, (1918) 9 U. S. Cust. App. 11, wherein it appeared that the manager of the importing company testified that the identification marks had been unintentionally or accidentally interfered with, and that the apparel had not been out of the importing company's establishment or lent to anyone. It was held that since it did not appear that he had direct charge or custody of the apparel or that he was in a position to know of his own knowledge whether or not the goods had been taken out of the establishment and put to a use other than that for which they had been entered, he was not competent so to testify, and his testimony did not establish such statements as facts.

Vol. II, p. 887, par. Q. [First ed., 1914 Supp., p. 133.]

Effect of Revenue Act of 1916.—There being no conflict between paragraph Q and the Revenue Act of September 8, 1916 (see 1918 Supp. 270), the paragraph was not repealed by the Revenue Act. Nor should they be regarded as separate and independent of each other. The principle of paragraph Q, that goods in bond shall be subjected to the rate of duty in force at the time of withdrawal and not to that in force at the time of entry, should be applied in the administration of the Revenue Act. *Vandegrift & Co. v. United States*, decided concurrently herewith (9 Ct. Cust. App. 112; T. D. 37978). Consequently merchandise which was entered and bonded before, but withdrawn after, the Revenue Act went into effect is ratable for duty under the Revenue Act of 1916, and not under the Tariff Act of 1913. *U. S. v. Cronkhite Co.*, (1919) 9 U. S. Cust. App. 129; *Vandegrift & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 112.

Vol. II, p. 902, sec. 1. [First ed., 1914 Supp., p. 57.]

Scope of President's authority.—Under the provisions of this section relating to the reorganization of the customs service, the President is authorized to abolish positions such as those of naval officers, surveyors, appraisers, and assistant appraisers; to dispense with their statutory functions; to transfer the auditing functions of the naval officer to a deputy auditor for the Treasury Department or to a deputy collector of customs; to consolidate certain customs positions; to abolish the fee system and place all officers on a flat salary basis; to abolish the authority of collectors to sell blank manifests, etc.; and to require a protest fee for the lodging of protests before the Board of General Appraisers or a similar board. The President is not authorized to change the functions and personnel of the Board of General Appraisers; nor can he place in the classified civil service the Board of General Appraisers and collectors of customs, appraisers, surveyors, naval officers, and assistant appraisers. The President is authorized to transfer or consolidate with the Bureau of Customs the functions now exercised by the Customs Division of the Treasury Department, by the Division of Special Agents of the Treasury Department, and such of the functions of the Appointment Division of the Treasury Department as pertain to customs matters; but he is unauthorized to transfer to the Bureau of Customs certain functions pertaining to imports and exports now exercised by the Bureau of Statistics of the Department of Commerce and Labor and he cannot transfer to the Department of Commerce and Labor functions exercised by customs officers in enforcing the navigation laws. The President may, within certain limits, increase the functions of the employees of the Customs Division, the special agents force, and the Appointment Division, and he may also increase the number of such employees other than the special agents. Reduction of the cost of collecting the customs revenue to the maximum prescribed by the above Act is not a condition precedent, in a legal sense, to the taking effect of the reorganization. The scheme of reorganization to be submitted to Congress need not show in detail the estimated items of reductions in expenditure, though it should contain some general estimate as to that matter. The transfer of the auditing functions of the naval officer to a deputy auditor for the Treasury Department does not authorize the President to omit from the estimates for collecting customs revenue the expenses of such auditing work. (1913) 31 Op. Atty-Gen. 577.

Vol. II, p. 962, sec. 2638. [First ed., vol. II, p. 587.]

Forfeiture of goods imported.—Goods imported in violation of this act may be for-

feited under R. S. sec. 3082. *In re* 200 7/12 Dozen Wool Hose, etc., (C. C. A. 2d Cir. 1920) 263 Fed. 376.

Vol. II, p. 966, sec. 2652. [First ed., vol. II, p. 591.]

Appeal from collector's liquidation.—This section directing customs officers to carry out the instructions of the Secretary of the Treasury confers no rights upon an appellant from a collector's liquidation. *Saji, etc., Co. v. U. S.*, (1919) 9 U. S. Cust. App. 78.

Vol. II, p. 989, sec. 2809. [First ed., vol. II, p. 647.]

Validity of penalty for smuggling smoking opium into United States.—This section does not authorize the Customs Department to impose a penalty on a person smuggling smoking opium into the United States, since it applies only to "merchandise," which is defined by R. S. sec. 2766, (2 Fed. Stat. Ann. (2d ed.) 973) as "goods, wares, and chattels of every description capable of being imported," whereas the importation of smoking opium is absolutely prohibited by section 1 of the Act of Feb. 9, 1909, ch. 100 (3 Fed. Stat. Ann. (2d ed.) 723). Moreover, in order to justify the imposition of a penalty under this section the court must be able to measure the penalty in the case by the value of the imported thing, which cannot be done as to smoking opium, since it is not a thing of value because its importation is prohibited. Nor is the imposition of such a penalty authorized by section 8 of the Act of Jan. 17, 1914, ch. 9 (3 Fed. Stat. Ann. (2d ed.) 727), since that section relates only to opium which may be lawfully imported into the United States, and not to smoking opium. *U. S. v. Sischo*, (W. D. Wash. 1919) 262 Fed. 1001.

Vol. II, p. 1010, par. C. [First ed., 1914 Supp., p. 114.]

Quantity.—Paragraph C requires that all invoices of imported merchandise "shall contain a correct, complete, and detailed description of such merchandise and of the packages, wrappings, or other coverings containing it." If the invoice of imported liquor states its quantity incorrectly, or does not state it, the importer has no right to complain if the capacity of the containers as reported by the gauger be accepted by the collector as the quantity in them at the time of exportation. *Park & Tilford v. U. S.*, (1919) 9 U. S. Cust. App. 53.

Vol. II, p. 1012, par. E. [First ed., 1914 Supp., p. 115.]

Nature of bond required.—When entry of merchandise exceeding one hundred dollars in value is made by a statement in the form of an invoice, the collector may only require a bond for the production of a duly certified

invoice. He has no authority under this section to require a bond containing the provision that the obligor shall pay to the collector "the amount of duty to which it shall appear by such invoice the said goods . . . are subject over and above the amount of duties estimated on the appraisement of said goods." *U. S. v. Romeo*, (S. D. N. Y. 1918) 258 Fed. 497.

Vol. II, p. 1019, par. I. [First ed., 1914 Supp., p. 117.]

Entered value in excess of market value.—Where, in the entry, two separate additions were made to the invoice value "to make market value," while, in the certificate provided by the Treasury Department for claiming assessments of duty on less than the entered value in accordance with the concluding sentence of this paragraph, only one of these sums was claimed to be added to "meet advances by appraiser in similar cases," the direction of the Secretary of the Treasury, upon final appraisement at the invoice value that duty be assessed on the entered value, less the sum so claimed in the certificate and not upon the invoice value or the entered value, less both sums, was correct. *Twell & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 73.

Clerical error.—Where merchandise, designed by the seller and the importers to be distributed by the importers gratuitously as samples, was, for this reason, invoiced at a specially reduced price which the importers knew to be below the foreign market value, its entry at the specially reduced price was not "manifest clerical error" within the meaning of that expression in this paragraph, and additional duty as provided by the paragraph was correctly levied upon the difference between the entered and appraised values. *Fougera & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 296.

Excess merchandise.—Where regular-sized packages of merchandise were invoiced to the importers at a special price in consideration of an understanding between the seller and the importers that they were to be distributed by the importers gratuitously as samples, and the importers entered them at the special price instead of the market value, the fact that the importers believed the samples to be smaller than the regular-sized packages did not constitute the case one of excess merchandise within the rule of *Downing & Co. v. United States* (2 Ct. Cust. Appls., 278; T. D. 32033), since the importers' misapprehension as to the size of the packages did not affect the question of value, and additional duty upon the difference between the entered and appraised values was justly levied under this paragraph. *Fougera & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 296.

Value of carton as part of value of hand-

kerchiefs therein.—Handkerchiefs were imported in individual cartons, a number of the cartons being packed in large pasteboard boxes, and a number of the large pasteboard boxes packed in wooden cases. The value of the handkerchiefs alone was stated at entry. The appraiser added the value of the cartons, and the collector imposed the additional duty provided by this paragraph in cases where the appraised exceeds the entered value. Since the handkerchief and the carton were shown to be the unit of trade in the country whence exported, the value of the carton is a part of the value per se of the handkerchief, and the additional duty was justly imposed. *U. S. v. Rappolt*, (1918) 9 U. S. Cust. App. 21.

"Appraised" and "entered" value as "unit" value.—In this paragraph, levying additional duty in case the appraised exceeds the entered value, the "appraised value" and the "entered value" must be taken to mean the unit value and not the total value. *U. S. v. Kuttroff*, (1919) 9 U. S. Cust. App. 239.

An importation of 114 casks containing 17,920 pounds net of hydrosulphite of soda was erroneously entered on a pro forma invoice as 104 casks of hydrosulphite of soda containing 19,040 pounds at \$1.25 per pound and 10 casks of zinc formosul containing 1,120 pounds at 50 cents per pound. The appraiser returned a value of 62½d. per pound. Since 62½d. per pound at the current rate of exchange exceeds \$1.25 per pound by between 1 and 2 per cent, the collector's action in treating the whole importation as having been entered at \$1.25 per pound and in assessing additional duty of one per cent under this paragraph, furnished the importer with no just ground for complaint. The fact that the importer's misapprehension as to the content and weight of the importation resulted in his having paid to the collector a greater sum than the duty he really owed does not relieve him of the penalty incurred under the law for undervaluation, since the valuation was the unit value and not the total. *U. S. v. Kuttroff*, (1919) 9 U. S. Cust. App. 239.

Vol. II, p. 1029, sec. 2869. [First ed., vol. II, p. 667.]

Withdrawal from customs custody, when complete.—Merchandise is not "imported" until it has passed beyond the custody and control of the customs officials and into the custody and control of the importer, his agent or consignee, thereby becoming a part of the body commerce of this country. *Five Per Cent Cases*, 6 Ct. Cust. App. 291; T. D. 35508. So long as goods remain in the custody and control of the officers of the customs they are to be regarded as in customs custody so as to be affected by any new legislation in relation to the duties that Congress may see fit to adopt. With-

drawal from the custody of the customs and introduction into the body commerce requires payment of duties and the due delivery to and receipt by an importer of an unconditional permit of delivery. Since a permit of delivery has no legal efficacy until signed by the naval officer, withdrawal of bonded merchandise under a permit of delivery dated September 8, 1916, but signed by the naval officer and delivered to the importer September 9, 1916, was not made on September 8. *U. S. v. Cronkhite Co.*, (1919) 9 U. S. Cust. App. 129.

Vol. II, p. 1052, sec. 2921. [First ed., vol. II, p. 686.]

Conflicting customs regulation.—This section provides that, if the appraiser shall find a deficiency in imported merchandise, he shall certify it to the collector and an allowance shall be made in estimating the duties. Article 608, Customs Regulations of 1915, provides that this shall be done provided the collector be satisfied that such articles were not in the importation. The proviso is an attempt by the Treasury Department to amend the law, and is of no force. *Madeira Embroidery Co. v. U. S.*, (1919) 9 U. S. Cust. App. 140.

Weight given appraiser's report showing shortage.—Where the appraiser reported a shortage, and the collector investigated and decided, without impeaching the appraiser's report for fraud or mistake, that he was not satisfied that there was a shortage, his action in refusing to make an allowance was without warrant of law. *Madeira Embroidery Co. v. U. S.*, (1919) 9 U. S. Cust. App. 140.

Vol. II, p. 1062, par. K. [First ed., 1914 Supp., p. 118.]

Market value.—Within the meaning of the term "market value," in paragraphs K, L, and R, a single actual buyer may be a market. *Lloyd Co. v. U. S.*, (1919) 9 U. S. Cust. App. 280.

Books of wall-paper samples, made up to illustrate the stock of wall paper purchased, were imported. These books were paid for by the importer at a price based upon the cost of production. They were not sold by the importer to his customers, but distributed free, their cost being recouped as a part of the overhead expense. It cannot be said that the action of the reappraisal board in refusing to hold them samples of no commercial value and in affirming their appraisal at the price paid for them was, in view of paragraphs K, L, and R, illegal and of no effect as proceeding upon a wrong principle of law. *Lloyd Co. v. U. S.*, (1919) 9 U. S. Cust. App. 280.

Vol. II, p. 1064, par. L. [First ed., 1914 Supp., p. 118.]

"Consigned for sale in the United States."
—The expression in paragraph L, "con-

signed for sale in the United States," does not have reference only to cases where the consignment was made to an "agent" of the consignor; it includes cases where the consignor in another country shipped the goods to himself in this country. *U. S. v. Johnson Co.*, (1919) 9 U. S. Cust. App. 258.

"Such" as equivalent of "identical."—In the language of paragraph L, "the wholesale price at which such or similar imported merchandise is actually sold or freely offered for sale in usual wholesale quantities in the United States in the open market," the word "such" means identical. The provision does not mean that the inquiry must be confined to the identical merchandise if possible and extended to similar merchandise only in the event of the absence of proof as to the identical merchandise. It means that appraising officers may take into consideration not only sales of the very merchandise imported but also sales of similar merchandise. Since the word "such" means identical, the paragraph cannot be taken to mean that the inquiry as to market value in this country must be as of the time when the exportation was made. *U. S. v. Johnson Co.*, (1919) 9 U. S. Cust. App. 258.

Finality of appraisement by Board of Appraisers.—Pineapples were prepared and canned in Bahama by the Johnson Co. and shipped by them to themselves in New York. The merchandise concededly had no market value in Bahama. Appraisement by a board of general appraisers was nullified by a classification board. There was before the appraisement board evidence as to the cost of production and as to the sale price in this country of it and similar merchandise. Of this evidence and the weight to be given it or any part of it the appraisement board were the sole judges. Whatever method of appraisement prescribed by paragraphs K and L, Section III, Tariff Act of 1913, was adopted by them—cost of production, sale price of the identical merchandise, or sale price of similar merchandise—was supported by some substantial evidence. The decision of the Board of United States General Appraisers nullifying their appraisement is reversed. *U. S. v. Johnson Co.*, (1919) 9 U. S. Cust. App. 258.

Vol. II, p. 1065, par. M. [First ed., 1914 Supp., p. 119.]

Decisions by Court of Customs Appeals—Classification board's power over appraisement.—To justify a classification board in declaring null and void an appraisement by three general appraisers on the ground that it was based upon a wrong theory of law, it must appear positively, clearly, and certainly that they did proceed upon such wrong theory. *U. S. v. Johnson Co.*, 7 Ct. Cust. App. 466; T. D. 37050. All appraising officers and boards of appraising officers authorized and directed by the statute to assess and charge the property of the citizen

with government dues, being creatures of the statute, their procedure finding warrant only in the words of the statute, are bound in their procedure to follow the statute; and any deviation therefrom is without warrant of law and void. The prescribed mode is the measure of power. *U. S. v. Johnson Co.*, (1919) 9 U. S. Cust. App. 258.

Vol. II, p. 1071, par. N. [First ed., 1914 Supp., p. 120.]

Scope and effect of collector's liquidation.—The collector, not the Secretary of the Treasury, is the liquidating officer, and paragraph N makes the collector's decision final and conclusive unless or until appealed from according to law. This is true, even though the collector's decision may violate the direction of the Secretary. *Saji, etc., Co. v. U. S.*, (1919) 9 U. S. Cust. App. 78.

Scope of provision providing for transmission of exhibits to appraisers.—The provision of paragraph N, that "the collector shall transmit the . . . exhibits to the board of nine general appraisers" cannot be construed as authority for a motion originating in this court for an order to the Board of United States General Appraisers directing them to send to this court the official samples of the merchandise, which were not forwarded to the board by the collector but were retained by the appraiser. It cannot be permitted a party to add thus to the record either pleading or evidence not before the trial court. *Fougera & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 284.

Thirty days after.—Where merchandise had been withheld from warehouse in bond under a claim of free entry as being for American vessels, the thirty days allowed by paragraph N began to run from the time the collector assessed the merchandise with duty, and not from the time the duty was paid. A protest filed more than thirty days after the assessment and less than thirty days after the payment will not be considered. *Kennedy v. U. S.*, (1919) 9 U. S. Cust. App. 49.

Protest containing alternative claims.—A protest may make alternative claims; and one which makes a large number of such claims as to three kinds of wares, each of the paragraphs claimed under bearing some relation to the merchandise, and the protest being sufficiently explicit to direct the attention of the collector to what claims were made, is not subject to motion to dismiss for multifariousness. *U. S. v. Willenborg & Co.*, (1919) 9 U. S. Cust. App. 187; *U. S. v. Koscherak Bros.*, (1919) 9 U. S. Cust. App. 190.

Variance between allegations in protest and proof.—Under a protest alleging goods to be dutiable under a certain paragraph, the protestant may not prove them to be dutiable at the same rate under another paragraph. *U. S.*

v. International Forwarding Co., (1919) 9 U. S. Cust. App. 144.

Sustaining protest upon claim not made.—A protest cannot be sustained upon a claim which it does not directly or indirectly make. Four protests involving similar merchandise were combined by stipulation. Three of them contained a claim for free entry as a crude drug under paragraph 477, but the one at bar did not. The Board of United States General Appraisers held that the merchandise was entitled to free entry under paragraph 477. In drafting the judgment entry all of the protests were scheduled together as making claim for free entry under paragraph 477. The decision of the board is modified so as to overrule the protest at bar. *U. S. v. National Gum, etc., Co.*, (1919) 9 U. S. Cust. App. 250.

Vol. II, p. 1086, par. R. [First ed., 1914 Supp., p. 122.]

Coverings with merchandise but not on it.—The provision of this paragraph that the value of imported merchandise subject to an ad valorem duty shall include the value of usual and necessary coverings does not include coverings which were with the merchandise but not covering it at the time it came into customs custody. *Minneapolis Cold Storage Co. v. U. S.*, (1919) 9 U. S. Cust. App. 225, wherein it appeared that quarters of beef were imported, some covered with an inner covering of cotton and an outer one of burlap and others uncovered at the time the beef came into customs custody. Coverings for the uncovered beef were imported with it and were put on it at the time it was unloaded. It was held that a duty was properly levied upon the coverings which were not on the beef at the time it came into customs custody. *Minneapolis Cold Storage Co. v. U. S.*, (1919) 9 U. S. Cust. App. 225.

Vol. II, p. 1090, par. X. [First ed., 1914 Supp., p. 123.]

"Perishable" defined.—The adjective "perishable," when used as descriptive of commodities, primarily signifies a natural liability to speedy deterioration or decay, as is the case with fruit, fish, and similar articles, rather than the general tendency to deterioration or decay from age or exceptional circumstances which is common to most, if not all, edible articles. It will be given this meaning in paragraph X, and article 600, Customs Regulations 1915 pursuant thereto, prescribing the method of claiming allowance in duty for shortage or nonimportation caused by decay, destruction, or injury to perishable merchandise. The term was employed with reference to the class of merchantable commodities to which a given importation may belong, rather than

to the exceptional, perhaps latent, condition of the particular importation when exported. *Poole Co. v. U. S.*, (1919) 9 U. S. Cust. App. 271.

"Fruit" as restricted to perishable fruit.—The word "fruit" in paragraph X does not apply to only such fruits as are perishable. *Houlder v. United States* (4 Ct. Cust. Appls., 247; T. D. 33480). Olives in brine, which will keep two to three years, and dried figs, which will keep six months to a year, are within its meaning. Any claim for allowance in duty by reason of their shortage or non-importation caused by decay, destruction, or injury must be made according to the customs regulations promulgated pursuant to this paragraph. *U. S. v. Mascablades*, (1919) 9 U. S. Cust. App. 40.

Weight given official classification of merchandise as nonperishable.—The fact that Reggiano cheese is admitted to the Government warehouses (article 240, Customs Regulations, 1915), from which all "perishable" goods are barred by specific regulations, amounts to a practical official classification of Reggiano cheese as a nonperishable article, and is entitled to great force in an issue as to whether or not it is "perishable" within the meaning of that term in paragraph X, and article 600, Customs Regulations, 1915, pursuant thereto. *Poole Co. v. U. S.*, (1919) 9 U. S. Cust. App. 271.

Goods spoiled in transit.—Where part of a shipment has been utterly destroyed and not simply damaged by decay in transit, the case is one of destruction and not of damage. *United States v. Pastene* (3 Ct. Cust. Appls., 164; T. D. 32458). In such case the part destroyed is not dutiable, and the importer's claim to that effect may be presented by protest. *Poole Co. v. U. S.*, (1919) 9 U. S. Cust. App. 271, wherein it was held that it would be inequitable and presumably not within the intention of Congress to assess duty upon an article which on a voyage to this country and before arrival within the limits of a port of entry had become utterly worthless by reason of casualty, decay, or other natural causes, and which the importer might rightfully abandon and refuse to receive or enter for consumption. Articles thus circumstanced are not in truth within the category of goods, wares, and merchandise imported into the United States, within the meaning of the tariff laws. *Poole v. U. S.*, (1919) 9 U. S. Cust. App. 271.

Claim for allowance for spoiled merchandise, how made.—Reggiano cheese was shown to be, when properly cured or seasoned, an article which would keep for a very long time. A particular shipment of it was made so green that part of it spoiled in transit. The importer was not compelled to make his claim for allowance under paragraph X, and article 600, Customs Regulations, 1915, pursuant thereto, which provide for such claims in the case of "perishable" merchandise, but properly presented his claim by protest

against the assessment of duty upon the spoiled portion. *Poole Co. v. U. S.*, (1919) 9 U. S. Cust. App. 271.

Vol. II, p. 1115, sec. M. [First ed., 1914 Supp., p. 130.]

Validity of Treasury regulations.—To same effect as 1919 Supplement annotation, see *U. S. v. Regensburg*, (S. D. Fla. 1919) 258 Fed. 243.

Vol. II, p. 1118, sec. 29, note.

Antimonial lead as "refined metal".—Antimonial lead, which is a combination of metals obtained from the smelting or refining process, is a "refined metal" within the meaning of section 29 of the Tariff Act of July 24, 1897 (30 Stat. 210), and might be exported and cancellations or credits had upon the warehouse bond in the ratio of the respective metals contained in the imported ore or bullion. (1916) 31 Op. Atty-Gen. 13.

Cancellation on warehouse bonds.—Under this section providing for cancellation on warehouse bonds upon the exportation of ninety per centum of the refined metal produced from the imported bullion, it was incumbent upon the refining company to ascertain, set aside and export the metals in the exact proportions in which they were contained in the bullion; and refined metal, neither derived from the bullion imported nor set aside in the representative proportions of the metal contents of such bullion, cannot constitute any portion of the ninety per centum export required for cancellation on its bond. (1916) 31 Op. Atty-Gen. 29.

Vol. II, p. 1136, sec. 21. [First ed., vol. II, p. 760.]

Parties to protest.—Ordinarily different parties are not permitted to litigate their diverse claims against a common defendant in a single proceeding, because such procedure would tend to make complications and cause such confusion and delay as would hamper the administration of justice and make impossible the speedy settlement of legal controversies. In customs cases, however, while different importers importing the same kind of merchandise may not have a common interest in the merchandise imported, they frequently do have a common interest in the rulings of the collector affecting the customs status of merchandise of the same kind imported by them. As such rulings are generally the same, the protests against them usually raise the same issue, and that issue may be tried out and finally disposed of in one proceeding with less embarrassment to judicial tribunals and less expense, annoyance, and delay to litigants than if determined in separate proceedings initiated by each importer. Thus the permitting of misjoinder in customs proceed-

ings is designed to achieve the very result aimed at by its prohibition in other proceedings. Such has been the continuous and unquestioned practice before the Board of United States General Appraisers and the United States Court of Customs Appeals practically since their respective organizations. The government's motion to dismiss for misjoinder the petition by two importers for review of decisions by three different boards on five diverse dates overruling 11 different protests involving the same kind of merchandise is denied. *Cochran Co. v. U. S.*, (1919) 9 U. S. Cust. App. 172.

Vol. II, p. 1138, sec. 1. [First ed., vol. II, p. 729.]

Mistake as to destination.—Merchandise came into the port of Vanceboro, Me., from New Brunswick, Canada, en route to Boston, Mass., for shipment to Cuba. The agent of the shipper (who was also the consignee) at Vanceboro, seemingly not understanding that the goods were destined for Cuba, entered them for consumption, and duty was paid. The entry was one which the broker had authority to make, and it was the entry he intended to make. Repayment of the duty may not be had. *U. S. v. Maine Cent. R. Co.*, (1919) 9 U. S. Cust. App. 192.

Vol. II, p. 1154, par. O. [First ed., 1914 Supp., p. 132.]

Departmental construction of drawback provision as controlling on Supreme Court.—The Supreme Court will follow the long-standing ruling of the Treasury Department under which the drawback provided for by the Act of August 27, 1894, § 22, upon the exportation of articles manufactured from imported dutiable materials, to be "equal in amount to the duties paid on the materials used," less one per cent, is computed, where linseed oil and oil cake have both been manufactured from imported linseed paying a specific duty and the oil cake has been exported, upon the basis of the value of the two products, and not in proportion to their respective weights. *National Lead Co. v. U. S.*, (1920) 252 U. S. 140, 40 S. Ct. 237, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 635.

Diamond necklace.—Drawback should be allowed upon the exportation of a certain diamond necklace manufactured in the United States with the use of twenty-two imported diamonds. (1917) 31 Op. Atty.-Gen. 92.

Cigarettes shipped abroad for destruction as entitled to drawback provision.—A drawback is not allowable under this paragraph on cigarettes manufactured in the United States from imported Turkish tobacco for domestic trade and which have been recalled from domestic trade, after having become deteriorated or unsalable, and then shipped abroad, not for use in the commerce of any foreign country, but for the purpose of destruction.

The sending of goods out of this country merely for the purpose of destruction does not constitute an "exportation" within the intent of the drawback provision of the statute in question. (1916) 31 Op. Atty.-Gen. 1.

Vol. II, p. 1161, sec. 3061. [First ed., vol. II, p. 742.]

Liability of collector for assault in stopping vehicle for search.—A deputy collector of the United States customs service may not be prosecuted in a state court for felonious assault because he fired a shot at an automobile in order to intimidate the occupants and cause them to stop the automobile so that it could be searched in accordance with the provisions of this section. *Ex p. Beach*, (S. D. Cal. 1919) 259 Fed. 956.

Vol. II, p. 1161, sec. 3062. [First ed., vol. II, p. 743.]

Transportation of merchandise prohibited from importation.—This section has no application to vehicles used to transport merchandise which cannot be entered in the custom house at all. Thus, an automobile used to bring intoxicating liquors into the United States may not be forfeited under this section, since the importation of such liquors is prohibited by the Act of Aug. 10, 1917, ch. 53, § 15 (1918 Supp. Fed. Stat. Ann. 188). *U. S. v. One Ford Automobile, etc.*, (C. C. A. 2d Cir. 1919) 262 Fed. 374. The court said: "By the act of August 10, 1917, it is an offense to import distilled spirits, and the act prescribes a new and specific punishment for its violation. It was a war measure. The customs law statutes referred to do not make it a crime to bring in distilled spirits into the United States from the Dominion of Canada, and it was not until August 10, 1917, that such action constituted a breach of the criminal law. This act makes no reference to any other statute, and if a forfeiture be granted now of the automobile of the defendant in error, it would be imposing added punishment not provided for in the statute. Indeed, it would be a double punishment for the commission of one offense, and this is not permissible. The customs laws referred to have for their purpose and intention a prevention of smuggling merchandise into the United States. It was intended to provide customs duties to be paid for the importations. After August 10, 1917, Tourville could not bring distilled liquors into the United States, irrespective of the customs law."

Vol. II, p. 1168, sec. 3082. [First ed., vol. II, p. 748.]

Failure to enter free goods.—To same effect as original annotation, see *U. S. v. Twenty-Five Pictures*, (S. D. N. Y. 1919) 260 Fed. 851.

Failure to present certified invoice.—In *U. S. v. Twenty-Five Pictures*, (S. D. N. Y. 1919) 260 Fed. 861, an importer failed to present a certified consular invoice for certain oil paintings imported by him as required by section 3E of the Tariff Act of Oct. 3, 1916, ch. 16 (2 Fed. Stat. Ann. (2d ed.) 1012). In holding that such failure was sufficient to show intent on the part of the importer to violate the law and to sustain a forfeiture, the court said:

"The question remains whether the words of section 3082, *supra*, 'fraudulently or knowingly' make it necessary to show intent to violate the law on the part of the claimant, or his agent, in order to establish a cause of forfeiture under the fourth count.

"It was held by Judge Ray in the Case of *Fifty Waltham Watch Movements* (D. C.) 139 ed. 291, and by the Supreme Court of Arizona, in *Six Parcels of Placer Gold v. United States*, 8 Ariz. 389, 76 Pac. 473, that a failure to comply with the customs provisions as to entry would not be excused in a proceeding to forfeit merchandise merely because the goods were not in fact dutiable. By both courts it was apparently thought that an intention to defraud the United States of customs revenues was not a necessary ingredient of the crime covered by section 3082. See, also, *United States v. McKim*, Fed. Cas. 15,693. I am inclined to think that proof of purpose to do the forbidden act is enough to satisfy the requirements of the provisions of section 3082. But if the addition of the word 'fraudulently' (though in the disjunctive) requires proof of an intention to defraud the government, the requisite fraud need not consist of deprivation of customs revenues. The collation of information in order to pass upon the classification of merchandise, and the question often most difficult as to whether it is dutiable, and, if so, just what duty is imposed, is an important function of the revenue department of the government. Without such information, the Customs Act cannot really be enforced or the revenues collected.

"By the failure of the importer to comply with section 3 E and produce a consular invoice, any part of the shipment that was not original paintings or replicas or works of art over 100 years old apparently escaped duty, and the antiquities also escaped duty because the importer did not furnish satisfactory proof of age. Indeed, in the case of all this merchandise, any exemption and classification was dependent on proof. To deprive the United States of the information it was entitled to, and of the opportunity for investigation and classification afforded to it by the express provisions of section 3 E, was to defraud the United States. In *Haas v. Henkel*, 216 U. S. 462, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112, which was an indictment for a conspiracy to defraud the United States by bringing an employee of the Department of Agriculture to furnish secret information, the Supreme Court says that it

is enough to defraud the government if an act is done calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair, impartial, and reasonably accurate. See, also, *Stager v. United States*, 233 Fed. at page 511, 147 C. C. A. 396. It seems clear from the conduct of the importer that he avoided submitting the merchandise to the investigation which the production of a proper consular invoice and a regular entry would have involved, and that he did this deliberately and clandestinely because he wished to take no chances of paying duty."

Goods imported by a customs official in violation of R. S. sec. 2638 are imported "contrary to law" and subject to forfeiture under this section. In *re* 200 7/12 Dozen Wool Hose, etc., (C. C. A. 2d Cir. 1920) 263 Fed. 376.

Stolen goods.—This section is applicable to the receipt of a coil of rope stolen and brought ashore by a sailor from a vessel from a foreign port. *Goldman v. U. S.*, (C. C. A. 5th Cir. 1920) 263 Fed. 340. The court said: "We think section 3062 was not intended to be limited to cases of smuggling in the sense of introducing dutiable merchandise without paying and with the intent to avoid paying the duty on it. The proper administration of the custom laws requires that it be given a wider scope. It is important, in order to enforce the collection of duties, to establish many regulations relating to the introduction of merchandise into the country, other than the ultimate one of requiring the payment of duties. These are auxiliary regulations and can only be enforced by the imposition of penalties and punishment for their infraction. It is necessary not only to establish them, but to make disobedience of them criminal. This Congress accomplished through the enactment of section 3082, the effect of which, as we construe it, is to punish criminally and by forfeiture the bringing into the United States of any merchandise, whether dutiable or nondutiable, contrary to law, and the receiving and buying of it knowing it to have been brought in contrary to law. "Contrary to law" we construe to mean to be in violation of any regulation, relating to its introduction, established by law (other than section 3082 itself) and made punishable when disobeyed. *Keck v. U. S.*, 172 U. S. 434-437, 19 Sup. Ct. 254, 43 L. Ed. 505; *One Pearl Chain v. U. S.*, 123 Fed. 371, 59 C. C. A. 499; *Estes v. U. S.*, 227 Fed. 818, 142 C. C. A. 342.

"It is further urged by the defendant that the rope was not 'merchandise' within the meaning of section 2872. It may be conceded that it was originally part of the ship's tackle, and that so long as it remained so it could not be merchandise, nor require a permit for its landing. *U. S. v. A Chain Cable*, 25 Fed. Cas. 391, No. 14,776; *The Gertrude*, 10 Fed. Cas. 265, No. 5,370. It was not therefore subject to forfeiture, at least as

against the ship's owner. However, when the sailors from whom the defendant received it stole it from the ship by paying it out over the ship's side into a skiff with the intent to sell it when landed, it ceased to be a part of the ship's tackle as to them and as to their guilty receiver and forthwith became merchandise. It was being landed by the sailors for the purpose of sale, and the fact that they acquired possession of it by theft does not as to them and their guilty receiver prevent this conclusion."

Concealment by agent.—Where an agent, contrary to the orders of his principal, conceals and fails to declare merchandise brought by him into this country, the principal is bound by the acts of the agent, and the merchandise is subject to forfeiture. *U. S. v. One-Strand Pearl Necklace*, (S. D. N. Y. 1919) 260 Fed. 671.

Indictment—description of goods.—It is not necessary to describe the smuggled merchandise by the name under which it is described in the tariff schedule. *U. S. v. Powers*, (W. D. Wash. 1920) 263 Fed. 724, holding a description of the property as "four bottles of whiskey" to be sufficient.

1918 Supp., p. 140, sec. 500.

"When imported."—The expression "when imported," in this section, should be read as

meaning "which are imported," and should be construed as having no purpose to change the time or condition under which a collection of revenue is to be had. *Vandegrift & Co. v. U. S.*, (1919) 9 U. S. Cust. App. 112.

"Flavors."—Synthetic coumarin, shown to be used as a material in the manufacture of flavoring extracts, and not as a flavor itself, is not classifiable under the provision for "flavors," in Group III, of this section. *U. S. v. Lehn*, (1919) 9 U. S. Cust. App. 309.

1918 Supp., p. 149, sec. 708.

Furnishing information to War Trade Board.—The United States Tariff Commission is not prohibited from placing in the hands of the War Trade Board for appropriate use trade secrets which have come into the possession of the commission in the course of the exercise of its official functions. The Tariff Commission should furnish such information to the War Trade Board only after due consideration of the use designed to be made of it, and if, as a result of its inquiry, the commission has any doubt as to whether the proposed use of such information would be inimical to the purpose of the statutory inhibition against divulging trade secrets, it would be entirely within the scope of its sound discretion to decline to disclose it. (1919) 31 Op. Atty. Gen. 541.

DISTRICT OF COLUMBIA

1918 Supp., p. 151. [*Control and regulation, etc.*]

"A bona fide purchaser for his own occupancy" may recover possession of the premises without proving that the premises are necessarily required for his own occupancy. *Borden v. Carter*, (App. Cas. D. C. 1919) 261 Fed. 458.

For cases construing this resolution, see *Maxwell v. Brayshaw*, (App. Cas. D. C. 1919) 258 Fed. 957; *Gilder v. Dickens*, (App. Cas. D. C. 1919) 258 Fed. 962; *White v. Hickman*, (App. Cas. D. C. 1919) 258 Fed. 963; *Williams v. Jacobs*, (App. Cas. D. C. 1919) 258 Fed. 964; *Biggs v. Sparks*, (App. Cas. D. C. 1919) 258 Fed. 964.

EMINENT DOMAIN

1918 Supp., p. 166. [*Lands for military purposes, etc.*]

Necessity of condemnation—Review by courts.—The question of the necessity of a condemnation under this section rests with the Secretary of War and his action is not reviewable by any court. *U. S. v. Forbes*, (M. D. Ala. 1919) 259 Fed. 585. In passing upon these questions, the court said:

"There appears to be a clear distinction between the adjudged cases brought under acts of the state legislature by railroad companies, waterworks companies, and the like,

and those adjudged cases where the United States has sought to condemn, under Act of Congress, lands for public use.

"In the first class of cases the necessity for the condemnation seems to be a question for judicial determination. In the other class, to which class the case we are now trying belongs, the question of the necessity for the condemnation is not left to judicial determination, for this power was bestowed by Congress on the Secretary of War, the Secretary of the Treasury, or Secretary of the Interior, as the case may be; and the weight of authority sustains the proposition

that the action of the official to whom this duty and discretion is delegated by Congress is not reviewable by any court. . . . It is also competent to delegate the authority to decide upon the necessity for its taking. *Cooley, Const. Lim. (5th ed.) 668-670*. As was said in the *Narragansett Case* [145 Fed. 654]: 'While the taking of property must always be limited to the necessity of the case, and consequently no more can be appropriated in any instance than the proper tribunal shall adjudge to be needed for the particular use for which the appropriation is made, the Secretary of War is authorized by Congress to make the judgment as to what land is needed.'

"Again, in the case of the *United States v. Burley (C. C.) 172 Fed. 615*, in a proceeding by the United States to condemn land for reservoir purposes, under the Irrigation Act, Act of Congress June 17, 1902 c. 1093 32 Stat. 388, the court held that 'Whether a more feasible plan of irrigation than the one adopted might be devised, or some other site selected for the reservoir, is immaterial; the determination of the proper government authorities being conclusive.' (1st headnote.)

"And in the case of the *United States v. O'Neill (D. C.) 198 Fed. 677*, where the power conferred upon the Secretary of the Interior by the Reclamation Act (Irrigation Act), Act of Congress June 17, 1902, was to condemn lands necessary for use in constructing irrigation works, the court said: ' . . . It must be borne in mind that the petitioners here are not exercising in this proceeding the state's power, and therefore are not bound by the limitations and restrictions placed on that power; but they are exerting their own sovereign right, and the only restriction on the exercise of that right is that just compensation shall be made for private property taken for public use. *Fifth Amendt. Const. U. S.*'

"The court also declared: 'The question of necessity is political, and must be determined by Congress. "When the use is public, the necessity or expedience of appropriating any particular property is not a subject of judicial cognizance."' Citing *Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. Ed. 206; *U. S. v. Jones*, 109 U. S. 513, 518, 519, 3 Sup. Ct. 346, 27 L. Ed. 1015. And in the *O'Neill Case, supra*, it was held that "The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government." *Backus v. Depot Co.*, 169 U. S. 557, 568, 18 Sup. Ct. 445, 450, 42 L. Ed. 853. The legislative branch may delegate the determination of the question of necessity. The Reclamation Act imposes that duty on the Secretary of the Interior. . . . On the facts here presented, the conclusion is reached that the only inquiry for determination in limine is whether the contemplated purpose to which the lands sought to

be condemned are to be devoted to is a public use.'

"And quoting from the case of *Shoemaker v. United States*, 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170, the court continued: 'If this question is decided in the affirmative, the judicial function is exhausted.'

"Other decisions of the federal courts, including the Supreme Court, uphold these principles.

"This court, therefore, cannot review the discretion of the Secretary of War in causing this proceeding to be instituted through the duly authorized and responsible official of the government, the United States Attorney for this district, or in maintaining the suit after he has caused it to be brought. If he had the undoubted authority and discretion to cause the condemnation proceedings to be instituted, then, for the same reason, or perhaps for stronger reason, he has the right to prosecute and maintain the suit to a conclusion. . . . It would also appear to be obvious that where possession of the property has been taken, and condemnation proceedings have been instituted, and expensive improvements erected, it is not for a defendant, or a judge or court, to determine as to whether the property will be used by the Secretary of War permanently, temporarily, or for the purpose for which the condemnation proceedings were brought.

"If the use be a public one — and such it is here — whether the necessity exists for the taking, and the extent of the taking, is exclusively within the province of Congress to determine, and Congress has, under this act, vested this authority, not in a court or a jury, but in the Secretary of War. *Kaw Valley Drainage Dist. v. Metropolitan Water Co.*, 186 Fed. 315, 319, 108 C. C. A. 393. The Secretary of War has exercised the discretionary power conferred upon him by law, and I do not think that Mr. Forbes can open this question at any stage of the proceeding; and, certainly, he cannot now raise such issues after the judgment of the court ordering the lands condemned under the prayer of the petition, which judgment of the court was not only not objected to at the time, but was acquiesced in by the defendant until after the award was made by the commissioners.

"The status of this case, and the rights of the parties, were fixed at the time the petition for condemnation was granted, and the further operation of the law invoked to ascertain the just compensation to be awarded to the owner. . . . And again, after the Secretary of War has exercised the authority vested in him to determine that there is a necessity to condemn the fee, the condemnation proceedings have been resorted to, an award made, and an appeal from the award is taken to a jury, it is not within the province of the court to say what shall be done with the land or to what use it shall be put. This is reserved to the Congress,

which, of course, can act, or authorize the Secretary of War to act."

Jurisdiction of federal courts over proceedings under Act.—Condemnation proceedings under this Act may be instituted in the District Court for the district where the land is situated, since the Act of August 1, 1888, ch. 728 (8 Fed. Stat. Ann. (2d ed.) 1111) in terms provides "that such proceedings instituted by the Secretary of the Treasury or any other officer of the government, seeking to acquire property for the United States by condemnation, or under judicial process, may be instituted whenever it is necessary or advantageous to the government so to do, and that the United States District Courts of the district where the land lies shall have jurisdiction of such proceedings." *In re Military Training Camp*, (E. D. Va. 1919) 260 Fed. 986.

Questions to be determined.—Under this Act the judicial question to be determined is whether the use for which it is proposed to take the property sought to be condemned, is a public one or not. When that is done, the judicial function is exhausted, and the extent to which property may be taken, or just how it will be paid for, rests in the legislative discretion; the court, however, to see that just compensation is made before the property is taken. *In re Military Training Camp*, (E. D. Va. 1919) 260 Fed. 986.

Objections to granting of petition first made on appeal.—Where the defendant in a condemnation proceeding under this section makes no objection to the granting of the petition for condemnation, he may not raise the objection for the first time in the appellate court. *U. S. v. Forbes*, (M. D. Ala.) 1919) 259 Fed. 585, wherein it was said:

"It is also urged that the Act of Congress (Act of July 2, 1917) authorizing this and the like condemnation proceedings requires them to 'be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted.' And it was further contended that section 914, R. S. [vol. IV, Fed. Stat. Ann. (2d ed.) 21], known as the Conformity Statute, is applicable here.

"It is apparent, of course, from an examination of the Alabama statutes governing condemnation proceedings (Code Ala. 1907, §§ 3860-3887) that the practice governing the Alabama courts cannot be followed in every particular by this court.

"The books contain many cases where the United States District and Circuit Courts have not conformed to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held. See *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286; *United States v. Fidelity Co.*, 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696; *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct.

1002, 38 L. Ed. 936; *In re Chateaugay Iron Co.*, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; *McDonald v. Pless*, 238 U. S. 264, 35 Sup. Ct. 783, 59 L. Ed. 1300; *Beers v. Hauffman*, 34 U. S. (9 Pet. 329, 9 L. Ed. 145; *Insurance Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365; *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732; *Kenyon v. Gilmer*, 131 U. S. 24, 9 Sup. Ct. 696, 33 L. Ed. 110; *Brackenn v. Union Pacific Ry. Co.*, 56 Fed. 447, 5 C. C. A. 548; *Shepard v. Adams*, 168 U. S. 625, 18 Sup. Ct. 214, 42 L. Ed. 602; *Lamaster v. Keller*, 123 U. S. 389, 8 Sup. Ct. 197, 31 L. Ed. 238. In the trial of this case in this court the condemnation procedure prescribed by the Alabama statutes cannot be followed in every particular. In the first instance, under section 3860, Code Ala. 1907, the application must be made to the court of probate of the county in which the lands are situated, and if the petition is granted, then, under section 3869, the judge of probate must appoint commissioners, who must assess the damages and compensation. Section 3871. The commissioners are required by section 3874, after hearing all the evidence, to make a report in writing to the court stating the amount of damages and the compensation ascertained and assessed by them. Under the provisions of section 3875, any party may appeal from the order of condemnation to the circuit court, the superior tribunal, where the matter of damages must be submitted to a jury; and upon the hearing of such appeal, the statute (Code of Alabama 1907, § 3875) provides that the trial 'shall be de novo.' Other sections of this Alabama law provide for an appeal to the Supreme Court of the state, etc.

"In the instant case the petition for condemnation was filed in this court, and the court heard the petition without objection—that is to say, no question of the jurisdiction of the court was made, and no question of the authority of the Secretary of War to cause these proceedings to be instituted was raised; and the court, after a full and fair hearing, the defendant being present by his attorney, granted the prayer of the petition for condemnation, and appointed commissioners to assess the damages, and gave these commissioners appropriate written instructions as to their duties. . . .

"I think the defendant's attorneys would have the court give too broad a meaning to the words, 'on such appeal (to the circuit court and to a jury) the trial shall be de novo.' Section 3875, Code Ala. 1907. There are similar statutes of other states, where it is provided that the case on appeal shall be tried 'anew,' or a 'new trial had,' or the trial 'shall be de novo.' And some of the courts in defining these terms have given necessary limitations to these terms, or restricted the scope of their meaning, in order that the statute may be workable and brought into harmony with common sense and the doing of justice in the particular case.

"In the case of *Ea parte Morales*, 53 S. W. 107, 108, where the defendant sought to file new pleas, the Court of Appeals of Texas, construing the Texas statute providing for a trial de novo in the county court where the case was appealed from the justice of peace said: 'These articles certainly require that the trial shall be de novo upon the original papers. The term "de novo" means "anew"; a second time. . . . In civil cases this term has been construed to mean that a trial de novo, where an appeal is taken from a judgment of a justice court to the county court, is a trial upon the original papers, and upon the same issues had in the court

below.' See *Ostrom v. Tarver* (Tex. Civ. App.) 29 S. W. 69.

"It does not seem that the defendant Forbes can here, on appeal from the award of the commissioners and for the first time, file pleas denying the right to condemn, or the necessity to condemn, when the matter has already been decided by the court at a former hearing of the cause, when he was present by his attorneys, and when and where he made no objection to the granting of the petition for condemnation. To allow him to do this would be to approve his speculation upon the award of the commissioners."

ESTIMATES, APPROPRIATIONS AND REPORTS

Vol. III, p. 138, sec. 3679. [First ed., 1909 Supp., p. 124.]

Promulgation by President of regulation affecting surgeons which creates deficiency in pay fund.—The President has authority to promulgate the amended regulation 47 of the Public Health Service, which gives passed assistant surgeons a right to promotion to any vacancy in the grade of surgeon, whether

a vacancy exists or not, after 12 years' service and passing an examination, provided they are appointed by the President, with the advice and consent of the Senate; and the fact that the amended regulation will or will not have an effect to create or increase a deficiency in the pay fund appears to bear upon its wisdom as an administrative measure and not upon its legality. (1921) 31 Op. Atty-Gen. 570.

EVIDENCE

Vol. III, p. 168, sec. 861. [First ed., vol. III, p. 7.]

Testimony given at a former trial by a witness since deceased may be received notwithstanding this section. *Smythe v. New Providence Tp.*, (C. C. A. 3d Cir. 1920) 283 Fed. 481.

Vol. III, p. 172, sec. 863. [First ed., vol. III, p. 8.]

When taken—*Examination before issue joined*.—To same effect as original annotation, see *Levinstein v. Du Pont De Nemours*, (D. C. Mass. 1919) 258 Fed. 667, which was an action at law.

Notice—*Length of notice*.—In *Jones v. Illinois Cent. R. Co.*, (S. D. Miss. 1919) 260 Fed. 488, it was held that depositions of witnesses absent from the state, taken on such short notice that the defendants were precluded from filing cross-interrogatories to accompany the commission, were inadmissible because of lack of reasonable notice required by this section and because of the failure to give ten days' notice as required by the state statute.

Vol. III, p. 189, sec. 866. [First ed., vol. III, p. 20.]

Showing necessity for *dedimus*.—To same effect as original annotation, see *Levinstein v. Du Pont De Nemours*, (D. C. Mass. 1919) 258 Fed. 667.

Determination of necessity for *dedimus*.—The only requirement of this section for the issuance of a commission is that it be necessary "in order to prevent a failure or delay of justice." The determination of this question is for the court issuing the commission and cannot be collaterally attacked in another federal court. *Levinstein v. Du Pont De Nemours*, (D. C. Del. 1919) 258 Fed. 662.

Vol. III, p. 193, sec. 868. [First ed., vol. III, p. 23.]

Refusal to testify before commissioner as contempt.—In *Levinstein v. Du Pont De Nemours*, (D. C. Del. 1919) 258 Fed. 662, a witness was held guilty of contempt in refusing to testify before a commissioner appointed under R. S. sec. 906 (3 Fed. Stat. Ann. (2d ed.) 189). The court said: "The witness last asserts as a defense a disclaimer

of intentional disrespect or design to embarrass the due administration of justice. Such denial may be considered as purging the contempt, if there be any real justification for the act constituting the contempt. But the question whether a certain act is or is not a contempt does not depend upon whether there is present an actual intent to embarrass the due administration of justice, but may be determined from the nature of the act and by the presence or absence of any sound and substantial reason for its occurrence. No sound reason has been shown by the witness in this case for his refusal to testify. But the absence of an actual intent may properly be taken into account when fixing the punishment.

"The case presented by the foregoing facts is radically different from a case certified for the refusal of a witness to answer questions upon the ground of personal privilege, or where it clearly or affirmatively appears that the evidence sought cannot possibly be competent, material or relevant, and that it would be an abuse of the process of the court to compel its production.

"The subpoena issued by the clerk was not only a subpoena requiring the production of certain books and papers, but was also a subpoena requiring the witness to appear and testify. Either of these objects may be enforced without the other. *Wilson v. United States*, 221 U. S. 361, 373, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D 558. The rule issued in this case is to show cause why the witness should not be adjudged guilty of contempt, not for his failure to produce the books called for by the subpoena, but solely because he declined to be sworn and to testify. It is immaterial to a decision in this proceeding whether or not the command to produce the books was rightfully inserted in the subpoena. . . .

"It appears from the foregoing that the commission in question was issued by a court of the United States for taking the testimony of a witness named therein at a place within this district. Further, that the clerk of this court did on the application of the plaintiff issue a subpoena for the witness Lamot Du Pont commanding him to appear and to testify before the commissioner named in the commission at a time and place stated in the subpoena. And it also appears that the witness, after being duly served with such subpoena refused to testify, not being privileged from giving testimony, and such refusal is not only proven to the satisfaction of the court, but is admitted. From this it unavoidably follows that the witness must be adjudged in contempt, and the rule made absolute."

Vol. III, p. 196, sec. 875. [First ed., vol. III, p. 25.]

Order directing service of process to aid foreign tribunal.—While a federal court has power to execute letters rogatory, it will not

by order direct the service of process to aid a foreign tribunal to acquire jurisdiction over a party within the United States. *In re Letters Rogatory, etc.*, (S. D. N. Y. 1919) 261 Fed. 652, wherein Hand, J., said: "Letters rogatory have been so long familiar to our courts, and so exclusively limited by understanding and in practice to proceedings in the nature of commissions to take depositions of witnesses at the request of a foreign court, that I should hardly feel inclined to assume such a novel jurisdiction as is proposed without statutory authority, even if I regarded the case as one where, as a matter of sound policy, aid should be given to the foreign tribunal."

Vol. III, p. 197, sec. 882. [First ed., vol. III, p. 26.]

Letters and carbon copies of letters, introduced in evidence at a naval court-martial and required by article 34 of the Articles for the Government of the Navy (1 Fed. Stat. Ann. (2d ed.) 432) to be kept on file in the Navy Department, are within the scope of this section, and hence, copies of them authenticated under the seal of the department are as admissible in evidence as the originals. *Cohn v. U. S.*, (C. C. A. 2d Cir. 1919) 258 Fed. 355, 169 C. C. A. 371. With reference to the scope of this section, the court said:

"In *Block v. United States*, 7 Ct. Cl. 406, 413, the statutory provision above referred to was considered, and the court declared that—

"The words 'documents and papers,' used in the several acts of Congress, cannot be held to mean every document or paper on file in the Department, but such only as were made by an officer or agent of the government in the course of the discharge of his official duty. Any other rule of interpretation would defeat the reason on which all public writings are admissible as evidence, i. e., that they have been made by authorized and accredited agents, appointed for the purpose, and that the subject-matter of such writings is of a public nature.

"Official documents, duly certified, need no further proof; but other documents, so certified, do not, by the mere fact of certification, become so authenticated as to entitle them to be received as evidence if they are objected to; but the originals must be produced and proved according to the course of the common law."

"But if the 'originals' above referred to happen themselves to be on file in one of the departments, there must be power in the courts to compel their production when needed in a judicial proceeding, or else transcripts or copies of them certified under the seal of the department must be admissible in evidence. And if the statute applies only to such writings as 'were made by an officer or agent of the government in the course of the discharge of his official duty,' then, of course, it has no application to letters by this defendant to the Chief Yeoman of the battleship

Arkansas, although it would extend to any letters written by the latter to the defendant or to the defendant's father. We are not inclined to put so narrow a construction upon the statute, and we can see no substantial reason for thinking that copies of such letters as are on file in the record of the proceedings of the court-martial, and which are authenticated by the Department of the Navy as provided in the act, may not be introduced in evidence at the trial of the defendant. The statute authorizes the introduction in evidence of copies of any documents or papers which are required by law to be kept on file in the departments, provided such copies are authenticated under the seal of the department in which the document is kept. It is the opinion of the majority of this court that the statute was intended to apply at least to any document or paper which is by law required to be filed and kept on file in any of the Executive Departments of the government. A document or paper which is required to be so filed and kept on file is in the opinion of the majority of the court an official document as much so as one which is written or published by an officer in his official character or in the performance of an official duty. The word 'official' is defined in the New Standard Dictionary as follows:

"1. Of or pertaining to an office or public trust; as official duties.

"2. Derived from the proper office or officer, or from the proper authority; authoritative; as, an official report."

"A paper which must be kept on file in a designated office and which cannot be removed therefrom, pertains to that office, and so becomes official. And we are unable to see why the statute is not as applicable to that class of official papers as well as to the other class. The one class is as much within the letter of the statute as is the other, and it is also as much within the reason and the spirit of the statute."

Vol. III, p. 212, sec. 905. [First ed., vol. III, p. 37.]

Memorandum of decision as evidence of judgment.—A memorandum of decision by a

judge for the information of the clerk whose duty it is forthwith to make an entry of judgment is but a direction to enter judgment as distinguished from a judgment and is an action on the judgment brought in a state other than that in which it was rendered; such memorandum of decision is not admissible as proof of the judgment. *Bruce v. Ackroyd*, (Conn. 1920) 110 Atl. 835.

Full faith and credit—*Evidence of judgment roll and jurisdictional facts*.—In an action on a judgment of a sister state the introduction of the judgment duly authenticated as required by this section is sufficient to sustain the plaintiff's case if the defendant offered no evidence; in other words such introduction makes a prima facie case. It is not necessary to introduce the judgment roll or offer proof of jurisdictional facts. *Lang v. Lang*, (S. D. 1919) 173 N. W. 443.

Sufficiency of record as establishing judgment.—"There can be no doubt but that any state may determine for itself what are the essentials of a judgment of record in its own courts. If the record discloses such essentials as to entitle it to recognition as a judgment in a domestic court, it is, under the United States Constitution and the statute, entitled to the same recognition in the courts of other states. *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683. Conversely, it must follow that if the domestic courts would not recognize the record as establishing a judgment, it cannot be given that effect in any other state. The law of the state in which the judgment is rendered governs, and not the law of the other state in which the record is sought to be used to establish the fact of a judgment in the original jurisdiction." *Bruce v. Ackroyd*, (Conn. 1920) 110 Atl. 835.

Vol. III, p. 227. [*Admitted handwriting allowed as evidence.*]
[First ed., 1914 Supp., p. 141.]

This act changes the common-law rule in regard to comparison of writings.—To same effect as original annotation, see *Smythe v. New Providence Tp.*, (C. C. A. 3d Cir. 1920) 263 Fed. 481.

EXECUTION

Vol. III, p. 243, sec. 3. [First ed., vol. III, p. 54.]

"For at least four weeks."—To same effect as original annotation see *Walker v. Stuart*,

(D. C. Md. 1919) 261 Fed. 427, holding that there was not a compliance with the statute where the first publication was only 23 days before the date of sale.

"If the respondent can recover, under the guaranty clause in the contract, more than the prices fixed by the Federal Food Administration, the law under which such prices were so fixed would be nullified. The purpose of the Food Control Act, as applied to the subject-matter of the contract here in controversy, was to insure fishermen a reasonable price for the fish they caught, enable the cannery men to secure an adequate supply of fish for canning purposes at such a reasonable price as would enable them to sell the same at a reasonable price to the purchasing public and make a fair profit. If the act could be avoided by contracts such as the one here in question, its provisions would be largely defeated. To hold that this contract was one of employment, and therefore not subject to the regulations of the Federal Food Administration, would be to put a premium upon subterfuge. While the Food Control Act remains in force and effect, its provisions must be held controlling, and that contracts made in violation thereof are unenforceable."

Sugar refiners' agreement with Food Administration as violating Sherman Antitrust Act.—A certain agreement negotiated by the United States Food Administration with the leading refiners of sugar in the United States which provides that until December 31, 1919, the refiners should purchase their entire requirements of raw sugar from the United States Sugar Equalization Board, Inc. (an agency of the Food Administration), and that during such period the refiners shall observe a fixed maximum price on all sugar manufactured by them, was authorized by the Food Control Act and was not prohibited by the Sherman Antitrust Act. (See vol. IX, p. 644.) 31 Op. Atty-Gen. 376.

1918 Supp., p. 183, sec. 4.

Punishment for making unreasonable rates.—In *U. S. v. Mossew*, (N. D. N. Y. 1919) 261 Fed. 999, it appeared that the defendant was indicted for a violation of this section in making unreasonable rates and charges for a necessary. He pleaded guilty and was fined five hundred dollars. In granting a writ of error on the ground that this Act provided no punishment for such an offense, the court said:

"While by section 4 it is declared to be unlawful to make any unjust or unreasonable rate or charge in handling or dealing in necessities, it is impossible to find in the act any provision for the punishment of this particular act so made unlawful.

"Penalties and punishments are denounced by the act for the doing of certain acts by this section made unlawful as well as for other acts forbidden by other sections of the act, but no penalty is prescribed for doing other of the acts made unlawful by this section.

"There is no general provision in the act denouncing a penalty or punishment for a

violation of these provisions where no specific penalty or punishment is provided. The result is that, while it is made 'unlawful' to make an unreasonable and unjust charge for a necessary, no penalty or punishment is expressly denounced or prescribed for the doing of such unlawful act, and made unlawful by a valid statute. . . . In the instant case Congress has defined the act of making an excessive and an unreasonable charge for a necessary by any dealer therein an offense against the law of the United States, and hence the act is denounced as a criminal offense, in that it is declared to be unlawful. The District Courts are given general original power and jurisdiction to try all indictments for crimes committed against the United States. Section 24, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091). Hence we have a law making the act unlawful and a general law giving to the United States District Court jurisdiction to try and determine the case, but we have in the act itself no penalty or punishment denounced or prescribed for the doing of the unlawful act. By section 4 of the act of Congress referred to, the doing of each of more than half a dozen independent acts is made unlawful; but the act, in no part or section of it, prescribes a penalty or punishment for the commission of several of these unlawful acts. The omission seems to have been deliberate and intentional.

"I think it doubtful whether the statute makes it a crime or misdemeanor to commit the act charged in the indictment against Mossew; no punishment for the commission of such act being denounced or prescribed, even though the commission of such act is declared to be unlawful. 1 Bouvier (14th ed.) defines a 'crime' as 'an act committed or omitted in violation of a public law forbidding or commanding it.' But 1 Bishop's Criminal Law, § 43, gives this definition: 'A wrong which the government notices as injurious to the public and punishes in what is called a criminal proceeding in its own name.'

"However, in 12 Cyc. 142, it is said:

"It has been held in some of the cases that, where an act is a crime solely by statute and no penalty is prescribed in the statute, an indictment will be quashed, or judgment arrested"—citing *Curry v. Dist. of Columbia*, 14 App. D. C. 423; *Cribb v. State*, 9 Fla. 409; *Gibson v. State*, 38 Ga. 571; *Rosenbaum v. State*, 4 Ind. 599.

"Also it is said (same page):

"Other courts have held that where a statute prohibits any matter of public grievance or commands a matter of public convenience, although no penalty is prescribed for disobeying its prohibitions or commands an indictment will be sustained and the offense punished by a fine"—citing *State v. Fletcher*, 5 N. H. 257; *Keller v. State*, 11 Md. 525, 69 Am. Dec. 226; *People v. Shea*, 3 Parker's Cr. Rep. (N. Y.) 562; *United*

States v. O'Connor, (D. C.) 31 Fed. 449; 2 Hawkins, P. C. c. 25, § 4; Russell on Crimes, 40; People v. Long Island R. Co., 134 N. Y. 506, 31 N. E. 873.

"In *United States v. O'Connor*, *supra*, the court, by Thayer, J., said:

"At the beginning of the inquiry it may be further conceded that no statute of this state or of the United States, in so many words, forbids the writing of names in the registration book in the manner charged to have been done by the defendant, or imposes a penalty for so doing. The fact, however, that no penalty has been imposed is unimportant, if the act in question has been in effect prohibited, as an act which is prohibited by law is none the less unlawful, although no penalty is denounced."

"This decision in *United States District Court* was rendered in 1887, and I cannot find that it has ever been cited or referred to.

"In New York this subject is fully covered by section 1937 of the Penal Law (Consol. Laws, c. 40), which declares:

"A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this chapter, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

"The same provision, except as to penalty which is greater, is made as to felonies by section 1935. Diligent search fails to find any similar provision in the statutes of the United States, or any general provision authorizing punishment for offenses against the law where no provision for punishment is made in the act creating them.

"In this case, on the imposition of the fine of \$600 by the court after plea of guilty, the defendant paid the fine and made no motion in arrest of judgment, nor did the defendant move at that term, nor has he moved at any subsequent time or term, to set aside or quash the indictment, or set aside or vacate the conviction. The plea of guilty was entered, and the fine imposed and paid, at the June term of this court held at Binghamton. That term ended October 7th, when the October term of this court commenced. The October term expired December 2d, when the December term commenced. That term has not expired.

"The defendant now applies for a writ of error, and I assume that it is my duty to grant same, and therefore the writ is granted and signed."

1918 Supp., p. 185, sec. 10.

Requisition of cottonseed cake.—Under the provision of this section, the President has the power, acting through the Food Administrator, to requisition cottonseed cake to be

used to preserve the cattle herds of Texas and insure a proper meat supply for the country. (1918) 31 Op. Atty-Gen. 198.

Manner of serving process on United States.—In the suit against the United States authorized by this section, the petition should be served on both the district attorney and the Attorney-General. *National Casket Co. v. U. S.*, (S. D. N. Y. 1920) 263 Fed. 246, wherein it was said:

"It seems to me that in this dilemma the analogy of sections 5 and 6 of chapter 359 of the Laws of 1887 should be adopted, and that the proper procedure is to file and serve petitions as therein required. There is, it is true, force in the assertion of the United States that the difference of expression between section 10 and sections 12, 16, and 25 might indicate a difference in intent. Obviously it does to some extent, because the jurisdiction of this court extends to 'all such controversies,' regardless of their amount. Moreover, it is a little perplexing to learn that the original form of section 10 conformed to that of the later sections and that the change was deliberately made in the Senate. Nevertheless, some solution must be found, or the purpose of Congress will miscarry, and I think that the difference of intent between section 10 and the later sections is satisfied by the removal of limitation in amount upon the jurisdiction of the District Court.

"The service of a summons upon the local district attorney has the support of no prior procedure ever sanctioned by Congress, and it seems to me more likely to accord with what must have been meant to adopt the nearest analogy which has any warrant of law. The case is wholly of first impression, but it must be decided in one way or the other, and in such circumstances courts should, I think, try to find that way out which leaves the fewest anomalies, exceptions, or diversities between cases in substance the same.

"The motion to vacate the summons is therefore granted, but, to avoid further perplexities, I may add, in accordance with what I have just said, that petitions following the provisions of the Tucker Act would in my judgment answer the requirements of section 10."

Authority of Food Administration Grain Corporation.—The Food Administration Grain Corporation, as an authorized agent of the President, may lawfully extend its operations to include the buying, selling, and storing of rye, barley, oats, rice, corn, and other cereals, in order to co-ordinate the flow of such commodities to seaboard over our railways and to assure the civil population of our own country as well as the allies a sufficient amount thereof, and to provide sufficient distribution for the Army and Navy of the United States and the allies. 31 Op. Atty-Gen. 344.

1918 Supp., p. 188, sec. 15.

Forfeiture of vehicles.—To same effect as 1919 Supplement annotations, see U. S. v. One Ford Automobile, (N. D. N. Y. 1919) 259 Fed. 894, wherein it was said:

"The vehicles used by the offender against this statute are not, of themselves, unlawfully in the United States, or subject to seizure, condemnation and sale. They were used in the commission of a crime against the United States and to aid in the commission of such offense. The property itself and not the owner is proceeded against, but if seized, condemned as forfeited to the United States and sold, the owner is deprived of his property and of his ownership in such automobile for the sole reason he used it as an instrumentality in the commission of a crime. The automobile did nothing of its own volition. It cannot be compared to the case of a vicious bull, or dog, or other animal or to the case of a nuisance. It cannot be doubted, I think, that the state in one statute may provide by law for the seizure, condemnation, and killing of every ferocious or dangerous animal apprehended at large and doing damage, or for the suppression of a nuisance, and in another statute may make it a crime for the owner to harbor such an animal and allow it to go at large and denounce a punishment by fine or imprisonment or by both for so doing. If the owner of such animal offends, he may be apprehended, convicted, and fined or imprisoned. This would not bar the seizure, condemnation, and killing of the ferocious animal under the other statute, even though it deprives the owner of such animal of his property. I do not think this would be regarded as the imposition of a double or added punishment. The animal is killed or the nuisance suppressed because obnoxious to the law and prejudicial to the general welfare. But an automobile or other vehicle is only operated by the owner or by his authority and is of itself harmless and of considerable value. It is not dangerous to the public or a nuisance. The opium act of 1909 (act of February 9, 1909, c. 100, 35 Stat. 614), above referred to, not only made it a crime to bring smoking opium into the United States, but denounced the penalty of fine or imprisonment and also in terms provided for the forfeiture of the opium. The seizure and disposition of the opium in the one case and of the distilled spirits in the other is necessary to the effective operation and enforcement of the law, but the forfeiture of the vehicle used, automobile in this case, is not. The seizure and condemnation and disposition of the opium in the one case and of the distilled spirits in the other are not acts done by way of punishment for the commission of the offense of bringing them into the United States contrary to law, but to prevent such obnoxious and forbidden articles going at large or into use in the United States.

This cannot be said of the automobile used to transport the prohibited merchandise. In the exercise of its police power, the general government has declared that distilled spirits shall not be brought into the United States. It is true that the prohibitory act unlike the opium act does not itself state what shall be done with such spirits if brought in, but the old statute then and still in force does. This provision is separable from the part providing for the seizure and forfeiture of the vehicles used in bringing in such articles in defiance of law. The one provision is applicable here, the other not. Logically we well may inquire why Congress specifically provided in the opium act for its seizure and condemnation when brought into the United States in defiance of law if it was thought the old statute authorized the seizure, etc., of such goods when so brought in.

"I am of the opinion and hold that the seizure, condemnation, and disposition of distilled spirits brought into the United States in violation of the act of August 10, 1917, is not illegal or adding to the punishment prescribed by the statute itself, but that the seizure, condemnation, or forfeiture of the vehicle or instrumentalities used by the offender in so unlawfully bringing in such prohibited article would be."

1918 Supp., p. 191, sec. 25.

Power of President to regulate directly.—"The word 'may' in the last clause of the first paragraph of section 25 of the National Defense (Lever) Act (40 Stat. 276) is permissive. The President is thereby empowered, not required, to exercise his authority to regulate the prices and production of coal through the Federal Trade Commission in each instance. This is the ordinary significance of the word. *United States v. Lexington Mill Co.*, 232 U. S. 399, 34 Sup. Ct. 337, 55 L. Ed. 658, L. R. A. 1915B 774. And that it was so intended is clear from the context. It may be noted that the third paragraph vests in the President a similar optional discretion to act through the commission or otherwise." U. S. v. Ford, (S. D. Ohio, 1920) 263 Fed. 449.

Authority of commission contingent.—"The authority of the commission under the thirteenth paragraph of the section is to fix local prices only after direction by the President to make the investigation authorized by the eleventh paragraph. The grant of powers to the commission is contingent, and does not become effective until that direction is given. Such grant does not, therefore, require the construction of the first paragraph, to the effect that the President can act only through the commission, for which the defendant contends." U. S. v. Ford, (S. D. Ohio, 1920) 263 Fed. 449.

Contract in violation of Act.—Though the Act does not interfere with contracts made

before its enactment, if such a contract has terminated, a new contract renewing it is invalid if the price is higher than that fixed under this section. *Bewly-Darst Coal Co. v. Chattanooga Gas Co.*, (Tenn. 1920) 220 S. W. 1083.

Contracts below fixed price.—The price fixed under this section is merely a maximum price and the fixed price cannot be recovered under a contract for a less price. *Bewly-Darst Coal Co. v. Chattanooga Gas Co.*, (Tenn. 1920) 220 S. W. 1083.

GAME ANIMALS AND BIRDS

1918 Supp., p. 196, sec. 1.

Constitutionality.—The rights of the several states are not unconstitutionally infringed by the Migratory Bird Treaty of December 8, 1916, and the Act of July 3, 1918, enacted to give effect to such treaty, under which the killing, capturing, or selling any of the migratory birds included in the terms of the treaty is prohibited except as permitted by regulations compatible with those terms to be made by the Secretary of Agriculture. *Missouri v. Holland*, (1920) 252 U. S. 416, 40 S. Ct. 382, 64 U. S. (L. ed.) —, (affirming (W. D. Mo. 1919) 258 Fed. 479), wherein the court said:

"To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by article 2, section 2, the power to make treaties is delegated expressly, and by article 6 treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under article 1, section 8, as a necessary and proper means to execute the powers of the government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

"It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the states, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the states had been held bad in the District Court. *United States v. Shauver*, 214 Fed. 154; *United States v. McCullagh*, 221 Fed. 288. Those decisions were supported by arguments that migratory birds were owned by the states in their sovereign capacity for the benefit of their people, and that under cases like *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 400 L. Ed. 793, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

"Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. *Andrews v. Andrews*, 188 U. S. 14, 33, 23 Sup. Ct. 237, 47 L. Ed. 366. What was said in that case with regard to the powers of the states applies with equal force to the powers of the nation in cases where the states individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

"The state, as we have intimated, founds its claim of exclusive authority upon an assertion of title to migratory birds,—

an assertion that is embodied in statute. No doubt it is true that, as between a state and its inhabitants, the state may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the state upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the state's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another state, and in a week a thousand miles away. If we are to be accurate, we cannot put the case of the state upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that, but for the treaty, the state would be free to regulate this subject itself.

"As most of the laws of the United States are carried out within the states, and as many of them deal with matters which, in the silence of such laws, the state might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties, of course, 'are as binding within the territorial limits of the states as they are effective throughout the dominion of the United States.' *Baldwin v. Franks*, 120 U. S. 678, 683, 30 L. ed. 766, 767, 7 Sup. Ct. Rep. 656, 763. No doubt the great body of private relations usually falls within the control of the state, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as *Hopkirk v. Bell*, 3 Cranch 454, 2 L. ed. 497, with regard to statutes of limitation, and even earlier, as to confiscation, in *Ware v. Hylton*, 3 Dall. 199, 1 L. ed. 568. It was assumed by Chief Justice Marshall with regard to the escheat of land to the state in *Chirac v. Chirac*, 2 Wheat. 259, 275, 4 L. ed. 234, 238; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *Blythe v. Hinckley*, 180 U. S. 333, 340, 45 L. ed. 557, 561, 21 Sup. Ct. Rep. 390. So, as to a limited jurisdiction of foreign consuls within a state. *Wildenhus's Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. ed. 565. See *Ross v. McIntyre*, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. ed. 581. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

"Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the state, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with. We see nothing in the Constitution

that compels the government to sit by while a food supply is cut off and the protectors of our forests and of our crops are destroyed. It is not sufficient to rely upon the states. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Cary v. South Dakota*, 250 U. S. 118, 63 L. ed. 886, 39 Sup. Ct. Rep. 403."

This act is constitutional as being one to carry into effect a valid treaty made by the President and the Senate under art. 2, sec. 2 of the Constitution. And it does not infringe upon the rights reserved to the several states under the Tenth Amendment. *U. S. v. Thompson*, (E. D. Ark. 1919) 258 Fed. 257. The court, in passing upon the validity of the treaty and this act, said: "The issue in this cause, raised by demurrer to an information filed by the United States attorney, charging the defendant with a violation of the Migratory Bird Act of July 3, 1918, entitled 'An Act to give effect to the convention between the United States and Great Britain for the protection of migratory birds, concluded at Washington, August 16, 1916, and for other purposes,' is whether the act is constitutional. This, of course, involves the power to make the treaty.

"The contention of counsel for the defendant, briefly stated, is that a treaty or convention between the United States and a foreign nation is of no higher grade than an act of Congress, and if an act of Congress regulating migratory birds is beyond the constitutional powers of Congress a treaty on the same subject is also void.

"The constitutional provisions relating to the treaty power are: Article 2, § 2, cl. 2, which, among the powers granted to the President provides that: 'He shall have power, by and with the . . . consent of the Senate, to make treaties: Provided, two-thirds of the Senators present concur.'

"Article 1, § 10, cl. 1, provides that: 'No state shall enter into any treaty, alliance or confederation.'

"The Tenth Amendment to the Constitution provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'

"It is now contended that as it was held by this court in *United States v. Shauver* (D. C.) 214 Fed. 154, by Judge Pollock in *U. S. v. McCullagh* (D. C.) 221 Fed. 288, and in *State v. Sawyer*, 113 Me. 458, 94 Atl. 863, L. R. A. 1915F 1031, Ann. Cas. 1917D 650, and *State v. McCullagh*, 96 Kan. 786, 153 Pac. 657, that the migratory bird section of the Appropriation Act for Department of Agriculture of March 4, 1913, c. 145, 37 Stat. 828, 847, was unconstitutional, the same result must follow in this case; or, in other words, that the treaty power under the Constitution is no greater than the power of Congress to enact statutes. (The Act of

1913 was not enacted to carry into effect a treaty.)

"In construing the Constitution it is the settled canon of construction that every part of it must be given effect, and none of its provisions may be disregarded. Article 6, cl. 2, of the Constitution, provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

"It will be noticed that this section, in speaking of the laws of the United States, limits the power to enact them to such laws as are 'made in pursuance thereof.' On the other hand, when referring to treaties, the only limitation is 'which shall be made under the authority of the United States,' omitting the words 'in pursuance of the Constitution.' It cannot be assumed that the framers of that instrument intended to make no distinction between laws and treaties, when using language differing so materially. The words, 'laws made in pursuance of the Constitution,' can have but one meaning, namely, when authorized by the Constitution, while as to treaties the limitation is when made 'by authority of the United States.' The reason for this distinction is obvious. In making laws, our own consent alone is necessary, but in forming treaties the concurrence of the other power to the treaty is required.

"To subject the treaty power to all the limitations of Congress in enacting the laws for the regulation of internal affairs would in effect prevent the exercise of many of the most important governmental functions of this nation, in its intercourse and relations with foreign nations, and for the protection of our citizens in foreign countries. The states of the Union may enact all laws necessary for their local affairs, not prohibited by the national or their own constitution; but they are expressly prohibited from entering into treaties, alliances, or confederations with other nations. If, therefore, the national government is also prohibited from exercising the treaty power, affecting matters which for internal purposes belong exclusively to the states, how can a citizen be protected in matters of that nature when they arise in foreign countries? . . . To make treaties is one of the highest attributes of every sovereign government, and if the United States does not possess it to the fullest extent it would not be invested with the powers which belong to independent nations, and the rights of our citizens in their intercourse with foreign nations, or their right to the protection of life, liberty, and the enjoyment of property in foreign countries would be at the mercy of foreign nations, as the states are without authority to enter into treaties.

It is impossible to conceive that the framers of the Constitution overlooked a matter of such importance, and intended to deprive the people of protection in foreign lands, which can only be secured by treaty.

"To say that by the exercise of that power the people of the states may be deprived of their liberties is to reflect, not only on those who by the Constitution are invested with that power, but on the people themselves, for a treaty can only be made by the President and the concurrence of two-thirds of the Senators, all elected by the people, and their servants.

"Aside from this, a treaty may be repealed by Congress at any time, as there is no principle of law more firmly established by the highest court of the land than that, while a treaty will supersede a prior act of Congress, an act of Congress may supersede a prior treaty. The latest expression controls, whether it be a treaty or an act of Congress. Therefore, if it be conceivable that a President, with the concurrence of two-thirds of the Senators, should make a treaty subversive of the rights and liberties of the people, a Congress would be elected pledged to repeal it.

"In the opinion of the court, the power to make the treaty in controversy exists, and the act of Congress to carry it into effect was in discharge of a moral obligation assumed by the nation, by the convention with Great Britain."

To the same effect, see *U. S. v. Rockefeller*, (D. C. Mont. 1919) 260 Fed. 346; *U. S. v. Samples*, (W. D. Mo. 1919) 258 Fed. 479. In the latter case the court said: "The validity of this act then depends upon whether this treaty was a valid exercise of federal authority as delegated by the Constitution. A treaty is a compact between two or more independent nations with a view to the public welfare. It is a compact made between two or more nations, entered into for the common advancement of their interests and the interests of civilization. *Michie's Encyc. of U. S. Sup. Ct. Rep.*, vol. 11, p. 636; *Altman & Co. v. United States*, 224 U. S. 583, 32 Sup. Ct. 593, 56 L. Ed. 894; *14 Diamond Rings v. United States*, 183 U. S. 176-182, 22 Sup. Ct. 59, 46 L. Ed. 138.

"A treaty is invalid if in violation of or inconsistent with the Constitution. *Butler on Treaties*, vol. 2, par. 455, p. 350; *Crandall on Treaties* (2d ed.) p. 268; *Federal Statutes Annotated*, vol. 9, p. 29; *Cherokee Tobacco Case*, 11 Wall. 620, 20 L. Ed. 227; *United States v. Old Settlers*, 148 U. S. 427, 13 Sup. Ct. 650, 37 L. Ed. 509; *Fong Yue Ting v. United States*, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905; *Ex parte Dos Santos*, Fed. Cas. No. 4,016, 7 Fed. Cas. 949; *Geofroy v. Riggs*, 133 U. S. 266, 10 Sup. Ct. 295, 33 L. Ed. 642.

"And this being true, the court, in a proper case where the rights of citizens are involved, may so declare. *Michie's Encyc. of U. S. Sup. Ct. Rep.*, vol. 11, p. 640; *Head*

Money Cases, 112 U. S. 580-598, 5 Sup. Ct. 247, 28 L. Ed. 798; *In re Cooper*, 143 U. S. 473, 501, 503, 12 Sup. Ct. 453, 36 L. Ed. 232; *Jones v. Meehan*, 175 U. S. 32, 29 Sup. Ct. 1, 44 L. Ed. 49.

"The general rule as to limitations upon the treaty making power is most comprehensively stated in *Geofroy v. Riggs*, 133 U. S. 266, 10 Sup. Ct. 295, 33 L. Ed. 642. If this pronouncement, in any view, could properly be regarded as obiter, nevertheless it has been so frequently and approvingly restated that it must now be regarded as the settled rule in the courts of this country.

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. . . . But with these exceptions, . . . there is no limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.' *Geofroy v. Riggs*, 133 U. S. 266, 10 Sup. Ct. 297, 33 L. Ed. 642.

"As has been frequently stated, 'An attempt to enumerate these limitations in more specific terms than here used by Mr. Justice Field would be idle.' It is sufficiently comprehensive to include all acts by the treaty making power which might seek or tend to impair or destroy the constitutional functions exclusively conferred upon this government and its several departments.

"Is the protection of migratory birds then 'properly the subject of negotiation with a foreign country'? In the opinion of a former Attorney General the United States is given power to enter into treaty stipulations with Great Britain for the regulation of the fisheries in the waters of the United States and Canada along the international boundary; and such is now the accepted view. This is because 'the nature and habits of fishes, the means necessary to their preservation from extinction, and their protection in spawning time are such as to render it of importance that laws regulating their capture shall be uniform and uniformly enforced over the whole extent of the body of water which they inhabit. Where a lake or river is divided into two jurisdictions by a boundary line between two nations, it is manifest that it would be not only convenient, but almost necessary, for the adequate regulation of the subject that an agreement by treaty or other stipulation should exist between the governments of the two countries, in order to make any system of regulation and protection effective.' Otherwise 'it is impossible of regulation by uniform and reciprocal rules.' Mutuality and the at-

tainment of reciprocal benefits are distinctive features of international conventions. Of course, such must be tangible and proximate. The subject-matter must be of the nature of those that have usually been made the subject of negotiation and treaty in the ordinary intercourse of nations, provided, always, that they are consistent with the nature of our institutions. It is, of course, unnecessary that the precise subject shall have been previously under consideration. This would mean that nations have exhausted the subject-matter of their intercourse, and can no longer extend their avenues of mutual advantage. But, as above stated, the matter of negotiation must be one which falls naturally and logically into recognized classification. It must not be arbitrary, disconnected, and remote from international intercourse.

"The case of free-swimming fishes in international waters is one which appeals more readily to the common understanding, because there international contract is apparent. But does the case of migratory birds differ in principle from that of migratory fishes or other similar forms of wild life? The term 'migrate' as used in this connection is thus defined:

"To pass periodically from one region or climate to another for feeding or breeding. . . . The majority of birds of the north temperate and arctic regions perform regular migrations, which are dependent on food supply more than on temperature, moving north in the spring and south in the fall.'

"Seals go regularly to their breeding and feeding grounds. Fishes migrate during the spawning season. Migratory birds nest in the north and feed in the south with the regularity of the seasons. The movements of all these forms of life may be computed almost with mathematical precision. Their courses through the water and through the air are almost as well defined as though marked by Old Trails' monuments. Their movements are dictated by neither whim nor caprice, but are impelled by an instinct which inheres in the law of their being. If this be true, what distinction can we draw between the fish which swims through one of the great natural elements and the bird which flies through another? The controlling consideration is the effect upon the mutual interests of the two nations concerned. By this treaty the United States profits by the protection which is accorded such wild fowl in Canada during the nesting and feeding seasons before the migration sets in to the south. Canada gains by the same protection which is thrown about the same birds during their stay within the United States. The people of both countries, of our entire Union and of all the states, benefit by the mutual and reciprocal advantages which accrue from this arrangement. If this be so, then the subject-matter comes properly within the treaty making power. If it curtails any right which would otherwise be lodged in an individual state, it does so

only through the full and untrammelled exercise of a federal power to negotiate with a foreign government. The conflict of jurisdiction, if one can be said to exist, differs in no respect from that which is experienced in the exercise of any power concededly lodged in the federal government which comes in contact with the ordinary powers of the state over the same subject matter."

See further to the same effect, *U. S. v. Selkirk*, (S. D. Tex. 1919) 258 Fed. 775, wherein it was said:

"While the demurrers present various forms of attack on the law, the gist of the contention is that, as the matter of the regulation of wild game is lodged in and a part of the sovereign power of the states and has not been delegated to the central government by the Constitution, the Congress is without power to legislate on the subject, and that the mere fact that the act is passed to give effect to a convention between the United States and Great Britain will not furnish Congress the power which without the treaty it clearly did not have, as I have no doubt that the cases in the federal and state courts holding the Migratory Bird Act of March 4, 1913 (37 Stat. 847, c. 145), invalid, were correctly decided.

"I cannot, however, assent to the view of counsel that the present act is likewise invalid.

"The constitutional provisions relating to the treaty power are: Article 2, § 2, cl. 2, which, among the powers granted to the President, provides that: 'He shall have power, by and with the . . . consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.'"

"Article 1, § 10, cl. 1, provides that: 'No state shall enter into any treaty, alliance, or confederation.'"

"The Tenth Amendment to the Constitution provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.'"

"The Constitution (article 6, cl. 2) provides:

"This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

"It could not be for a moment contended that two sovereign states could not by treaty regulate the taking of migratory birds which pass from the one country to the other, and with the state of Texas still a sovereign republic, instead of a constituent part of the United States, there is no doubt that it could have concluded a treaty with Great Britain and enforced it, of the tenor and effect of that concluded by Congress.

"What a state itself could do, that all the states can do through their agent, the central government, and it only remains to determine whether that government has been

made the agent, or mouthpiece, of the states in the matter of treaties.

"Even the most casual examination of the constitutional provisions above set out establishes: first, that the states have completely divested themselves of the power to enter into treaties; second, that without limitation or restriction they have conferred upon the President, with the consent of the Senate, the power to make treaties; and, third, that treaties made under the authority of the United States are the supreme law of the land, along with the Constitution and acts of Congress passed under the authority thereof."

Suit by state to enjoin game warden as proper method of raising constitutionality of Migratory Bird Treaty Act.—A suit by a state to enjoin a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act and the regulation made by the Secretary of Agriculture in pursuance thereof on the ground that the statute is an unconstitutional interference with the reserved rights of the states, and that acts of the defendant, done and threatened under that authority, invade the sovereign rights of the state and contravene its will manifested in statutes, is a reasonable and proper means to assert the alleged quasi sovereign rights of the state. *Missouri v. Holland*, (1920) 252 U. S. 416, 40 S. Ct. 332, 64 U. S. (L. ed.) —, *affirming* (W. D. Mo. 1919) 258 Fed. 479.

1918 Supp., p. 196, sec. 2.

Plumage manufactured into aigrettes prior to passage of Act.—This Act does not prohibit the possession of aigrettes manufactured from the plumage of migratory birds prior to the date of its enactment. *U. S. v. Fuld Store Co.*, (D. C. Mont. 1920) 262 Fed. 836. Regarding the application of this Act, the court said:

"The treaty (39 Stat. 1702) includes herons as migratory nongame birds, declares for a continuous close season in their behalf, and provides for legislation to execute its purposes. The act provides 'that unless and except as permitted by regulations' by it authorized to be made by the Secretary of Agriculture, 'it shall be unlawful to hunt, . . . kill, possess, offer for sale, sell, offer to purchase, purchase, . . . at any time or in any manner, any migratory bird included' in the treaty, 'or any part, nest, or egg of any such bird.' It also provides for seizure and confiscation of the things so denounced. There is no regulation purporting to apply to plumage antedating the act, and it is very doubtful if there can be.

"Pretermitted whether plumage manufactured into aigrettes is 'any part' of a bird within the intent of the act, or by merger and transformation into a new article has lost its identity as plumage or part of a bird, the act appears prospective, to protect birds in the future, to make killing

them in the future a crime, and incidentally to make possession or offer of sale of any part of the birds unlawfully killed (that is, killed in the future) also a crime. To kill is made unlawful, and to possess or sell the fruits of such unlawful killing alone is also made unlawful. This is the most reasonable construction of the act, in view of associated words and the circumstances, and perhaps the only construction which will sanction the act's validity. Before the act, herons were lawfully killed and their plumage lawfully possessed and sold. Much of this plumage had been converted into aigrettes, artistic, beautiful, useful, and ornamental—harmless and valuable. They had entered into the domain of commerce, and the stock of private property; and were possessed by many persons. An intent on the part of Congress to virtually outlaw and destroy such property ought not to be assumed, unless very clear and the only reasonable construction of the act; for it is very doubtful if Congress has any such power. In harmless, useful, and valuable property there is a vested right of possession, use, enjoyment, and sale—a liberty of action, of which owners cannot be arbitrarily deprived without compensation. The 'due process' clause of the Constitution well may forbid. See *Eberle v. Mich.*, 232 U. S. 706, 34 Sup. Ct. 330, 58 L. Ed. 803; *U. S. v. Jin Fuey*, 241 U. S. 401, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854; *Barbour v. State*, 249 U. S. 454, 39 Sup. Ct. 316, 63 L. Ed. 704, Apr. 14, 1919; *Hamilton v. Distilleries & Warehouse Co.*, 251 U. S. —, 40 Sup. St. 106, 64 L. Ed. —, Dec. 15, 1919; *Ruppert's Case*, 251 U. S. —, 40 Sup. Ct. 141, 64 L. Ed. —, Jan. 5, 1920. And it would be at least interesting to learn that the department's agents are embarked on a campaign to seize these ornaments from

women's hats and hair, and how they propose to accomplish it.

"Furthermore, such construction, denouncing as a crime possession and sale of this theretofore lawful private property, would expose the act to serious question as an ex post facto law within constitutional inhibition. Taking immediate effect, it would instantly convert many law-abiding citizens into criminals, change the law to their great disadvantage, and not for any act of theirs subsequent to the law, so far as possession goes, but only because they theretofore had acted and thereafter remained inactive. All this can be avoided by construction that the act relates only to birds and parts of birds killed subsequent to the act, a permissible and more reasonable construction, and in principle always to be preferred to avoid grave doubts of the validity of the law otherwise.

"True, treaties and laws to execute them may sometimes extend beyond congressional power, but, even as are acts and enactments of the war-making and all other powers, treaties and executory laws are subject to constitutional limitations. *Doe v. Braden*, 16 How. 657, 14 L. Ed. 1090. And the treaty is silent upon birds and parts of birds theretofore and lawfully killed and possessed. It does not require that they be regulated, and so creates in Congress no power to deal with them. See *U. S. v. Jin Fuey*, *supra*. That in game laws it is generally provided that it is unlawful to possess game in the close season, though lawfully acquired in the open season, is not analogous. There the game is acquired subject to a known condition that to retain possession into the close season is unlawful. Note, too, such laws have not been construed to include possession of stuffed game, mounted heads, ornaments, and the like."

GUANO ISLANDS

Vol. III, p. 423, sec. 5570. [First ed., vol. III, p. 159.]

Swan Islands.—The United States has never acquired sovereignty of any kind or to any extent over the Swan Islands in the Caribbean Sea by reason of the provisions of the Guano Islands Act. But the United States Government may at any time assert its sovereignty over these islands by appropriate action and no other country has any

proper claim to them. The property rights of the Swan Island Commercial Co. in the Swan Islands are dependent upon the assumption of sovereignty over these islands by the United States Government, and upon such assumption there can be no doubt that the rights of the company in the lands occupied and improved by it will become at least so equitably fixed as to warrant some provision for compensation by the Government. (1918) 31 Op. Atty-Gen. 216.

HABEAS CORPUS

Vol. III, p. 427, sec. 751. [First ed., vol. III, p. 162.]

VI. Federal interference with custody of state court.

1. Rule stated.
2. Exceptional circumstances.

VII. Restraint of personal liberty.

2. Petitioner at large on bail.

VIII. Review of proceedings of special tribunals.

3. Immigration.

VI. FEDERAL INTERFERENCE WITH CUSTODY OF STATE COURT

1. Rule Stated (p. 438)

Where a person is in custody, under process from a state court.—To same effect as third paragraph of original annotation, see *Shapley v. Cohoon*, (D. C. Mass. 1918) 258 Fed. 752, wherein it was said:

"For the welfare of the community, as well as that of the insane, and to guard against unnecessary conflicts between the federal courts and those of the state, both of which are equally bound to guard and protect rights secured by the Constitution, it is necessary that one who alleges that he has been deprived of his liberty in violation of his constitutional rights should have exhausted all his remedies in the state court before application should be made to a federal court. The exceptional cases in which a federal judge should exercise the power conferred upon him to issue a writ of habeas corpus to release one who is in custody by state authority and claims that he is deprived of liberty in violation of the Constitution are stated in *Ex parte Royall*, 117 U. S. 241, 251, 6 Sup. Ct. 734, 740, 29 L. Ed. 868, as follows:

"When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, or where, being a subject or citizen of a foreign state, and domiciled therein, he is in custody, under like authority, for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity, and effect whereof depend upon the law of nations, in such and like cases of urgency, involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority. So, also, when they are in the

custody of a state officer, it may be necessary, by use of the writ, to bring them into a court of the United States to testify as witnesses."

"It is evident that the case presented by the petitioner does not fall within any of these enumerated classes. While the petitioner has presented a petition to the Supreme Judicial Court for a writ of habeas corpus, which was denied by a single justice of that court, it does not appear that upon the hearing any question of law was reserved or reported to the full court, as might have been done. *King's Case*, 161 Mass. 46, 36 N. E. 685. If this had been done, and the highest court of the state, competent under the state law to dispose of the matter, had finally acted, the case could have been brought to the Supreme Court of the United States upon a writ of error." To same effect, see *Shapley v. Cohoon*, (D. C. Mass. 1919) 258 Fed. 757.

To same effect as fourth paragraph of original annotation, see *Ex p. Beach*, (S. D. Cal. 1919) 259 Fed. 956, approving *Ex p. Royall*, (1886) 117 U. S. 241, 6 S. Ct. 734, 29 U. S. (L. ed.) 868, in original annotation.

2. Exceptional Circumstances (p. 441)

Illustrations.—In *Ex p. Beach*, (S. D. Cal. 1919) 259 Fed. 956, it was held that a deputy collector of the United States customs service, charged under the Constitution and laws of the United States with the duty of preventing the importation of opium into the United States, was entitled to be discharged on habeas corpus from custody under a warrant issued by a state court on a charge of felonious assault committed in the performance of that duty.

VII. RESTRAINT OF PERSONAL LIBERTY

2. Petitioner at Large on Bail (p. 443)

A person arrested in one federal district charged with the commission of an offense in another district, who, upon his own request upon advice of counsel, is admitted to bail by a United States commissioner to answer the indictment before application had been made to the court for his removal, and before there had even been an order of the commissioner that he be held to await such application, is not entitled to his discharge on habeas corpus. He was no longer under actual restraint in the district of his arrest, and all questions in controversy in the habeas corpus and removal proceedings had terminated, including the question whether his arrest and detention had originally been valid, and whether there was a right then to remove him. *Stallings v. Splain*, (1920) 253 U. S. 339, 40 S. Ct. 537, 64 U. S. (L. ed.) —, affirming 49 App. Cas. (D. C.) —.

VIII. REVIEW OF PROCEEDINGS OF SPECIAL TRIBUNALS

3. Immigration (p. 443)

To same effect as third paragraph of original annotation, see *Yee Won v. White*, (C. C. A. 9th Cir. 1919) 258 Fed. 792, 170 C. C. A. 86; *Louie Share Gan v. White*, (C. C. A. 9th Cir. 1919) 258 Fed. 798, 170 C. C. A. 92, holding that there was no abuse of discretion on the part of the immigration authorities.

Chinese exclusion—Allegations in petition for habeas corpus.—Allegations in the petition for habeas corpus sued out by a Chinese applicant for admission to the United States may be interpreted in the light of the immigration records filed with the petition and with respondent's return, where, with such petition, were filed all the testimony and papers pertaining to the proceedings prior to the appeal to the Secretary of Labor, and there was a prayer that when the copy of the proceedings thereafter had should become available, they might be made a part of the petition. *Kwock Jan Fat v. White*, (1920) 253 U. S. 454, 40 S. Ct. 566, 64 U. S. (L. ed.) —, reversing (C. C. A. 9th Cir. 1919) 255 Fed. 323, 166 C. C. A. 493.

Advising alien of rights on preliminary examination.—The fact that a preliminary examination is had of an alien held for deportation without advising him of his right of representation by counsel, is not ground for discharging him on habeas corpus. *Jung Back Sing v. White*, (C. C. A. 9th Cir. 1919) 257 Fed. 416, 168 C. C. A. 456.

Vol. III, p. 449, sec. 753. [First ed., vol. III, p. 167.]

VI. CONSTITUTION, LAWS OR TREATIES (p. 454)

Prisoner held under state process.—To same effect as original annotation, see *Ex p. Beach*, (S. D. Cal. 1919) 259 Fed. 956.

Vol. III, p. 462, sec. 754. [First ed., vol. III, p. 172.]

Petition—"Setting forth the facts."—A petition containing merely loose general allegations which fail to show that the petitioner is wrongfully detained, is defective. *U. S. v. Uhl*, (S. D. N. Y. 1919) 262 Fed. 226.

Affirmative showing of want of jurisdiction.—Where one files a petition for habeas corpus it is incumbent upon him to show that his detention is unlawful; therefore, where one is confined under a statute containing a number of provisions, on any one of which he may be detained, the petition must clearly set forth each provision of the statute, and it must be averred that none of them applies to him. *Hines v. Mikell*, (C. C. A. 4th Cir. 1919) 259 Fed. 28, 170 C. C. A. 28, reversing (E. D. S. C. 1918) 253 Fed. 817 in 1919 Supplement annotation.

Vol. III, p. 464, sec. 755. [First ed., vol. III, p. 173.]

Petition as determining duty to issue writ.—To same effect as original annotation, see *U. S. v. Uhl*, (S. D. N. Y. 1919) 262 Fed. 532.

Vol. III, p. 469, sec. 761. [First ed., vol. III, p. 174.]

"Dispose of the party as law and justice require."—The provision of this section that the judge granting the writ shall on the hearing "dispose of the party as law and justice require," means as law and justice require at the time of the hearing. *Guiney v. Bonham*, (C. C. A. 9th Cir. 1919) 261 Fed. 582, 8 A. L. R. 1282.

HOSPITALS AND ASYLUMS

Vol. III, p. 572, sec. 4813. [First ed., vol. III, p. 252.]

The money benefits provided for in R. S. sec. 4756, are "pensions" within the purview of this section and the pertinent provision of the Act of June 30, 1914 (see vol. III, p. 573) and such money benefits inure to the grantees concurrently with maintenance in the Naval Home. (1918) 31 Op. Atty-Gen. 268.

Allowances under R. S. sec. 4757 are "pensions" within the meaning of this section and the Act of June 30, 1914 (see vol.

III, p. 573) and should therefore be disposed of, in cases where the beneficiaries are inmates of the Naval Home, in the manner prescribed by that Act. (1918) 31 Op. Atty-Gen. 268.

Vol. III, p. 573, sec. 1. [*Disposition of moneys, etc.*] [First ed., 1916 Supp., p. 169.]

See annotations under R. S. sec. 4813, *supra*, this title.

IMMIGRATION

Vol. III, p. 640, sec. 2. [First ed., 1912 Supp., p. 89.]

VIII. PERSONS SOLICITED TO MIGRATE
(p. 646)

Accountant as "contract laborer."—An assistant accountant brought into this country by a foreign bank for the purpose of employment in a branch bank here is not a "laborer" within the meaning of this section. *U. S. v. Union Bank*, (C. C. A. 2d Cir. 1919) 262 Fed. 91, 8 L. R. A. 1438.

Vol. III, p. 649, sec. 3. [First ed., 1912 Supp., p. 90.]

Necessity of "entry" into United States.—In *Tama Miyake v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 732, 169 C. C. A. 20, it was held that an alien in Hawaii who had been found receiving, sharing in, and deriving benefit from the earnings of prostitutes and who had been connected with the management of a house of prostitution, was subject to deportation under this section, regardless of the fact that she was a resident of Hawaii before the treaty of annexation. The court said:

"The second contention is that the appellant was not subject to deportation under the statute, since she was a resident of Hawaii before the treaty of annexation, and did not 'enter' the United States within the purview of the statute. That contention was made in *United States v. Kimi Yamamoto*, 240 Fed. 390, 153 C. C. A. 316, and *United States v. Sui Joy*, 240 Fed. 392, 153 C. C. A. 318, and adversely decided by this court."

In the earlier of these two cases, the court said: "The definition of the charge under which the appellee is held for deportation is limited by the words 'after such alien shall have entered the United States.' It is true that she has never technically entered the United States. While the territory of Hawaii may in a sense be said to have entered the United States by its annexation on August 12, 1898, it does not follow that its inhabitants thereby became immigrants to the United States. In ascertaining the intention of Congress in making the amendment of 1910, an important fact is that the amendment was made by striking certain words from the former act, whereby the time limitation in the former act was repealed. We think that Congress intended by the amendment to say that any alien found in the United States practicing prostitution shall be sent out of the country, and that such exclusion shall apply to all alien women, whether they came into the United States at a port of entry, or by the annexation of the land in which they lived, or became

aliens by marriage to an alien, or were born alien within the United States, as not being 'subject to the jurisdiction thereof,' and that the words 'after such alien shall have entered the United States' should be construed as if they read 'while such alien is in the United States.' It should be assumed that Congress intended to make no discrimination between these classes of aliens. The consideration which induced the amendment was that the objectionable aliens were in the United States, not the manner in which they got there."

Dismissal of other proceedings against alien.—The fact that proceedings against an alien for keeping and maintaining a house of ill fame are dismissed at the time deportation proceedings are begun against her under this section, does not deprive her of her constitutional right to trial by jury, since the dismissal of the proceedings was not necessary to give the immigration officials the right to proceed. *Tama Miyake v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 732, 169 C. C. A. 20.

Vol. III, p. 681, sec. 21. [First ed., 1909 Supp., p. 170.]

Fair trial.—A decision of the Secretary of Labor denying the admission into the United States of a Chinaman claiming American citizenship was rendered without the fair hearing which due process of law demands, where the only form in which the recognition of the Chinese applicant by three white witnesses called by him and examined in his presence by the government inspector was placed before the Secretary was a letter which the acting commissioner of immigration, who did not himself render the decision, sent to applicant's counsel and placed with the record, and where apparently there was no record of such recognition before the immigration commissioner when he decided the case. *Kwock Jan Fat v. White*, (1920) 253 U. S. 454, 40 S. Ct. 566, 64 U. S. (L. ed.) —, reversing (C. C. A. 9th Cir. 1919) 255 Fed. 323, 166 C. C. A. 493.

Review by court of proceedings for admission.—The denial of a fair hearing to a Chinese applicant who was refused admission into the United States requires that a judgment of the federal Circuit Court of Appeals which affirmed a judgment of the District Court, sustaining a demurrer to the petition of such Chinaman for habeas corpus, be reversed and the cause remanded to the District Court for trial of the merits. *Kwock Jan Fat v. White*, (1920) 253 U. S. 454, 40 S. Ct. 566, 64 U. S. (L. ed.) —, reversing (C. C. A. 9th Cir. 1919) 255 Fed. 323, 166 C. C. A. 493.

Vol. III, p. 685, sec. 25. [First ed., 1909 Supp., p. 172.]

III. Finality of decisions of immigration officers.

IV. Habeas corpus.

III. FINALITY OF DECISIONS OF IMMIGRATION OFFICERS (p. 687)

Rule stated.—To same effect as original annotation, see *Jeung Bock Hong v. White*, (C. C. A. 9th Cir. 1919) 258 Fed. 23, 169 C. C. A. 161, wherein it was held that if the executive officers of the Department of Labor found that the evidence in support of the petitioners' right to land and enter the United States was so impaired by discrepancies as to render it unsatisfactory, the court was not authorized to reverse the conclusion.

IV. HABEAS CORPUS (p. 690)

Waiver to right to hearing before board of special inquiry.—Where no claim for a hearing before a board of special inquiry is made at any time in proceedings before immigration officials to determine the right of an applicant to enter the United States as the minor son of a Chinese merchant lawfully domiciled here, the right to such hearing will be regarded as having been waived and cannot be demanded for the first time in habeas corpus proceedings. *Lim Chan v. White*, (C. C. A. 9th Cir. 1920) 262 Fed. 762.

1918 Supp., p. 214, sec. 3.

"Teacher" as "laborer."—An alien who seeks admission into this country for the purpose of teaching the Japanese language is not a "laborer" within the meaning of this section and may not be excluded as such. *Tatsukichi Kuwabara v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 104, 171 C. C. A. 140. In defining the terms, the court said:

"In the case of *Scharrenberg v. Dollar S. S. Co. et al.*, 229 Fed. 970, 144 C. C. A. 252, Ann. Cas. 1917C, 258, this court held that it was not a violation of the Immigration Act of February 20, 1907 (34 Stat. 900, c. 1134), making it a misdemeanor to prepay the transportation or assist in the importation of contract laborers into the United States, for the operators of a merchant vessel flying the American flag to bring aliens from China, which decision was affirmed by the Supreme Court in 245 U. S. 122, 38 Sup. Ct. 28, 62 L. Ed. 189, where the court, after referring to the claim there made that the seaman described in each count of the complaint was an alien contract laborer, and that the steamship was a part of the territory of the United States, and that therefore the contracting to bring such alien to San Francisco and to there employ him upon such a vessel, was to knowingly assist and encourage the migration of an alien contract laborer into the United States for the pur-

pose of having him perform labor therein in violation of the fourth and fifth sections of the Act of 1907, said:

"The validity of this claim, and of the argument in support of it, calls for the construction of three short provisions of two statutes.

"Section 2 of the Act of 1907, as amended in 1910 (36 Stat. 263), furnishes this definition of "contract laborers," which must be read into sections 4 and 5 of the Act of 1907: "Persons . . . who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled."

"Section 4 makes it a misdemeanor for any corporation to "in any way assist or encourage the importation or migration of any contract laborer or contract laborers into the United States."

"Section 5 imposes severe penalties for every violation of the act "by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States."

"Thus a contract laborer is one who under the conditions described in the first of these statutes comes "to perform labor in this country," and the penalties denounced by the sections of the other act are against persons who knowingly assist or induce the importation or migration of such laborer "into the United States."

"The purpose of this alien labor legislation was declared by this court almost 30 years ago, in *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, to be, to arrest the bringing of an ignorant, servile class of foreign laborers into the United States, under contract to work at a low rate of wages, and thus reduce other laborers engaged in like occupations to the level of the assisted immigrant.

"Having these terms of the statutes and this history in mind, can it with reason be said that the men shipped on the *Mackinaw* as "seamen" were "laborers," and that when employed upon that vessel in foreign commerce they were performing labor "in this country" within the meaning of the acts?

"In familiar speech a "seaman" may be called a "sailor" or a "mariner," but he is never called a "laborer," although he doubtless performs labor when assisting in the care and management of his ship; and a "seaman" is defined in the United States statutes applicable to "merchant seamen" as being, any person (masters and apprentices excepted) who shall be employed to serve in any capacity on board a vessel. R. S. § 4612. In the shipping articles, which the United States law requires shall be signed by members of the crews of ships of American registry engaged in foreign commerce, the men are designated as "seamen" or

"mariners." Thus, neither in popular nor in technical legal language would the men employed on the Mackinaw be called or classed as "laborers," and such seamen are not brought "into this country" to enter into competition with the labor of its inhabitants, but they come to our shores only to sail away again in foreign commerce on the ship which brings them or on another, as soon as employment can be obtained."

"We are of the opinion that in view of the purpose of the legislation here in question as declared by the Supreme Court in the cases that have been cited it cannot be held to apply to an alien who seeks to enter this country for the purpose of teaching 'the Japanese language, history, geography, and arithmetic,' first, because the doing so is not to perform labor in this country within the meaning of the Act of February 5, 1917; and, secondly, because a teacher of the Japanese language, history, geography, and arithmetic may be properly regarded as belonging to a 'recognized learned profession.'"

Employee of foreign steamship company temporarily in country as contract laborer.—To same effect as 1919 Supplement annotation, see *U. S. v. Union Bank*, (C. C. A. 2d Cir. 1919) 262 Fed. 91, 8 A. L. R. 1438, affirming (S. D. N. Y. 1918) 250 Fed. 913.

Literacy test—*Exemption*.—In *Mototaro Eguchi v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 144, 171 C. C. A. 180, it was held that the fact that an alien who had been lawfully admitted to the United States and who had resided in this country continuously for five years, was unable to procure passage on ships returning to the United States within the prescribed six months from the time of his departure therefrom, did not extend the prescribed period so as to exempt him from the literacy test imposed by this section.

Evidence.—In *Mototaro Eguchi v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 144, 171 C. C. A. 180, the evidence was held sufficient to sustain the finding of the lower court that an immigrant had failed to pass the literacy test prescribed by this section.

Proof necessary for reversal of deportation order.—Successfully to attack an order issued by the Secretary of Labor for the deportation of an alien under this section, it must be shown that the proceedings upon which the order is based were unfair, or that the relator has been denied a fair hearing, or that there has been an abuse of discretion on the part of the executive officers of the United States. *Lopez v. Howe*, (C. C. A. 2d Cir. 1919) 259 Fed. 401, 179 C. C. A. 377.

1918 Supp., p. 228, sec. 17.

Applicable only to aliens.—In *U. S. v. Low Hong*, (C. C. A. 5th Cir. 1919) 261 Fed. 73, a petition for habeas corpus alleged that the petitioner was a natural-born citizen of the

United States and held in custody under a warrant issued by the Secretary of Labor for hearing to determine whether or not he should be deported in conformity with law. The return to the petition averred that the arrest and detention were in pursuance of a warrant of the Secretary of Labor duly and lawfully issued under section 19 of this Act. By demurrer to the petition and orally the citizenship of the petitioner was admitted. As the provisions of this section 17 and other provisions of the Act are in express terms made applicable only to aliens, it was held that the petitioner was entitled to discharge immediately and without waiting for a hearing under the provisions of this section, the admission as to citizenship amounting to a concession that the Secretary of Labor was without power or jurisdiction to have the petitioner kept in custody under the warrant issued.

Appeal to Secretary of Labor as condition precedent to habeas corpus proceedings.—Where a person is ordered to be deported by a board of special inquiry, an appeal from its decision to the Secretary of Labor must be made in accordance with the provisions of this section before the District Court will entertain an application for a writ of habeas corpus. *U. S. v. Uhl*, (S. D. N. Y. 1919) 262 Fed. 532.

1918 Supp., p. 230, sec. 19.

The five-year limitation contained in the first clause of this section should not be read into the clause providing for the deportation of aliens found advocating or teaching the unlawful destruction of property, since the latter clause expressly provides for the deportation of any alien who at "any time after entry" shall be found advocating such practices. *Guiney v. Bonham*, (C. C. A. 9th Cir. 1919) 261 Fed. 582.

In *Lopez v. Howe*, (C. C. A. 2d Cir. 1919) 259 Fed. 401, 170 C. C. A. 377, the relator obtained a writ of habeas corpus claiming that an order of the Secretary of Labor directing his deportation as an anarchist was invalid because he was a philosophical anarchist and opposed the overthrow of government by force or violence, that he was not within the provisions of this section, except in the five-year class, and that, as he had been in this country for fifteen years, he could not be deported. Answering this contention, the court said:

"The relator was taken into custody under a warrant which charged him with being in the United States in violation of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 874. Section 3 of that act provides that certain enumerated classes of aliens shall be excluded from admission into the United States. Among the classes so excluded are anarchists. And section 19 of the Act provides for the arrest and deportation within 5 years after entry of any alien who at the time of entry was a member of

one or more of the classes excluded by law. It then provides for the deportation of classes of aliens therein mentioned, irrespective of the time of their entry into the United States, and among those so specified is the following:

"Any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the government of the United States or of all forms of law or the assassination of public officials.' . . . From what has been said in an earlier part of this opinion, it appears that the relator's understanding of the statute differs from the understanding of this court. That section deals with a number of different classes of aliens, and provides that certain classes may be deported at any time within 5 years after entry, but does not so limit the time of deportation as respects certain other classes, as to whom it is declared they may be deported irrespective of the time of their entry into the United States. An alien at the time of his entry may not be an anarchist, and therefore may be entitled to enter. But if, at any time after his entry, he is found 'advocating or teaching anarchy,' he may be deported. The relator's testimony, only a portion of which has been quoted, shows conclusively that he is an advocate and a teacher of anarchy, making speeches in its favor, organizing anarchist groups, and distributing anarchist literature. As he reads and writes Spanish, Italian, Portuguese, and English, he is a man of ability, who naturally has influence with his associates. That he is liable under the law to deportation admits of no doubt."

Exclusion of Chinese aliens.—A Chinese laborer, who, after the passage of this Act, re-enters this country by using a fraudulent merchant's certificate, may be deported under the provisions of this section. *Ng Leong v. White*, (C. C. A. 9th Cir. 1919) 260 Fed. 749, 171 C. C. A. 487, wherein the court said:

"The majority of the Circuit Court of Appeals of the Fifth Circuit, in the case of *Mayo, Immigration Commissioner, et al. v. United States*, 251 Fed. 275, 163 C. C. A. 431, held that section 19 of the Immigration Act of February 5, 1917 (39 Stat. 874, c. 29), does not apply to a Chinese person against whom deportation proceedings were pending at the time of its taking effect, unless some offense was thereafter committed which changed his status.

"In the present case, however, the appellant, who is admittedly a Chinaman, entered this country at the port of San Francisco subsequent to the passage of that act, so that if he was thereafter found to be illegally in the United States, we think there can be no doubt of the application to him of section 19 of the Act of February 5, 1917, since section 38 thereof declares that it 'shall not be construed to repeal, alter, or amend exist-

ing laws relating to the immigration or exclusion of Chinese persons, . . . except as provided in section 19 hereof'; and since the said section 19 provides for the taking into custody upon the warrant of the Secretary of Labor, and the deportation of 'any alien who shall have entered or who shall be found in the United States in violation of this act, or in violation of any other law of the United States.'"

Allegations in warrant of arrest.—A warrant of arrest for deportation of an alien issued under the provisions of this section, is sufficient if it give him adequate information of the acts relied upon to bring him within the excluded classes, and to enable him to offer testimony to refute the same at the hearing. It need not have the formality and particularity of an indictment. *Guiney v. Bonham*, (C. C. A. 9th Cir. 1919) 261 Fed. 582, 8 A. L. R. 1282.

Hearing—Necessity of alien being represented by counsel.—A hearing before an immigration inspector regarding the deportation of an alien is not unfair because the alien is not represented by counsel until most of the testimony has been taken. *Guiney v. Bonham*, (C. C. A. 9th Cir. 1919) 261 Fed. 582, 8 A. L. R. 1282.

1918 Supp., p. 232, sec. 20.

Proceeding held unfair.—In *Ex p. Jackson*, (D. C. Mont. 1920) 263 Fed. 110, an order deporting a member of the I. W. W. was set aside in habeas corpus as unfair and denying due process because (1) an unlawful search was made and papers of the alien illegally seized and (2) because of refusal to produce a government witness for cross-examination.

1918 Supp., p. 239, sec. 35.

Seaman detained for treatment—deduction from wages.—Where a seaman contracts a venereal disease and is detained for treatment under this section, the amount paid by the ship's agents for the treatment may be deducted from his wages. *The Alector*, (E. D. Va. 1920) 263 Fed. 1007.

1919 Supp., p. 72, sec. 2.

Application of section.—Where the provisions of this Act were in force prior to the institution of deportation proceedings against an alien, the fact that the warrants of arrest and deportation are in terms based upon section 19 of the Act of Feb. 5, 1917, ch. 29 (1918 Supp. Fed. Stat. Ann. 230), does not render this section inapplicable to the case. Accordingly the provisions of this section apply to the deportation of an alien for teaching the unlawful destruction of property, and he may be deported therefor regardless of the time of his entry. *Guiney v. Bonham*, (C. C. A. 9th Cir. 1919) 261 Fed. 582, 8 A. L. R. 1282.

IMPORTS AND EXPORTS

Vol. III, p. 727, sec. 8. [First ed., 1916 Supp., p. 64.]

Smuggling smoking opium into United States.—The provisions of this section apply only to opium which may be lawfully im-

ported into the United States, and not to smoking opium, the importation of which is prohibited by section 1 of the Act of Feb. 9, 1909, ch. 100 (3 Fed. Stat. Ann. (2d ed.) 723). U. S. v. Sischo, (W. D. Wash. 1919) 262 Fed. 1001.

INDIANS

Vol. III, p. 795, sec. 2117. [First ed., vol. III, p. 374.]

Sheep.—Sheep must be regarded as cattle within the meaning of this section. *Ash Sheep Co. v. U. S.*, (1920) 252 U. S. 159, 40 S. Ct. 241, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1918) 250 Fed. 591, 162 C. C. A. 607; (C. C. A. 9th Cir. 1918) 254 Fed. 59, 165 C. C. A. 469.

"Indian lands."—Lands within that part of the Crow Indian Reservation in Montana as to which the Indians released their possessory right to the United States by an agreement ratified and amended by the Act of April 27, 1904, which contains many provisions intended to secure to the Indians the fullest possible value for what are referred to in the grant as "their lands," and to make use of the proceeds for their benefit, are Indian lands within the meaning of this section. *Ash Sheep Co. v. U. S.*, (1920) 252 U. S. 159, 40 S. Ct. 241, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1918) 250 Fed. 591, 162 C. C. A. 607; (C. C. A. 9th Cir. 1918) 254 Fed. 59, 165 C. C. A. 469.

Recovery of nominal damages for trespass as affecting claim for penalty.—The recovery of nominal damages in an equity suit to restrain a trespass does not bar the recovery at law of the statutory penalty for the same trespass, the claim for such penalty having been rejected in the equity suit because pursued in an action in which it could not be entertained. *Ash Sheep Co. v. U. S.*, (1920) 252 U. S. 159, 40 S. Ct. 241, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1918) 250 Fed. 591, 162 C. C. A. 607; (C. C. A. 9th Cir. 1918) 254 Fed. 59, 165 C. C. A. 469.

Vol. III, p. 825, sec. 5. [First ed., vol. III, p. 494.]

Title derived through "trust patents" as marketable title.—A marketable title to land is one that is fair of record and free from reasonable doubt. And where the title depends for its validity on matters of fact dehors the record, the determination whereof requires a judicial decree, it is not marketable, and the vendee in an executory contract

of sale is not bound to accept it. The rule applies to "trust patents" issued by the federal government to certain Indians of the White Earth Indian Reservation under the "general Indian Allotment Act" of Feb. 8, 1887, and acts supplementary thereto, which on their face do not convey the fee title. The fact that the Clapp Amendment to the acts referred to, approved June 21, 1906, declares that such patents shall operate as a transfer of the fee title as to mixed-blood Indians, does not clear the title until the character of the particular Indian as a mixed blood is established as a matter of record. With that fact unsettled and undetermined, a title derived through a trust patent so issued is not marketable within the rule stated. *Geray v. Mahnomen Land Co.*, (1919) 143 Minn. 383, 173 N. W. 871.

Descent in case of death pending allotment.—If a Creek citizen dies before receiving his allotment, at the time of his death he is not seized of an inheritable estate in lands afterward allotted to him or to his heirs, and the descent of such allotment is cast at the time the certificate of allotment is issued, and the law in effect at that particular time governs in the devolution of said allotted lands. *Hamilton v. Bahnsen*, (1919) 75 Okla. 216, 183 Pac. 413.

Rights of heirs of allottee dying before allotment.—John Nestel, a white man, by the provisions of the Kiowa, Comanche and Apache Agreement (31 Stat. 676, c. 813) was awarded all the benefits of land and money conferred by the agreement the same as members by blood of one of said tribes. Under the agreement, after an allotment was selected and approved by the Secretary of the Interior, the title thereto was to be held in trust for the allottee for a period of twenty-five years in the time and manner provided by Act Feb. 8, 1887, c. 119, 24 Stat. L. 388, and the act amendatory thereof approved Feb. 28, 1891 (26 Stat. L. 794, c. 383), and at the expiration of said period the title was to be conveyed in fee simple to the allottee, or his heirs, free from all incumbrances. The said John Nestel died in August, 1902, prior to the issuance of the final patent, but subsequent to the issuance of the trust patent. The Indian Appropriation Act approved

March 3, 1903 (32 Stat. L. 1008, c. 994), authorized and directed the Secretary of the Interior to issue a patent in fee to several designated persons, including the said John Nestell, and further provided that "all restrictions as to the sale, incumbrance, or taxation of said lands are hereby removed." On June 17, 1903, the Secretary of the Interior issued a patent to the heirs of John Nestell without naming them. It was held that said heirs took the estate by inheritance, and not by direct grant from the United States. *Gray v. McKnight*, (1919) 75 Okla. 268, 183 Pac. 489.

Vol. III, p. 830, sec. 6. [First ed., vol. III, p. 496.]

What passes by transfer—Right to damages for prior taking.—The transferee under this section of the rights of an allottee under the Flathead Indian Allotment Act of March 2, 1880, does not acquire the right of the Indian to compensation for a previous taking of part of the land for railroad purposes. *Smith v. Northern Pac. R. Co.*, (Mont. 1919) 186 Pac. 684.

Vol. III, p. 839, sec. 5. [First ed., vol. III, p. 501.]

Child of white man and Indian woman.—Under the provisions of this section, the illegitimate child of an allottee by an Indian woman, whether born as the result of cohabitation in accordance with Indian customs or not, is entitled to inherit rights in his father's allotment as his heir. *Gray v. McKnight*, (1919) 75 Okla. 268, 183 Pac. 489.

Vol. III, p. 841, sec. 1. [*Jurisdiction of actions for allotments, etc.*] [First ed., vol. III, p. 492.]

Persons bound by decree.—Where a suit, brought by certain Indians for the purpose of having themselves adjudged to be the sole heirs of a deceased Indian allottee, is defended by an attorney for the United States, who consents to the entry of a decree adjudging the plaintiffs the sole heirs of the deceased allottee and entitled to possession of the decedent's allotment, such decree is not binding on a claimant who did not appear in the proceedings because he had no notice thereof. *Ya-Koot-Sa v. U. S.*, (C. C. A. 9th Cir. 1920) 262 Fed. 398. The court said:

"The appellants contend that the decree of the court below of March 10, 1910, was a final adjudication of the title to the property in controversy, and was binding upon all persons, irrespective of whether they appeared in that proceeding or not, and that such is the effect of the acts of Congress of October 15, 1894 (28 Stat. 305), and Feb-

ruary 6, 1901 (31 Stat. 760), authorizing such proceedings to be brought against the United States. The appellee, on the other hand, contends that James Peters, not having appeared in the court in that proceeding, was not bound by the decree. Unquestionably the decree therein is not binding as to James Peters, unless by the provisions of Act Feb. 6, 1901, 31 Stat. 760, the United States as party to that suit is to be held to have represented the interests of all unknown and unnamed heirs. We do not think that such is the meaning of the statute. It provides that all persons who are or claim to be entitled to an allotment—"it may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper Circuit Court of the United States."

"It is true that the act further provides that in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant, and that the judgment or decree in favor of any claimant to an allotment shall have the same effect when properly certified to the Secretary of the Interior as if such allotment had been allowed and approved by him. But it makes it the duty of the district attorney to appear and represent 'the interests of the government in the suit.' Taking the whole statute together, with its provision that any person claiming an allotment may 'defend' any action or suit in relation thereto, and the provision making it the duty of the district attorney to defend only 'the interests of the government in the suit,' we think it is not to be inferred that the intention of the statute was to adjudicate in such a proceeding the interest of a claimant who was not advised of the proceeding and whose claim was unknown to the District Attorney. Such seems to have been the view of the courts in *United States v. Fairbanks*, 171 Fed. 337, 96 C. C. A. 229, and *Oakes v. United States*, 172 Fed. 305, 97 C. C. A. 139."

Vol. III, p. 846, sec. 7. [First ed., vol. III, p. 505.]

Effect on water rights.—After a patent has been granted under this section the rights of the allottee are the same as those of any other owner and the Secretary of the Interior cannot prescribe rules and regulations as to the distribution of water flowing through the allotted lands. *Hough v. Taylor*, (Wash. 1920) 188 Pac. 458.

Vol. III, p. 847, sec. 1. [*Restrictions on alienation of lands removed.*]

Applicable only to persons not of Indian blood.—"Act Cong. April 21, 1904, c. 1402, 35 Stat. 189-204, which provides that all restrictions upon the alienation of lands of all the allottees of the Five Civilized

Tribes who are not of Indian blood, except minors, are, except as to the homesteads, hereby removed, has no application to Creek Indians of more than half blood adopted by the Seminoles before the allotment, but is limited in its application to the adopted citizens not of any degree of Indian blood; and held, further, that where a person of any degree of Indian blood was enrolled by the Dawes Commission as 'adopted,' parol evidence may be received to show that such person is an Indian or possesses a quantum of Indian blood and thereby entitled to all protection and benefits thereof, notwithstanding such enrollment." *Munnah v. Gates*, (1919) 76 Okla. 167, 184 Pac. 127.

Vol. III, p. 853, sec. 1. [*Indian trust allotments, etc.*] [First ed., 1912 Supp., p. 96.]

Power and jurisdiction of Secretary of Interior.—This section applies only to cases where allotments have been made and the titles withheld in trust, to be followed by the issuance of a fee-simple patent at the end of the trust period. Accordingly, the Secretary of the Interior has no authority under this section to make a finding as to who are the heirs of a deceased Indian if a fee-simple patent has been issued to the decedent, although it is subject to restrictions on alienation therein contained. *U. S. v. Bowling*, (C. C. A. 8th Cir. 1919) 261 Fed. 657. Regarding the Secretary's authority to make such a finding, the court said:

"The statute, by its terms as quoted and as appears from its context, applied only to cases where allotments were made and the titles were withheld in trust, to be followed by the issuance of a fee-simple patent at the end of the trust period. In other clauses of the same section, the Secretary was given discretion to issue a patent in fee to the heirs of the allottee, if he decided them competent to manage their own affairs, or to issue patents in fee upon partition of the lands between the heirs, and by the language of the following section an allottee was given the right to dispose of the allotment by will, prior to the expiration of the trust period, and prior to the issue of a fee-simple patent.

"The claim is also made that the Secretary of the Interior had the sole authority to determine who were the heirs of William Wea, regardless of this statute, because the United States has retained the general control of controversies over the title and possession of allotments. *Hy-yu-tse-mil-kin v. Smith*, 194 U. S. 401, 24 Sup. Ct. 676, 48 L. Ed. 1039; *McKay v. Kalyton*, 204 U. S. 438, 27 Sup. Ct. 346, 51 L. Ed. 566. It must be conceded that the Secretary has the power to ascertain the heirs of a deceased Indian, when such action is essential to an execution of his powers, such as the issuance of a final patent to the heirs, or the approval of a

conveyance by the heirs, as required by statute. *Egan v. McDonald*, 246 U. S. 227, 38 Sup. Ct. 223, 62 L. Ed. 680; *Hallowell v. Commons*, 239 U. S. 506, 36 Sup. Ct. 202, 60 L. Ed. 409; *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Oregon v. Hitchcock*, 202 U. S. 60, 26 Sup. Ct. 568, 50 L. Ed. 935. But in this case the land had been patented to William Wea, and under the provisions of section 5 of the Act of February 8, 1887, the laws of the state of Kansas regulating the descent and partition of land were made applicable. Wea had died in 1894, and the descent of these lands had been fixed at that time. The title of the heirs was not dependent upon any action of the Secretary of the Interior, because Congress had released its control over the descent or partition of the lands. The ordinary judicial processes of declaring the heirs or of partitioning the land amongst them thereafter applied. *Beam v. United States*, 162 Fed. 260, 89 C. C. A. 240; *United States v. Park Land Co.*, (C. C.) 188 Fed. 383. See also *Finley v. Albner*, 129 Fed. 734, 64 C. C. A. 262."

Jurisdiction of federal courts.—This Act does not operate to deprive a federal court of jurisdiction of a suit brought solely to set aside a former decree, which stands as a cloud upon a title to an allotment which has been finally determined by the Secretary of the Interior. *Ya-Koot-Sa v. U. S.*, (C. C. A. 9th Cir. 1920) 262 Fed. 398. Regarding the jurisdiction of federal courts in such cases, the court said:

"Act June 25, 1910, 36 Stat. 855, withdrew the jurisdiction which Congress had given to the federal courts to determine claims to allotments and questions of heirship and descent as affecting allotted lands during the trust period, and conferred exclusive jurisdiction thereover upon the Secretary of the Interior. *Hallowell v. Commons*, 239 U. S. 506, 36 Sup. Ct. 202, 60 L. Ed. 409; *Parr v. Colfax*, 197 Fed. 302, 117 C. C. A. 48. The power of the courts to deal with those questions was thus abruptly terminated. But that does not meet the question here involved. The suit here is not brought to adjudicate the title of an heir to allotted land. It is brought solely to set aside a former decree, which stands as a cloud upon a title which has been finally determined, by the Secretary of the Interior. The transfer of jurisdiction to the Secretary of the Interior had not the effect to deprive the court below of jurisdiction to set aside its former erroneous decree. In so doing, and in entering the decree which is here appealed from, the court below was not exercising jurisdiction which had been conferred upon the Secretary of the Interior. It was simply setting aside its own decree, which stood as a cloud upon title, and had given rise to adverse claims on the part of the appellants herein, who had harassed the owner of the allotment with several suits."

Vol. III, p. 855, sec. 2. [First ed., 1914 Supp., p. 170.]

State laws of descent superseded as to wills executed under this section.—In *Blau-set v. Cardin*, (C. C. A. 8th Cir. 1919) 261 Fed. 309, holding that under this act and the regulations made thereunder by the Secretary of the Interior, a married Quapaw Indian may make a will in Oklahoma, whereby more than two-thirds of the allotted lands, held under a patent from the United States, containing restrictions on alienation, are devised to persons other than the spouse of the testator, notwithstanding Rev. Laws Oklahoma, (1910) § 8341, the court said:

"Before the enactment by Congress this testatrix could not have made a will conveying this land because of the prohibition in the last proviso of this section 8341 of the Oklahoma Laws. The grant of the right to dispose of this property by will is clear and comprehensive; it contains no limitation as to portions of property to be devised nor as to the devisees to be selected, nor other restraint upon the exercise of the power, except that the disposal must be in accord with the regulations to be prescribed by the Secretary of the Interior and that the will must be approved by him. . . . It is conceded that Congress has the right to pass legislation in the interest of the Indians as a dependent people, and that it may control the disposition of the allotments during the period of restriction of alienation. *Tiger v. Western Investment Co.*, 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; *Heckman v. United States*, 224 U. S. 413, 32 Sup. Ct. 424, 56 L. Ed. 820. The conclusion is that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part of the state as to the portions to be conveyed or as to the objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior. We understand this conclusion is in accord with the views of the Supreme Court of Oklahoma. See *Brock v. Keifer*, 157 Pac. 88."

Vol. III, p. 861, sec. 1. [First ed., 1909 Supp., p. 190.]

Osage Indians.—The United States did not exhaust its power as the protector and guardian of the Osage Indians, by the enactment of the provisions of the Act of June 28, 1906, for the division of the Indian property, so as no longer to have as to them any mission or authority, and notwithstanding the subjection to state taxation of the surplus lands of the noncompetent Osage Indians which was effected by that Act, authority exists in the officers of the United States to invoke judicial relief against the enforcement of state tax assessments against such

lands which are asserted to be based upon systematic, arbitrary, grossly excessive, discriminatory, and unfair valuations which amount to a perversion of the state laws, committed in order to defeat the property rights conferred by the federal statute. *U. S. v. Osage County*, (1919) 251 U. S. 128, 40 S. Ct. 100, 64 U. S. (L. ed.) —, reversing (C. C. A. 8th Cir. 1918) 254 Fed. 570, 166 C. C. A. 128.

Effect of act—State administration of estate of deceased Indian.—"Under the Act of Congress approved April 26, 1906, and the decisions of this court subsequently rendered, it is held, that the appointment of an administrator over the estate of a deceased minor Choctaw Indian of one-sixteenth blood, who died intestate, and the allowance of claims against the estate of the deceased by such administrator, and the approval thereof by the county court having jurisdiction over said estate, are proceedings within the grant of power conferred by said Act of Congress on said courts." *In re Hibdon*, (1920) 78 Okla. 23, 188 Pac. 97.

Construction of Act of April 18, 1912.—In construing the second proviso of section 7 of the Act of Congress of April 18, 1912, c. 83, 37 Stat. pt. 1, p. 86, the same must be construed tantamount to an independent enactment, and has the effect of removing the exemption from taxation on the homestead allotment of an Osage Indian, at the death of the allottee. *Hudson v. Hopkins*, (1919) 75 Okla. 260, 183 Pac. 507.

Contract in violation of restriction.—"Where, under the Osage Allotment Act (Act of April 18, 1912, ch. 83), a restricted Indian was incapable of alienating his restricted lands, or disposing either of his lands or his Osage trust funds by will, without the approval of the Secretary of the Interior, a court of equity will not enforce a contract to make a will to such property, entered into by such Indian during his lifetime, against his widow and heir, who was not a member of the Osage Tribe of Indians." *Wah-brah-lum-pah v. To-wah-e-he*, (1920) 77 Okla. 295, 188 Pac. 106.

Vol. III, p. 862, sec. 2. [First ed., 1909 Supp., p. 191.]

Mandamus to compel Secretary of Interior to place names on rolls.—The Secretary of the Interior cannot be compelled by mandamus to place upon the rolls of the Creek Nation the names of certain persons who, on the last day fixed by statute for the final completion of the rolls, he decided, reversing his prior decision without notice to the Indians, should be excluded from the rolls, with a direction that if they were already on the rolls, which was not the case, they should be stricken off. *U. S. v. Payne*, (1920) 253 U. S. 209, 40 S. Ct. 513, 64 U. S. (L. ed.) —, affirming (1918) 48 App. Cas. (D. C.) 169.

Vol. III, p. 863, sec. 3. [First ed., 1909 Supp., p. 192.]

Conclusiveness of roll.—"The enrollment record giving the age of an enrolled citizen of the Creek Tribe of Indians as four years of age in September, 1898, is conclusive that he had arrived at that age at some period of time within a year preceding that date, but is not conclusive as to the date of birth." *Harris v. Allen*, (1920) 78 Okla. 66, 188 Pac. 878.

Vol. III, p. 872, sec. 19. [First ed., 1909 Supp., p. 199.]

"Restrictions."—The term "restrictions" as used in this section and section 5 of the Act of May 27, 1908 (3 Fed. Stat. Ann. (2d ed.) 887) refers to prohibitions against alienation. *Barnett v. Kunkel*, (C. C. A. 8th Cir. 1919) 259 Fed. 394, 170 C. C. A. 370.

Conveyance of right to mineral rents.—Under this section and section 20 of this Act, and section 2 of the Act of May 27, 1908, ch. 199 (3 Fed. Stat. Ann. (2d ed.) p. 883), and the regulations of the Secretary of the Interior promulgated July 7, 1906, June 11, 1907, and April 20, 1908, the exclusive custody and control of mineral rents and profits derived from restricted lands of full-blood tribal Indian citizens of the Five Civilized Tribes is vested in the Secretary of the Interior, subject only to such rules and regulations as he may prescribe, as an independent trust fund, separate and distinct from the trust estate in the land itself, and the rules and regulations referred to show that the Secretary has elected to administer this trust and to retain the custody and control of such funds "until such time or times as the payment thereof is considered best for the benefit of said lessor, or his or her heirs." Hence, a conveyance by an allottee of land together with the rents therefrom is ineffectual to vest the right to mineral rents in the grantee. *U. S. v. Hinkle*, (C. C. A. 8th Cir. 1919) 261 Fed. 518.

Power to lease.—"An oral agricultural lease upon the lands of a full-blood Cherokee may be made during the existence of a valid and unexpired lease, for the ensuing year, but only for a fair rental, and near the expiration of a valid lease, that the tenant may know what he has to depend on for the ensuing year, but in no case can the oral lease be for more than one year." *Carden v. Humble*, (1919) 76 Okla. 165, 184 Pac. 104.

Vol. III, p. 881, sec. 1. [First ed., 1909 Supp., p. 232.]

Purpose and effect of Act.—This Act is a revising act, and is intended as a substitute for all former acts relating to the subject of such restrictions, and operated to repeal the provisions of Act Cong. April 28, 1906 (34 Stat. at L. 137, c. 1876), and previous congressional enactments in conflict therewith on the same subject. *Grayson v. Thompson*, (1920) 77 Okla. 77, 186 Pac. 236.

Mandamus to compel Secretary of Interior to deliver deed.—In *U. S. v. Lane*, (App. Cas. D. C. 1919) 258 Fed. 520, it was held that where the Secretary of the Interior under this section had removed the restrictions as to the sale of an allottee's land, and a bid for such land had been accepted by the superintendent of the Five Civilized Tribes and the deed executed by the allottee, mandamus would not lie to compel the Secretary of the Interior to deliver the deed to the purchaser on his refusal to do so because of the discovery of oil on nearby land and because of his belief that it would not be to the best interests of the allottee to sell the land.

Vol. III, p. 883, sec. 2. [First ed., 1909 Supp., p. 233.]

Appointment of guardian—Conclusiveness of judgment.—Assuming that section 4, Original Creek Agreement (31 Stat. 863, c. 676), providing that "all guardians or curators appointed for minors and incompetents shall be citizens," was not superseded by the provisions of this Act, still, when the county court appointed L. as guardian of G., a Creek minor, and the records of the county court being silent as to the citizenship of L., it will be presumed the court, in the proper discharge of its duty, upon inquiry, adjudged that L. possessed the requisite qualifications, and such judgment is not subject to collateral attack. *Tucker v. Leonard*, (1919) 76 Okla. 16, 183 Pac. 907.

Vol. III, p. 884, sec. 3. [First ed., 1909 Supp., p. 233.]

The enrollment records are conclusive as to the age of an Indian and no other evidence on the question is admissible. *Langford v. Newsom*, (Tex. 1920) 220 S. W. 544, holding further that the records cannot be proved by an unidentified copy.

Vol. III, p. 887, sec. 4. [First ed., 1909 Supp., p. 233.]

Recovery back of amount of taxes paid under protest.—Indian allottees who, through pending suits and otherwise, were objecting and protesting that the collection of certain sums from them by a county as taxes on their allotments was forbidden by a law of Congress, cannot be said to have paid such taxes voluntarily so as to defeat their right to compel restitution, where, notwithstanding such protest, the county demanded payment of the taxes, and by threatening to sell the lands and by actually selling other lands similarly situated made it appear to such allottees that they must choose between paying the taxes and losing their land, with the result that, to prevent a sale and to avoid the imposition of a penalty of 18 per cent, they yielded to the county's demand and paid the taxes, protesting and objecting at the time that the same were illegal. *Ward v.*

Lowe County, (1920) 253 U. S. 17, 40 S. Ct. 419, 64 U. S. (L. ed.) —, *reversing* (1918) 68 Okla. —, 173 Pac. 1050, *followed* in *Broadwell v. Carter County*, (1920) 253 U. S. 25, 40 S. Ct. 422, 64 U. S. (L. ed.) —, *reversing* (1918) 71 Okla. —, 175 Pac. 828.

Tax exemption under Creek Supplemental Agreement.—"A purchaser from an Indian cannot claim the benefit of the tax exemption given by the Creek Supplemental Agreement of June 30, 1902 (32 Stat. 500, c. 1323), § 16, requiring each Creek citizen to select a homestead allotment, which shall be non-taxable and inalienable for a specific period, and recognized by the provisions of the Oklahoma Enabling Act and Constitution, which preserved the rights of person and property of the Indians so long as such rights should remain unextinguished, and provided that nothing in the Constitution shall be construed to limit or affect the authority of the United States respecting the Indians or their lands, property, or rights, and exempted from taxation such property as might be exempt by reason of treaty stipulations existing between the Indians and the United States, or by federal laws during the force and effect of such treaties and laws, since, under the act of May 27, 1908 (35 Stat. 312, c. 199), which removed the existing restrictions on the alienation of the homestead allotments, thereby enabling the allottee to sell the land, 'all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottee.'" *Creek County v. Bartlett*. (1920) 77 Okla. 282, 188 Pac. 655.

Vol. III, p. 890, sec. 9. [First ed., 1909 Supp., p. 235.]

Repeal of previous acts.—This section repeals section 16 of the Supplemental Creek Agreement (Act June 30, 1902, 32 Stat. 500, c. 1323), imposing restrictions on the alienation of homesteads allotted to Creek Indians. *Grayson v. Thompson*, (1920) 77 Okla. 77, 186 Pac. 236.

Time when section took effect.—This section fixes the restrictions on alienation of allotted land of the Five Civilized Tribes, after the death of the allottee, and there being no expression or inference in the section or act that it was the intent of Congress to postpone the time when said section should take effect, therefore said section became effective May 27, 1908. *Seiffert v. Jones*, (1919) 77 Okla. 204, 186 Pac. 472, 187 Pac. 223.

Effect and application of section.—This section is prospective rather than retrospective in effect. It applies to conveyances and leases made after its passage and not to those made before. Hence, the Secretary of the Interior has authority to approve and validate a lease of an Indian after her death, where such lease was executed prior to the enactment of this section. *Anchor Oil Co. v.*

Gray, (C. C. A. 8th Cir. 1919) 257 Fed. 277, 168 C. C. A. 361. The court said:

"Counsel insist, however, that the Secretary's power to approve the lease ceased because under section 9 of the act of 1908 the death of the lessor removed all restrictions upon alienation of the land. But that removal did not change the status of Jennie Samuels' lease, did not remove the restriction upon the alienation by her, for those restrictions persisted until she died, and she could not alienate her land after her death. She had leased her land, subject only to the approval of the Secretary, and her heirs, so far as her lease was concerned, stepped into her shoes upon her death. The lease estopped them, as it did her, from revoking it or conveying the land free from it, unless the Secretary, in the exercise of his judicial discretion, refused to approve it, and, when he approved it, the estoppel became absolute upon all of them alike."

Power of Congress.—"As to restricted lands, Congress has plenary power thereover as long as the tribal relations exist, until by some act the title thereto is vested by purchase in some party other than the allottee." *In re Jessie*, (E. D. Okla. 1919) 259 Fed. 694.

Effect of lease prior to enactment of section.—Where an Indian leases land prior to the enactment of this section, the only restrictions on the alienation removed by her death are the restrictions on the alienation of the rights in the land which descended to her heirs upon her death, and those rights are inferior and subject to the rights of the lessees, if the lease is subsequently approved by the Secretary of the Interior under section 20 of the Act of April 26, 1906 (3 Fed. Stat. Ann. (2d ed.) 873). *Anchor Oil Co. v. Gray*, (C. C. A. 8th Cir. 1919) 257 Fed. 277, 168 C. C. A. 361, wherein it was said:

"There was nothing in her lease, or in the conduct of the parties to it, to indicate any bad faith or any attempt to evade the restrictions on alienation imposed by the act of Congress, and her lease was neither void nor voidable because the parties made and delivered it subject to the approval of the Secretary before the term of the lease commenced to run. Subject to that approval the parties to this lease, by the execution and delivery thereof, estopped themselves, and those claiming under them with notice of the lease, from denying, revoking, or avoiding it, when approved by the Secretary, except for fraud or mistake; and, when it was approved by the Secretary, as against the parties to it and those claiming under them with notice, it related back to and took effect as of the date of its execution by the parties named therein."

Execution of deed prior to issuance of patent.—An allottee may convey the equitable title under a certificate of allotment, before patent, if the lands are not otherwise subject to restraint against alienation. Thus, the fact that an allottee's heir executes

a deed for the allotted land two days before the patent is issued for it, does not render the deed void, where the selection of the allotment has been legally made and approved sometime before. *Barnett v. Kunkel*, (C. C. A. 8th Cir. 1919) 259 Fed. 394, 170 C. C. A. 370.

Royalties from mineral lease.—If an Indian allottee dies leaving issue and there is an outstanding mineral lease on his homestead, his issue "are entitled to the use of the interest or income which may be obtained by properly investing the same during their lives, until April 26, 1931, leaving the principal to go to the heirs in general on the termination of their special right; their guardian, appointed in the state probate court, not being entitled to the custody of such royalties without the consent of the Secretary of the Interior." *Rogers v. Rogers*, (E. D. Okla. 1919) 263 Fed. 160.

State champerty law is not applicable to a transfer of Indian lands authorized by this Act. *Canfield v. Jack*, (1920) 78 Okla. 127, 188 Pac. 1040.

Jurisdiction to approve deed—*Residence of allottee*.—Where an enrolled Creek Indian of the full blood was adjudged an incompetent by the county court of Okfuskee county, which appointed a guardian of his person and estate, his attempted change of residence to Seminole county, without the guardian's knowledge or consent, did not change his residence, and at his death in Seminole county he was a resident of Okfuskee county, and in view of this section the county court thereof was the only one authorized to approve a deed from his heirs. *Laughlin v. Williams*, (1919) 76 Okla. 246, 185 Pac. 104.

Vol. III, p. 913, sec. 2139. [First ed., vol. III, p. 382.]

Sale to Indian used as decoy.—In *U. S. v. Amo*, (W. D. Wis. 1919) 261 Fed. 106, it was held that the defendant was lawfully convicted of selling liquor to an Indian, although it was proved that the Indian was hired by a government agent to buy the liquor but without any element of deceit inducing the sale.

Vol. III, p. 915, sec. 2140. [First ed., vol. III, p. 385.]

Ownership of automobile.—See *infra* this title, following page.

Amendment.—To same effect as 1918 Supplement annotation, see *U. S. v. One Ford Five-Passenger Automobile*, (E. D. Okla. 1919) 259 Fed. 645, wherein it was said:

"As to the contention that whilst in the Eastern district, but without what was formerly the Indian Territory, the car was seized in the possession of the respondent, with which he was 'attempting to' or 'about to introduce,' transport and convey from without the state of Oklahoma into that part of the Eastern district of Oklahoma which

was formerly the Indian Territory, spirituous, vinous, fermented, and intoxicating liquor, in violation of section 8 of the act of Congress of March 1, 1895 (28 Stat. 697, c. 145), and other acts of Congress in such cases made and provided, and it was, therefore, not within the power of such officer to make such seizure. Section 2140, *supra*, as amended and supplemented by the various acts hereinbefore referred to, in effect provides that, if any duly authorized officer 'has reason to suspect or is informed that any . . . person . . . is 'about to introduce,' or 'attempting to introduce,' or 'has introduced any spirituous liquor or wine into Indian country or where the introduction is prohibited by treaty or federal statute, whether used by the owner thereof or other person, such automobile shall be seized and delivered to the proper officer and be proceeded against by libel. . . .' Under this record it is to be taken as admitted that such intoxicating liquors were 'about to be introduced,' or that respondent was by means of said automobile 'attempting to introduce' such liquors, into what was formerly the Indian Territory, 'where the introduction is prohibited by treaty or federal statute.' Under this condition the said Brents, a special enforcement officer for the Indian Bureau, was authorized to make the seizure."

Vol. III, p. 917, sec. 8. [First ed., vol. III, p. 424.]

Effect of Oklahoma Enabling Act.—In so far as this Act pertains to the introduction of liquors from a point without the state of Oklahoma into that part of Oklahoma which was formerly Indian Territory, it was not impliedly repealed by the Enabling Act of June 16, 1906, and is still in force and effect. *Commercial Invest. Trust v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 330.

Vol. III, p. 919, sec. 1. [First ed., vol. III, p. 384.]

Section not repealed.—To same effect as original annotation, see *U. S. v. Luther*, (E. D. Okla. 1919) 260 Fed. 579.

1918 Supp., p. 251, sec. 1. [*Intoxicating liquors, etc.*]

Possession of liquor in the state of Oklahoma is not *prima facie* evidence under this section of its unlawful introduction. *Goff v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 294, 168 C. C. A. 378.

1918 Supp., p. 260, sec. 1.

"Where the introduction is prohibited," etc.—This phrase applies to and includes that portion of Oklahoma formerly Indian Territory and adopts the prohibition contained in the Act of March 1, 1895, c. 145, § 8 (3 Fed. Stat. Ann. (2d ed.) 917).

Commercial Invest. Trust v. U. S.; (C. C. A. 8th Cir. 1919) 261 Fed. 330.

Ownership of automobile.—Automobiles or other vehicles or conveyances used in introducing liquor into Indian country in violation of this section, are subject to forfeiture regardless of ownership or of the rights of an innocent mortgagee therein. *U. S. v. One Seven-Passenger Paige Car*, (E. D. Okla. 1919) 259 Fed. 641. The court said:

"Libelant contends that this is a proceeding in rem, and that the guilty thing is the offender, and that this is to be forfeited irrespective of intervening lienholders. The mortgage stipulates that the mortgagor shall not remove or permit the removal of said property from the county of Oklahoma, and that said mortgagor shall not secretly run off, remove, or conceal, nor attempt to run off, remove or conceal, any of said property, nor permit such an act to be done, and in case said mortgagor shall violate or commit a breach of any of said conditions the mortgagee may declare the mortgage debt due and immediately take possession. It will here be taken as true that the automobile was taken out of Oklahoma county and into the Eastern district of Oklahoma without the consent or connivance of the mortgagee. However, this is no barrier to forfeiture if the statute imposes it. The statute being highly penal, and not in aid of the revenues, it must be strictly construed, and doubts resolved in favor of those against whom it is invoked. No person or case will be held within its terms unless clearly within its letter and legislative intent. A search of the Congressional Record discloses that said provision of the Indian Appropriation Act of March 2, 1917, was offered after the bill had passed the House and was being considered by the Senate in committee of the whole. On page 2052, volume 54, of the Congressional Record, it appears that the fifth amendment thereto was to insert on page 4, line 13, after '\$150,000,' the following:

"Provided, that automobiles or any other vehicles or conveyances used in introducing intoxicants into the Indian country in violation of law, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States."

"The bill as thus amended went to conference (pages 2931 and 2970, volume 54), and the first report provided that, in lieu of Senate Amendment No. 5 (which was the amendment quoted above), the following amendment be inserted:

"Provided, that automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, where the introduction is prohibited by treaty or federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel,

and forfeiture provided in section 2140 of the Revised Statutes of the United States."

"This report was again referred for conference. In the second conference report (pages 3808 and 3811, volume 54) it was provided that in lieu of Senate Amendment No. 5, which has heretofore been set out, the following amendment be substituted:

"Provided, that automobiles or any other vehicles or conveyances used in introducing, or attempting to introduce, intoxicants into the Indian country, or where the introduction is prohibited by treaty or federal statute, whether used by the owner thereof or other person, shall be subject to the seizure, libel, and forfeiture provided in section 2140 of the Revised Statutes of the United States."

"The development of this legislation indicates that this provision was enacted with especial reference to conditions existing in Eastern Oklahoma. The introduction of intoxicating liquors from without the state into that part which was formerly Indian Territory being prohibited by act of Congress, and the manufacture, sale, and transportation of such liquors between points within the state being also prohibited by provision of the state constitution, the rapid growth of cities and industrial and mining centers and general increase in population in said part of the state necessitated the utmost vigilance, fidelity, and efficiency among law enforcers. When section 2140 was first enacted in 1864, the usual mode of travel through the Indian country, frontier settlements, and remote regions was by means of stagecoach, freight wagon, steamboat, and sled. The carrying in such conveyance of intoxicating liquors by a passenger without the consent of its owner then did not work a forfeiture of the conveyance. With the coming of the automobile and its full development different conditions arose. Transportation by express or railroad being practically closed by law and the vigilance of the officers, the introducer and the illicit handler of intoxicants resorted to the automobile as an easy facility for carrying on such prohibited introduction and illicit traffic. If such law violators may encumber such automobiles so as to minimize the actual investment of such introducer the financial hazard of the business is thus reduced. Hence the reason for the terms of the act to include not only automobiles but also to exclude the innocent lienholder from any protection in such forfeiture."

The question whether the text paragraph "extends to the property of an innocent person; that is, a person not connected with the act of unlawful introduction," was decided in the affirmative in *Commercial Invest Trust v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 330, where judgment subjecting to forfeiture an automobile as against a claimant holding a lien on the same, who was innocent of its wrongful use, was affirmed, the court saying: "Under old section 2140 of the Revised Statutes only the

interest of the offending person was subject to forfeiture. This was manifest by the plain terms of the action itself. "Paragraph 4 of the Act of March 2, 1917, under which this proceeding is brought, contains the following provision: 'Whether used by the owner thereof or other person.' It is very evident that it was the intent of Congress to extend the power of seizure, libel, and forfeiture beyond the terms of the old section of the statute. This act of Congress authorizes a proceeding against the property so used itself. The offense attaches to the property; the property being the offender, in that it is the means of violating the law. Statutes such as this, and this one in particular, are directed at the means and methods used in the accomplishing of the violation of the statute, and are within the well-recognized jurisdiction and authority of the Congress of the United States."

Exclusive jurisdiction of federal court.—Where an automobile is seized under the provisions of this section, the federal court acquires exclusive jurisdiction thereby, and a subsequent seizure of the automobile under process from a state court is void. *Ford v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 657, 171 C. C. A. 421.

Allegations in libel.—A libel for the forfeiture of an automobile under this section need not show that the intoxicating liquor was being introduced into the Indian country. *Ford v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 657, 171 C. C. A. 421.

1918 Supp., p. 264, sec. 1.

Indictment — Sufficiency.—An indictment for a violation of this section need not allege the particular location in the Indian country where the defendant is charged to have had possession of intoxicating liquors. *U. S. v. Luther*, (E. D. Okla. 1919) 260 Fed. 579.

1918 Supp., p. 267, sec. 1.

Validity of Act.—"The Act of Congress of June 14, 1918 (40 Stat. 606, c. 101), entitled "An act to provide for a determination of heirship in cases of deceased members of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Tribes of Indians in Oklahoma, conferring jurisdiction upon district courts to partition lands belonging to full-blood heirs of allottees of the Five Civilized Tribes, and for other purposes," is not unconstitutional and void, nor in contravention of sections 1 and 2, art. 3, of the Constitution of the United States, but is a proper and lawful exercise of the political and administrative power and duty of Congress to legislate for restricted Indians of the Five Civilized Tribes concerning their property during the continuance of the national guardianship over such restricted Indians." *State v. Huser*, (1919) 76 Okla. 130, 184 Pac. 113. The court further said: "The plenary au-

thority of Congress to legislate for full-blood members of the Five Civilized Tribes concerning their restricted lands cannot be limited or impaired by the Constitution or laws of the state, and section 12, art. 7, of the state constitution, does not prohibit the county courts from exercising the authority conferred on said courts by the Act of Congress of June 14, 1918."

County courts as federal agency.—In *In re Jessie*, (E. D. Okla. 1919) 259 Fed. 694, regarding the powers of the County Court under this act, the court said: "The act of June 14, 1918, applying only to restricted lands and to full-blood members of such existing tribes, was a valid exercise of legislative power by Congress. In conferring this authority upon the county courts of the state, it is presumed that Congress considered the provisions of the state constitution. The county court in such capacity is, in effect, a federal agency, acting with the same result as if it was done by the Superintendent of the Five Civilized Tribes, the Commissioner of the Land Office, or the Secretary of the Interior."

Nature of power of county court.—"The power and authority conferred on the county courts by said act, though it involves the exercise by said courts of judicial or quasi judicial power, is not strictly judicial, but is administrative and ministerial, and in determining, pursuant to said act, as a question of fact who are the heirs of any deceased citizen allottee of the Five Civilized Tribes, the court merely finds the facts and fixes the status, which finding, when material to the question at issue, is conclusive and binding upon the state courts and upon the administrative officers of the national government in determining questions arising under acts of Congress to which it is applicable. The act, however, does not deprive the district courts of this state of jurisdiction of suits involving lands allotted to an Indian of the Five Civilized Tribes who may die or may have heretofore died leaving restricted heirs, where such suit necessarily includes the determination of the title, and, incidentally, the question of fact as to who are the heirs of said deceased allottee." *State v. Huser*, (1919) 76 Okla. 130, 184 Pac. 113.

Determination of heirship.—The county or probate courts of Oklahoma may determine heirship except where such determination would contravene the state constitution. In *re Jessie*, (E. D. Okla. 1919) 259 Fed. 694. Regarding the jurisdiction of such courts, it was said:

"At common law an administrator had nothing to do with the lands of his intestate. Under the statutes of this state the only power an administrator has to control the lands of the intestate is for the purpose of collecting the rents and profits, and under order of court to sell the realty, for the purpose of paying debts; the personal estate and lands and profits being insufficient."

"The county or probate court having jurisdiction of an estate for the purpose of administration may as an incident, when necessary, exercise such probate jurisdiction to determine the heirs of the intestate. So may the district or superior courts of the state, in exercising jurisdiction for the recovery of the possession of real estate in order to adjudicate the title, as an incident thereto, determine heirship."

But the court further said:

"When a conveyance from a full-blood member of the Five Civilized Tribes, approved by the county court without the determination of heirship, vests rights in allotted lands of such tribes in the grantees, no letters testamentary or administration having been granted and the time limited by the laws of this state for the institution of

proceedings therefor having elapsed without such application having been begun, as well as in cases where there exists no lawful ground for the institution of such proceedings in such court, the county court [in view of art. 7, sec. 12 of the state constitution] then has not the power to determine heirship in so far as it affects such title theretofore vested in such grantee or his assigns."

1918 Supp., p. 268, sec. 2.

Jurisdiction of state courts.—Partition proceedings.—Under this section the courts of a state have jurisdiction of partition proceedings between Indian heirs of less than full blood. *Salmon v. Johnson*, (1920) 78 Okla. 182, 189 Pac. 537.

INTERNAL REVENUE

Vol. III, p. 1028, sec. 3220. [First ed., vol. III, p. 597.]

Application for abatement of tax assessed as tantamount to appeal to commissioner.—An application for an abatement of the tax assessed, made before payment, and its denial, is not tantamount to an appeal to the commissioner as required by this section, because an appeal for a refund cannot be made until the tax is paid, and an action does not accrue until payment and rejection of the application for refund. *Rock Island, etc., R. Co. v. U. S.*, (1918) 54 Ct. Cl. 22.

Vol. III, p. 1034, sec. 3226. [First ed., vol. III, p. 601.]

Appeal as condition precedent.—An application to the Commissioner of Internal Revenue for the refund of an excise tax alleged to have been erroneously and illegally assessed and collected is a condition precedent to maintenance of a suit against the United States. *Rock Island, etc., R. Co. v. U. S.*, (1918) 54 Ct. Cl. 22.

Vol. III, p. 1037, sec. 3227. [First ed., vol. III, p. 603.]

Effect of Act of July 27, 1912.—The Act of July 27, 1912, 37 Stat. 240 (see vol. IV, p. 236) providing for the refunding of any internal revenue tax erroneously assessed and collected under the Act of June 13, 1898, 30 Stat. 448, is a remedial statute for the relief of a certain class of persons, and is in no way affected by the internal revenue law or the statute of limitations contained in this section. It is in no sense an extension of the remedy under the internal revenue law to recover for taxes illegally collected. *Union Trust Co. v. U. S.*, (1919) 54 Ct. Cl. 43.

Vol. III, p. 1038, sec. 3229. [First ed., vol. III, p. 604.]

Delinquencies under income tax laws.—The Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, is authorized to compromise claims for penalties imposed and interest charged against taxpayers for delinquencies under the income tax laws in all cases where, in his judgment, such compromises are for the interest of the United States. (1919) 31 Op. Atty.-Gen. 459, wherein it was said: "Opinions of my predecessors touching the nature and extent of the power of the commissioner to make compromises are more or less conflicting and it will not, I think, serve any useful purpose to review and attempt to reconcile them. I have given them, as well as all decisions of the courts bearing in any way on the question, careful consideration and will content myself with stating my conclusions."

"Your request does not relate to compromises of taxes, but only to penalties and interest imposed on account of delinquencies of the taxpayer. I shall accordingly confine my opinion to penalties and interest."

"It seems clear that Congress has left it to the judgment and discretion of the commissioner to determine when it is to the interest of the United States to compromise such claims instead of commencing or prosecuting suits therefor, and that the only limitation placed upon the exercise of this judgment and discretion is that his action shall be with the advice and consent of the cabinet officers mentioned in the statute. And I am of opinion that, subject to this limitation, he has the power to compromise the penalties and interest mentioned in the request for his opinion whenever, in his judgment, such compromises are for the interest of the United States. Congress has

not said that such compromises may be made only when in the judgment of the commissioner more money can thereby be realized than can be realized by commencing and prosecuting a suit. It cannot be said, therefore, as a matter of law, that the power to compromise is limited to cases in which either the liability for the penalty or the collectibility of the claim is doubtful. In these matters I think the judgment of the commissioner as to what is for the interest of the United States is made conclusive. What considerations shall control are fixed by no rule of law, but depend upon his own discretion and sound judgment exercised in good faith. It may be that with respect to the amount of tax to be collected, or the amount of penalty resulting from wilful fraud, the commissioner may never find a case in which he will feel justified in accepting less than can be legally collected, whereas in cases of penalties resulting from accident, negligence, or technical omission, he may honestly believe that the interests of the United States will be best served by accepting less than the full penalty. In such cases, I am of opinion that he has the right to compromise upon any ground which, in his judgment, renders the compromise for the interest of the United States."

Effect on criminal proceeding.—If an offer of compromise for failure to file an income tax return in accordance with section 1004 of the Act of Oct. 3, 1917 (1918 Supp. Fed. Stat. Ann. 384), is made and accepted by the internal revenue authorities, under this section, no criminal proceedings can thereafter be successfully prosecuted for failure to pay the tax. *Rau v. U. S.*, (C. C. A. 2d Cir. 1919) 260 Fed. 131, 171 C. C. A. 167. The court said:

"The defendant endeavored to establish that he offered to compromise and that he paid his check for the tax found to be due, together with the penalty, and that this was accepted in compromise of the criminal responsibility. He was entitled to urge this as a defense. We are of the opinion that the district judge disregarded this right which the defendant had as a defense of the criminal prosecution. The district judge evidently was of the opinion that the defendant could not defend upon the theory that he had compromised the criminal prosecution, for he stated: 'It makes no difference as to whether he has paid the tax or not.' This and similar remarks occur frequently in the record. For example, the court said: 'I will instruct this jury that it makes no difference whether the amount of the tax which had been agreed upon here was paid or not, so far as the criminal liability of the defendant is concerned.' And again: 'And so it is here—that if this man had committed a violation of the law at the time he made his offer in compromise or settlement, if you find that he willfully failed to file his income tax return under all the evidence of the case beyond a reasonable doubt,

I instruct you that such tender of payment would not affect such criminal liability.'

"This position was taken by the court in reference to other efforts made by the defendant to offer his defense of a compromise of the criminal prosecution. It is presented by offers of evidence and questions asked of witnesses, to which objections were sustained, tending to show that a compromise was in fact made. Much of this evidence was erroneously excluded by the trial judge.

"The defendant testified that—

"At the time of the presentation of the check, Mr. Bowden told me that there would be no further proceedings of any kind or character, that the offer of \$324.62, the receipt of the government for that, the offer of \$250 in compromise, that in consideration of that there would be no proceedings, no indictment; nothing would be done whatever.'

"He was then asked if it was on that condition that he paid the money, and his answer thereto, 'I did,' was stricken out upon objection by the United States attorney. Defendant then attempted to trace the money to the Treasury Department, and endeavored to show that it was never returned; by this making an effort to establish it was received by the United States Treasury after approving the compromise, and this was excluded.

"The Commissioner of Internal Revenue had the power and authority by virtue of the statute above referred to, and with the advice and consent of the Secretary of the Treasury, to compromise the criminal case as well as the civil case arising under the internal revenue laws. The compromise may have been made before the institution of the criminal proceedings or after. The provision relating to the necessary consent of the Attorney-General evidently intends a compromise after the institution of a civil or criminal action. If the defendant, in good faith, made the payment of the tax and penalty for the purpose of compromising the impending action, he is entitled to full protection and the benefits derived therefrom. If the money was accepted with the promise of immunity from further punishment in a criminal proceeding, it would be a complete defense to this indictment. *Willingham v. United States*, 208 Fed. 137, 127 C. C. A. 263. The acceptance, not only of the tax, but of the penalty, coupled with the statement of the internal revenue officer, that payment would end the matter, and that there would be no indictment, if true, would be a good defense. The fact that the money was retained by the United States is some evidence of its acceptance in compromise. We believe that under the facts disclosed in this record, as far as the defendant was permitted to show them, it was required of the court to submit as a question of fact to the jury, under proper instructions, whether or not a compromise was entered into. It was not a question of law for the district judge. As was said in *United States v. Chouteau*, 102 U. S. 603, 26 L. Ed. 246:

"He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense."

Effect on forfeiture proceeding.—A compromise under this section releases all forfeitures and bars a pending forfeiture proceeding brought under section 3281 of the Revised Statutes (see Vol. IV, p. 41). *U. S. v. One Five-Passenger Ford Automobile*, (W. D. Wash. 1920) 263 Fed. 241.

Vol. III, p. 1044, sec. 3242. [First ed., vol. III, p. 608.]

Single sale as "carrying on business."—A single sale disconnected from any habitual practice of selling liquor at retail, does not constitute the carrying on of "the business of a retail liquor dealer," within the meaning of this section. *Bailey v. U. S.*, (C. C. A. 6th Cir. 1919) 260 Fed. 88, 170 C. C. A. 156. In defining the meaning of this phrase, the court said:

"The statute says: 'Every person who carries on the business of a . . . retail liquor dealer . . . without having paid the special tax as required by law, shall, for every such offense, be fined,' etc.

"Obviously, the 'such offense' which is punished is to 'carry on the business of a retail liquor dealer.' This phrase would not seem to be difficult of definition either from the standpoint of the words used or from that of the purpose of the law. There must not only be a 'business,' but it must be 'carried on.' The purpose of the law was to raise revenue by an occupation tax. Both these considerations imply that there must be something more than a single casual sale, disconnected from any habitual or intended practice. There cannot be a 'business carried on' unless there is either an actual or intended adherence to that course of conduct which alone can constitute the adoption and practice of a business or occupation. Of course, it need not be the sole business or occupation, or even one of any comparative importance as relating to the other business or occupation of the same person; nor would it be necessary that any particular quantity of material should be kept on hand for sale for any particular length of time; but both the ability and the willingness to make sales from time to time, whenever appropriate conditions might arise, seem to us to be required, by the plain meaning of the words, in order to make out an offense against this statute.

"Perhaps it is rightly to be assumed that no other construction would ever have been attributed to this section, save for the supposed effect of another section of the act. Revised Statutes, § 3244, fixes the amount of the tax to be paid. The fourth subdivision says:

"Retail dealers in liquors shall pay \$25. Every person who sells or offers for sale foreign or domestic distilled spirits or wines in less quantities than five wine gallons at the same time shall be regarded as a retail dealer in liquors."

"From this it is argued that the more general language of section 3242 is defined and that therefore a single sale, inherently and necessarily and always, makes the seller a taxable retail liquor dealer. The language of section 3244 does not require this conclusion. 'One who sells' is not necessarily synonymous with 'one who makes a sale.' Even where standing by itself, 'one who sells' may well imply an habitual rather than an isolated act. It seems equivalent to 'one who is selling'; but when this definitive phrase is considered in connection with the fact that it is found in the law taxing occupations and in relation to the tax which is imposed only upon carrying on business, and that the phrase serves the main, if not the only, purpose of distinguishing between different kinds of business—wholesale and retail—section 3244 seems to us to lend no substantial support to the thought that it is thereby made immaterial whether or not there is any 'business carried on,' in the ordinary and usual sense of these words.

"It is further to be noted that the language of section 3244 is inappropriate for a single sale. It is 'one who sells . . . in quantities less,' etc. In strictness of language, this plainly refers to a plurality of transactions. One who makes only a single sale does not sell 'in quantities.' This distinction would be overnice as a substantial basis of interpretation; but it demonstrates that section 3244 does not imperatively and finally require that the language of section 3242 should have a forced and unreasonable construction.

"R. S. sec. 3244 seems to have been superseded by section 4 of the Act of March 1, 1879. The arrangement here found emphasizes the conclusion that the phrase 'one who sells' was adopted, not to define what 'carrying on business' means, but rather to distinguish between different kinds of business. It is repeated four times, always as incidental to the definition of a business; and in defining 'dealers in malt liquors' it says that one who sells malt liquors, 'but who does not deal in spirituous liquors,' shall pay a lesser tax, thus again implying that the higher tax is to be paid by those who 'deal in' spirituous liquors. . . Again, we observe that by section 3242, 'every such offense' draws separate punishment. If a single sale is not merely evidence of the offense, but is the offense itself, a single day of carrying on the business might support a great number of indictments, and such a result indicates an unreasonable construction. The preceding sections 3232-3241 also are all instructive to the effect that the thing taxed is not the sale, but the occupation.

"The question has not been authoritatively decided. In *Ledbetter v. United States*, 170 U. S. 606, 610, 18 Sup. Ct. 774, 775 (42 L. Ed. 1192) speaking of this statute, the court says:

"The offense does not consist in selling or offering for sale to a particular person distilled spirits, etc., in less quantities than five gallons at one time, but in carrying this on as a business; in other words, in the defendant holding himself out to the public as selling or offering for sale, etc. While it has been sometimes held that proof of selling to one person was, at least, *prima facie* evidence of criminality, the real offense consists in carrying on such business, and if only a single sale were proven it might be a good defense to show that such sale was exceptional, accidental or made under such circumstances as to indicate that it was not the business of the vendor. *United States v. Jackson*, 1 Hughes 531 [Fed. Cas. No. 15,455]; *United States v. Rennecke* [D. C.] 28 Fed. 847. It is quite evident that an indictment averring in the language of section 18 that the defendant sold or offered for sale the liquors named, without averring that he made this a business, and that he had not paid the special tax required by law, would be insufficient."

"It must be conceded that the quoted language was not necessary for a decision of the point before the Supreme Court in the *Ledbetter* Case; but it is evident that at least the writer of the opinion (Mr. Justice Brown) thought the statute should be construed as we have indicated our view to be. This view is also confirmed by the approving citations of *United States v. Jackson*, 1 Hughes, 531, Fed. Cas. No. 15,455, and *United States v. Rennecke* (D. C.) 28 Fed. 847."

Evidence held sufficient.—"The proofs tended to show that he [accused] was conducting a milk and dairy business upon his farm a few miles from Memphis, that he had on hand between two and three cases of whisky in half pint flasks, and that he sold two flasks to two persons who wished to buy. There was no reason suggested for making these sales, unless he was carrying the liquor for the purpose of selling to any one who should apply. These applicants were strangers to him, and offered no justification or excuse for their purchases. Defendant's explanation of the stock on hand was that it was no more than he needed for his own use and for his dairy helpers, and he met the testimony as to the two sales by an absolute denial. We think the proof for the government was sufficient to support the verdict which the jury found, under the rules declared in several of our recent decisions. *Bailey v. U. S.*, 259 Fed. 88, 170 C. C. A. 156; *Sodini v. U. S.* (Dec. 12, 1919), 261 Fed. 913." *Rooks v. U. S.*, (C. C. A. 6th Cir. 1920) 263 Fed. 894.

Vol. III, p. 1045, sec. 3243. [First ed., vol. III, p. 612.]

Independence of state and federal revenue systems.—To same effect as original annotation, see *Pinasco v. U. S.*, (C. C. A. 9th Cir. 1920) 262 Fed. 400, wherein the court said:

"It is contended that inasmuch as the purpose of the internal revenue law is to raise revenue only, and the adoption of prohibition by the state of Washington makes it impossible for any one in that state to procure a license to distill intoxicating liquors, it is a legal absurdity to say that a man may be punished criminally for failure to secure a license or give a bond therefor, or otherwise to comply with the federal statutes. A similar contention was made and adversely answered in *License Tax Cases*, 5 Wall. 462, 18 L. Ed. 497, where, upon a certificate from the Circuit Court of Massachusetts certifying that the defendant was indicted for carrying on the business of retailing liquors without a license, and it appeared that the defendant was a retail dealer as charged, and that the business was prohibited by the laws of Massachusetts, the question presented was whether the defendant could be legally convicted upon the indictment for not having complied with the act of Congress by taking out the required license to carry on the business. The court held that the recognition of the power of the state to prohibit the business was consistent with an intention on the part of Congress to tax such business for national purposes, and that it was not necessary to regard the acts of Congress as giving authority to carry on the prohibited business within the state in which it was prohibited. Said the court:

"There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the states. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we should hold a violation of the laws of the state to be a justification for the violation of the laws of the Union."

Vol. III, p. 1053, sec. 16. [First ed., vol. III, p. 609.]

"Carrying on business"—Single sale.—In *Sodini v. U. S.*, (C. C. A. 6th Cir. 1919) 261 Fed. 913, it appeared that the defendant, either alone or in association with another, owned a considerable quantity of intoxicating liquor; that he had the liquor on hand at the place of its alleged sale, with the purpose of selling it to such persons as he might conclude to accept as customers; and that he himself participated in the sale which culminated in his arrest. It was held

that under these circumstances it was not necessary to prove more than one sale in order to show a violation of this section.

Instructions.—In a prosecution for a violation of this section an instruction that if the jury finds that one of the defendants made a bona fide sale of his interest in the business in question at a time before the first date named in the indictment, and that during the period covered by the indictment he was only a clerk for the purchaser, he should be acquitted, should be denied since in spite of such facts he may be found guilty through the effect of section 332 of the Penal Laws (7 Fed. Stat. Ann. (2d ed.) 984). *Mayer v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 216, 170 C. C. A. 254.

Evidence—Sufficiency.—In *Faraone v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 507, 170 C. C. A. 483, it was held that the evidence was sufficient to sustain a conviction for a violation of this section.

Vol. III, p. 1067, sec. 3, par. first. [First ed., 1916 Supp., p. 85.]

Banking department in business having several departments.—Where a business is divided into several departments, one of which is a banking department, and the funds and profits of each are separately kept, only the capital used in the banking department is liable to the tax imposed by this section. *Real Estate Title Ins., etc., Co. v. Lederer*, (C. C. A. 3d Cir. 1920) 263 Fed. 667.

Compare, however, *Germantown Trust Co. v. Lederer*, (C. C. A. 3d Cir. 1920) 263 Fed. 672, wherein it did not appear that the corporation sought to be taxed had separated its funds sufficiently to exempt its general capital from the bank tax.

The fact that a bank also acts as a fiduciary does not entitle it to the repayment of part of a tax levied on its capital, surplus and undivided profits under the first paragraph of this section, in the absence of proof that any part of its capital, surplus, and undivided profits was not used in banking because it was used in its fiduciary business. Nor is it entitled to the repayment of a part of such tax because it engages in underwriting or promoting new enterprises and deals in stocks and bonds, where no evidence is offered to show the use of any specific portion of its capital, surplus, and undivided profits in such businesses. *Fidelity Trust Co. v. Miles*, (D. C. Md. 1919) 258 Fed. 770.

Title guaranty companies conducting savings bank business.—Where a company engaged chiefly in the business of examining and insuring real estate titles, also conducts a savings bank business for which it keeps a separate set of books, it should be taxed under this paragraph only on the part of its capital, surplus, and undivided profits used in its banking business. *Title Guaranty*

tee, etc., Co. v. Miles, (D. C. Md. 1919) 258 Fed. 771.

Vol. IV, p. 23, sec. 3257. [First ed., vol. III, p. 634.]

Criminal and civil actions—Election of remedies.—In *Rinasco v. U. S.*, (C. C. A. 9th Cir. 1920) 262 Fed. 400, the plaintiff in error, who had been convicted of violating various provisions of the internal revenue laws regarding distillers, contended that the trial court erred in failing to require the government to elect whether it would proceed under the indictment or proceed for a forfeiture of the distillery, apparatus, etc., under this section. Answering this contention, the court said: "It is sufficient to say in answer to this that no case was made for election of remedies. There was no ground to require the district attorney, while proceeding to prosecute the plaintiff in error under the indictment, to say that he would dismiss the forfeiture proceeding. If the government could not lawfully pursue both proceedings, that defense was thereafter available in bar of the forfeiture proceeding. *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, is authority for the proposition that an acquittal under an indictment under section 3257 is conclusive in favor of the accused on a subsequent trial of a suit in rem for forfeiture, where the existence of the same act or fact is the matter in issue. But that is far from saying that a conviction on an indictment under section 3257 may be availed of as a defense to a civil action for forfeiture based upon the same acts or transactions. That question, however, although discussed in the briefs in the present case, is not properly here for decision on a review of the ruling of the court below upon the motion to elect."

Vol. IV, p. 24, sec. 3258. [First ed., vol. III, p. 635.]

Statutory penalty recoverable on indictment.—Upon consideration of the nature of the statute, there being no exception requiring a civil action for a recovery of the penalty, it was held that the procedure is by way of indictment and that the penalty as well as the fine and imprisonment may be imposed and enforced under the same indictment. *U. S. v. Buckingham*, (D. C. Ore. 1919) 261 Fed. 418.

Vol. IV, p. 41, sec. 3281. [First ed., vol. III, p. 651.]

Instructions.—Regarding the validity of instructions in prosecutions under this section, see *Maupin v. U. S.*, (C. C. A. 4th Cir. 1919) 258 Fed. 607, 170 C. C. A. 61; *Guignard v. U. S.*, (C. C. A. 4th Cir. 1919) 258 Fed. 607, 170 C. C. A. 61.

Vol. IV, p. 177, sec. 1. [First ed., 1916 Supp., p. 101.]

Constitutionality.—This act is constitutional. *U. S. v. Loewenthal*, (N. D. Ohio 1919) 257 Fed. 444.

A state statute restricting the manufacture, sale, and dispensing of certain habit forming narcotic drugs was held not in conflict with the Harrison Act. *State v. Martinson*, (1919) 144 Minn. 206, 174 N. W. 823, wherein the court said: "Conceding, without considering or deciding the point, which we think of doubtful merit, that the right of legislation upon the subject in hand is paramount in the federal Congress, and that the state statute is void in so far as it conflicts with the act of Congress, we are unable after careful examination and comparison of the two statutes to discover any conflict in the respect here claimed. It would serve no useful purpose to attempt to analyze the respective enactments, and we are content with announcing the conclusion stated without further comment."

Evidence to rebut claim that drug was furnished for medical purposes.—"During the progress of the trial the government tendered as witnesses three physicians of New Orleans to testify as experts as to the proper method recognized by the medical profession for the treatment of narcotic addicts. The defendant objected to such expert testimony, on the tender of each of said witnesses, on the ground that expert testimony was inadmissible, and that the facts only as to what the defendant did in the practice of his profession, in the treatment of addicts, under the indictment, was admissible. This is the only objection shown in the record to any testimony given by either of the three witnesses. The defendant was a physician, and indicted under the Harrison Act for illegally dispensing the drugs; his claim being that said drugs were dispensed in the course of his practice as such physician. The objections were overruled by the trial court and exception noted. This general objection was properly overruled by the trial court. The plaintiff in error was on trial, charged with having illegally dispensed the drugs therein mentioned. It was material and proper for the jury to be informed of the method recognized by the medical profession for the treatment of drug addicts, and this method could only have been detailed by men skilled in medicine; otherwise, any physician could dispense the forbidden drugs in any quantity to persons not his patients, and thus defeat the purposes of the act. It seems to us that the instant case is governed by the decision in the case of *Melanson v. United States*, 256 Fed. 787, 168 C. C. A. 129. The issue being whether the drug was dispensed in the legitimate course of defendant's practice as a physician, the evidence was admissible on that issue. We can therefore see no merit in the objection urged to this ruling of the court." Reeves

U. S., (C. C. A. 5th Cir. 1920) 263 Fed. 690.

Vol. IV, p. 178, sec. 2. [First ed., 1916 Supp., p. 102.]

For prosecutions for conspiracy to violate this section, see annotations under PENAL LAWS. sec. 37, *post*.

Constitutionality.—This section is constitutional. *Workin v. U. S.*, (C. C. A. 2d Cir. 1919) 260 Fed. 137, 171 C. C. A. 173; *Saunders v. U. S.*, (C. C. A. 6th Cir. 1919) 260 Fed. 386, 171 C. C. A. 252; *Friedman v. U. S.*, (C. C. A. 6th Cir. 1919) 260 Fed. 388, 171 C. C. A. 254; *Oakshette v. U. S.*, (C. C. A. 5th Cir. 1919) 260 Fed. 830, 171 C. C. A. 556.

Physician's prescription.—To same effect as 1919 Supplement annotation, see *Doremus v. U. S.*, (C. C. A. 5th Cir. 1920) 262 Fed. 849, holding that a physician who issues such a prescription, knowing it is to be filled by a druggist who knows of its illegality, aids and abets the druggist in violating this section.

In *Trader v. U. S.*, (C. C. A. 3d Cir. 1919) 260 Fed. 923, a physician was convicted of a violation of this section in that he dispensed morphine sulphate to various individuals without the written orders required by this section. Error was assigned because of the refusal of the trial judge to charge that the Harrison Act "does not limit the amount of morphine sulphate which a physician may prescribe or administer to his patients." In affirming the conviction, the court said:

"The learned trial judge charged the jury that, while the act 'does not in specific terms' create such a limitation, 'it does provide that such drug must be prescribed in the course of his professional practice only.' It is true that the act does not in specific terms state how much morphine sulphate may be prescribed or administered by a physician to his patients. It does, however, exempt physicians, in the dispensing and distributing of the drugs covered by the act, from the requirements of section 2 only in such cases as are 'in the course of his professional practice only.'"

"The regulations promulgated by the Commissioner of Internal Revenue, pursuant to the authority conferred by section 1 of the act, provide for separate and distinct registration by dealers and physicians. Hence, if the defendant dispensed the drug in question not in the legitimate practice of his profession, he became a dealer in the drug and was required to register as such. Therefore whether he was a dealer depended upon whether or not he was dispensing the drug in the course of his legitimate practice as a physician. Likewise the legality of his acts in obtaining the drug by means of the statutory order forms was dependent upon whether he acquired it for use 'in the legitimate practice of his profession.' Mani-

festly, therefore, so far as the issues in this case are concerned, there is in the act just such a limitation as the learned trial judge stated. Accordingly the qualification which he made in the request or point for instruction to the jury was not only entirely proper, but, as it seems to us, was quite necessary in order that the jury might not be misled and confused."

Physician obtaining opium for personal use.—An indictment charging the defendant, a physician, with using order forms to obtain opium for his own personal use, is defective. *U. S. v. Parsons*, (D. C. Mont. 1919) 261 Fed. 223, wherein, sustaining a demurrer to the indictment, the court said:

"Plaintiff's contention is that the act creates and denounces as a crime purchase of opium with the prescribed order forms for personal use; that this is found in section 2, which provides:

"It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

"The objections to this are: (1) The alleged offense is not clearly and definitely expressed in section 2, and intentment and construction should not be resorted to to characterize acts and persons as within a new statute and criminal, without reasonable notice from the language of the statute. See *U. S. v. Carney* (D. C.) 228 Fed. 165, and cases cited. (2) Congress having no power to directly prohibit the purchase of opium for personal use, it cannot indirectly do so by incorporation of such prohibition in a revenue measure, the prohibition having no reasonable relation to the revenue. (3) If the section is so intended, it is to that extent unconstitutional and void. (4) Capable of another reasonable construction, viz. to prohibit business or practice in disregard of the details of procedure prescribed by the act to protect the revenue, which is constitutional, this will be adopted, rather than the one contended for which is unconstitutional. Business and practice conforming to the prescribed formalities are lawful and legitimate; otherwise unlawful and illegitimate. Section 2 must be construed to be in aid of the only object of the act that is constitutional, viz. to create and safeguard revenue. How the purchase herein alleged could in any wise affect the revenue is inconceivable.

"Nothing in section 2 forbids purchases for any lawful use. Among such may be purchase to destroy, or to absorb the supply, or to prevent purchase by others, or to obstruct illegal traffic, all of which are lawful purposes, and none of which are within section 2, even as purchase for personal use is not."

Indictment—Defendant in business of selling narcotics.—Indictments for a viola-

tion of this section need not allege that the defendant was in the business of selling narcotics. *Hosier v. U. S.*, (C. C. A. 4th Cir. 1919) 260 Fed. 155, 171 C. C. A. 191, wherein it was said:

"The defendant argues that all the indictments were defective, in that none of them alleged that he was in the business of selling narcotics. He cites a number of cases in which, in prosecutions under section 3242 of the Revised Statutes and similar enactments, it has been held that it was necessary to allege and to prove that the accused was carrying on the business of a liquor seller. It was not sufficient to say and to show that he had made a single sale. These authorities are not in point. In them, what the statute forbade was the carrying on of the business of a wholesale or retail liquor dealer, etc., without paying the tax imposed thereon. The act here in question declares it to be unlawful for any person to sell narcotics to any one except upon the written order of the latter, given on a blank form issued by the Commissioner of Internal Revenue.

"In the instant case, each indictment charges an offense in the language of the statute, and by setting forth the kind of narcotics sold, and to whom the sale was made, the accused was given sufficient information to enable him to prepare his defense. There is nothing in *U. S. v. Jin Fuey Moy*, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061 Ann. Cas. 1917D 854, which intimates that one who is not a regular dealer in narcotics, may lawfully make a sale of them otherwise than is permitted by section 2 of the act. It is true that it was held that the words 'any person,' in section 8, prohibiting the possession of the drug, must be restricted to the class of persons named in section 1, because, unless that was done, a grave constitutional question would be raised, and the familiar principle was reiterated that a statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional but also grave doubts upon that score. It is not open to dispute that Congress may levy a tax upon one who sells anything, the selling of which it chooses to tax. It may, in its discretion, provide that this tax shall be required only of such persons as make a business of dealing in the commodity in question, but it is equally open to it, if it will, to say that every one who sells at all shall pay, or that any one who makes even an occasional sale shall comply with reasonable regulations intended to prevent evasions of the law."

Admissibility of evidence—Other offenses.—In a prosecution under this section evidence showing other offenses not contained in the indictment, is admissible to show the criminal intent of the defendants and to prove a continuing conspiracy. *Workin v. U. S.*, (C. C. A. 2d Cir. 1919) 260 Fed. 137, 171 C. C. A. 173.

In a prosecution for a violation of this

section evidence of other sales than those specified in the indictment is admissible. *Hosier v. U. S.*, (C. C. A. 4th Cir. 1919) 260 Fed. 155, 171 C. C. A. 191. The court, in passing upon such evidence, said:

"The indictments were good. The defendant says that, if they were, it is because each forbidden sale is a separate offense, and that reversible error was committed in admitting, over his objection, evidence of other sales than those specified in the indictments. The evidence complained of was in every instance given by the purchasers named in the indictments. Each of such purchasers said that in addition to the sale, at or about the time mentioned in the indictments, the defendant had, on other occasions, made similar sales to the witness. As the government in its proof was not restricted to the precise dates set forth in the indictments, the defendant could not object to the receipt of such evidence. The most that he would be entitled to do was to ask that the government should elect upon which dates it would stand. That he did not do."

In a prosecution for selling morphine in violation of this section evidence that morphine was found in the defendant's possession in a district other than that in which the offense in the indictment is alleged to have been committed, is inadmissible where there is no proof of a sale of morphine by the defendants in such district nor any evidence connecting their possession of morphine in that district with the offense charged in the indictment. *Paris v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 529, 171 C. C. A. 313.

Proof of acts of an agent of accused is admissible after the agency is shown, though the indictment does not charge a conspiracy between the accused and the agent. *Pennacchio v. U. S.*, (C. C. A. 2d Cir. 1920) 263 Fed. 66.

Nonexpert opinion.—A habitual user of opium, though he is not a chemist and has no knowledge or training rendering him capable of making a chemical analysis, may testify that a substance exhibited to him is opium. *Pennacchio v. U. S.*, (C. C. A. 2d Cir. 1920) 263 Fed. 66.

Instructions.—In a prosecution for a violation of this section it is not error for the trial judge in his instructions to the jury to state the purpose that Congress had in passing the act. *Trader v. U. S.*, (C. C. A. 3d Cir. 1919) 260 Fed. 923, wherein it was said:

"It is assuredly within the discretion of a trial judge, in charging a jury, to state the purpose, as he conceives it, that Congress had in passing any given act. If an erroneous statement of such a purpose may be considered reversible error in any case, we are entirely clear that, although the Harrison Act was passed pursuant to the taxing power of Congress and is clothed in the garb of a revenue act, the learned trial judge did not misconceive or misstate the broad

underlying purpose which Congress had in passing it (*United States v. Jin Fuey Moy*, 241 U. S. 394-402, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854), and therefore that no harm was done the defendant by the statement in question."

In *Oakshette v. U. S.*, (C. C. A. 5th Cir. 1919) 260 Fed. 830, 171 C. C. A. 556, the defendant in a prosecution under this section complained that the trial court's charge was erroneous in that it was not responsive to the only issue presented by the indictments. Answering this contention the court said:

"The indictments charged the sales to have been made by the plaintiff in error, not in pursuance of written orders, given by the purchasers, on forms prescribed by the Commissioner of Internal Revenue. The proof showed that plaintiff in error was a physician and had registered with the collector of internal revenue. He was authorized to administer the prohibited drugs, without obtaining a written order, if they were administered 'in the course of his professional practice,' but not otherwise. The government contended that the drugs administered by him were not administered in good faith, in the course of his professional practice, but to gratify the desire or appetite of the patients or purchasers. The plaintiff in error contended that they constituted legitimately medical treatment for his patients. The district judge submitted the issue so made to the jury.

"The contention of the plaintiff in error is that it was not within the issues presented by the indictments, since they merely charged sales illegal because not in pursuance of written orders. The only prohibitions of the statute are (1) sales by unregistered persons and (2) sales by registered persons not in pursuance of written orders. The plaintiff in error could only be charged with having made the one kind or the other. As he had registered, he was not guilty of the first. If, having registered, he made sales or dispensed the drug without obtaining a written order he was guilty of the second kind, unless because he came within one of the excepted classes. If he administered the drug only in the course of his professional practice, he came within one of the excepted classes, and was not guilty. If, however, he administered the drug, not in the course of his professional practice, then he did not bring himself within any of the excepted classes, and so came within the operation of the prohibition of section 2, against selling or dispensing, not in pursuance of a written order, and was properly charged with that offense. As a registered person he could have been charged with no other offense, since the act creates no other out of the act of selling or dispensing by registered persons. It does not make it a separate offense for a physician to administer the drug when it is not done in the course of his professional practice. His doing so

merely removes him from the classes exempted from the operation of section 2 and leaves him subject to the punishment prescribed by section 2.

"Dispensing the drug, though by a physician, if not in the course of his professional practice, is in legal effect a sale, and, being one, can only be legally made in pursuance of an order form, and the offense of doing it without one is necessarily that of selling or dispensing not in pursuance of a written order, in violation of section 2 of the act. The indictments properly so charged the offenses, and proof tending to show that the drugs were not dispensed in the course of defendant's professional practice tended to sustain the charges, and the court properly held that the issue so made was presented by the indictment and properly submitted it to the jury. In the case of *Melanson v. United States*, 258 Fed. 783, 785, this court said of the indictment:

"The second count charged a joint sale by the physician and druggist without the use of the order form, required by the law to be used and filed in making sales, other than to patients in the regular practice of a physician on prescription, or by personal administration."

"A conviction under the second count of the indictment in that case was sustained upon proof like that in this case, tending to show that the defendant physician administered the prohibited drugs, under the guise of treatment, but in fact to gratify the appetite of his supposed patients."

Vol. IV, p. 187, sec. 8. [First ed., 1916 Supp., p. 106.]

Indictment—Averments negating exceptions.—To same effect as 1919 Supplement annotation, see *Oakshette v. U. S.*, (C. C. A. 5th Cir. 1919) 260 Fed. 830, 171 C. C. A. 556; *U. S. v. Loewenthal*, (N. D. Ohio 1919) 257 Fed. 444.

Vol. IV, p. 196, sec. 17. [First ed., vol. III, p. 126.]

Sale of forfeited business as including trademark.—A sale by a collector of internal revenue under the provisions of this section of the business of a company manufacturing oleomargarine, does not include a trademark used on its products. *Ammon v. Narragansett Dairy Co.*, (C. C. A. 1st Cir. 1919) 262 Fed. 880, wherein the court said:

"The statute under which the collector of internal revenue proceeded against the defendant contains no mention of trademarks, good will, going concern value, or any other sort of intangible property. It provides that the delinquent taxpayer 'shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined,' etc. As this

is a penal statute, it cannot be extended by construction. No attempt was made by the collector to sell any trademark, good will, or other intangible assets. The schedule of property sold by the collector to Matthews and transferred by Matthews to the new corporation contains no mention of trademark, good will, or other intangible property. The old corporation has not been dissolved. It is, so far as this record shows, still legally alive. The sale of its tangible property simply killed its business; and it abandoned thereafter all attempts to preserve its good will, including any right in its trademarks previously used."

Indictment.—An indictment which in various counts charges that the defendants while engaged individually and "as officers, agents and employees" of a corporation in the manufacture of oleomargarine, committed certain acts in violation of this section, sufficiently charges that the defendants were engaged in manufacturing oleomargarine within the meaning of this section. *Kelly v. U. S.*, (C. C. A. 6th Cir. 1919) 258 Fed. 392, 169 C. C. A. 408.

Effect of acquittal of conspiracy.—Where persons are indicted for a violation of this section and also for a conspiracy to commit an offense against the United States in violation of sec. 37 of the Penal Laws (7 Fed. Stat. Ann. (2d ed.) 534), the fact that they are acquitted of the charge of conspiracy does not prevent them from being convicted under this section. *Kelly v. U. S.*, (C. C. A. 6th Cir. 1919) 258 Fed. 392, 169 C. C. A. 408, wherein it was said:

"Counsel strenuously insist that, unless the present defendants acted in concert so as to constitute the offense of conspiracy charged in the first indictment, it was 'not possible' for them to commit any of the frauds alleged in the second indictment. The most obvious answer to this is to be found in the verdicts themselves, if upon the evidence they are sustainable; if they show anything, it is that what is claimed to have been 'not possible' actually happened. The same insistence was made for defendants on their motion for new trial. This was met in several ways by the learned trial judge. One was that, if the point was well taken, it would follow 'that a conviction on a fraud count laid against two or more persons under section 17 of the Oleomargarine Act cannot be sustained unless it be accompanied by averments of a conspiracy'—calling attention to decisions of this court (*Hart v. United States*, 183 Fed. 368, 105 C. C. A. 588, and *Hardesty v. United States*, 168 Fed. 25, 27, 93 C. C. A. 417, and also *Enders v. United States*, 187 Fed. 754, 109 C. C. A. 502 [C. C. A. 7]), where a plurality of persons had in each case been jointly indicted and convicted of frauds committed in violation of section 17 of the Oleomargarine Act. and the judgments were affirmed, although, as the district judge said, in none of the cases 'did the fraud counts hint at a conspiracy.'"

"Counsel say in their brief that the use so made of these decisions shows that the principle upon which they rested their contention of inconsistency was misunderstood, and that they did not intend to assert that a fraud count could not be laid against two or more persons under section 17 of the Oleomargarine Act without 'being accompanied by averment of conspiracy.' Thus the contention of inconsistency is reducible to a question of fact, whether in this particular instance the absence of a conspiracy rendered it impossible for defendants to commit the frauds charged in the second indictment. In its last analysis this question at once challenges the wisdom of the statutes and the power to enact them, since they punish a conspiracy to do an act independently of penalizing the act itself. The power to enact such legislation cannot be questioned (*Clune v. United States*, 159 U. S. 590, 595, 16 Sup. Ct. 125, 40 L. Ed. 269), and if the assertion of an impossibility of two or more persons to do a particular thing without first agreeing to do it could prevail, the law might readily be frustrated.

"The true test of this question is to be found in the instant case, not only in the verdicts, but also in the very rule counsel rely on; for it must be remembered that the gist of the offense charged in the first indictment was the formation of a conspiracy in violation of section 37 of the Criminal Code (35 Stat. 1095), while the substantive frauds charged in the second indictment were direct violations of the Oleomargarine Act. 24 Stat. 209, and as amended in 32 Stat. 194, c. 784, § 8. It therefore needs only to be stated, in view of the decisions before cited, as well as the rule of Mr. Bishop that the evidence offered to prove the fraud counts of the second indictment was not of a character, certainly was not sufficient, to prove the conspiracy alleged in the first indictment. These distinct offenses cannot be confused by the relation of evidence offered to show execution of the conspiracy alleged (not the conspiracy itself) to the evidence offered to show actual commission of the frauds charged in the other indictment. The contention of fatal inconsistency must therefore fail."

Vol. IV, p. 228, sec. 8. [First ed., vol. III, p. 784.]

Under Act of June 13, 1898, ch. 448, § 29 — For cases on section 29, see *Hunnell v. Gill*, (D. C. Mass. 1918) 257 Fed. 857.

Vol. IV, p. 232, sec. 3. [First ed., vol. III, p. 787.]

Meaning and purpose.—To same effect as original annotation, see *Hunnell v. Gill*, (D. C. Mass. 1918) 257 Fed. 857.

"Vested."—The interest of legatees in legacies paid over to them or to a trustee for them by the executor prior to July 1,

1902, although not demandable by them as of right until after that date, because the time for proving claims against the estate had not expired, had become absolutely vested in possession of such legatees prior to such date, within the meaning of the Act of June 27, 1902, providing for the refunding of taxes collected on contingent beneficial interests not vested prior to July 1, 1902, notwithstanding the remote possibility that the amounts so paid might have to be returned to the executor for payment of debts. *Henry v. U. S.*, 251 U. S. 393, 40 S. Ct. 185, 64 U. S. (L. ed.) — (affirming (1918) 53 Ct. Cl. 641) wherein the court said:

"There is no doubt that if the claimant had retained the funds in his hands, as he had a legal right to do, the interest of the legatees would not have been vested in possession within the meaning of the statute, whatever the probabilities and however solvent the estate. *United States v. Jones*, 236 U. S. 106, 35 Sup. Ct. 261, 59 L. Ed. 488, Ann. Cas. 1916A, 316; *McCoach v. Pratt*, 236 U. S. 562, 35 Sup. Ct. 421, 59 L. Ed. 720. He contends that the same is true if he saw fit to pay over legacies before the time came when they could be demanded as of right. We will assume that, if the estate had proved insufficient, the executor not only would have been responsible but could have recovered such portion of his payments as was needed to pay debts. Still the consequence asserted does not follow. There can be no question that the interest of the sisters was held in possession, and so was that of the trustee, although he happened to be the same person as the executor. The interest was vested also in each case. The law uses familiar legal expressions in their familiar legal sense, and the distinction between a contingent interest and a vested interest subject to be divested is familiar to the law. *Gray, Rule Against Perpetuities*, § 106. The remote possibility that the funds in the hands of the legatees might have to be returned no more prevented their being vested in possession and taxable than the possibility that a life estate might end at any moment prevented one that began before July 1, 1902, being taxed at its full value as fixed by the mortuary tables. *United States v. Fidelity Trust Co.*, 222 U. S. 158, 160, 32 Sup. Ct. 59, 56 L. Ed. 137. In that case it was contended that the life estate was contingent so far as not actually enjoyed."

The interest in a fund transferred from an estate to a trustee for ascertained persons was vested in possession although they had received no income from it prior to July 1, 1902, within the provision of the Act of June 27, 1902, for the refunding of taxes collected on a contingent beneficial interest not vested prior to such date. *Henry v. U. S.*, (1920) 251 U. S. 393, 40 S. Ct. 185, 64 U. S. (L. ed.) —, affirming (1918) 53 Ct. Cl. 641.

Trust fund legacies which it was the legal duty of the executors to pay over to the

trustees before July 1, 1902, and for compelling payment of which a statutory remedy was given to the legatees before that date, were vested in possession and enjoyment within the meaning of the provision of the Act of June 27, 1902, for the refund of succession taxes collected on contingent beneficial interests not vested prior to July 1, 1902. *Simpson v. U. S.*, (1920) 252 U. S. 547, 40 S. Ct. 367, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 640.

Vol. IV, p. 236, sec. 1.

Purpose and effect of Act.—This Act is a remedial statute for the relief of a certain class of persons, and is in no way affected by the internal revenue law or the statute of limitations contained in R. S. sec. 3227 (see vol. III, p. 1037). It is in no sense an extension of the remedy under the internal revenue law to recover for taxes illegally collected. *Union Trust Co. v. U. S.*, (1919) 54 Ct. Cl. 43.

Manner of prosecution of claims.—All claims under this Act should be prosecuted by suit against the United States rather than against the collector under the general revenue statutes. *Hunnewell v. Gill*, (D. C. Mass. 1918) 257 Fed. 857. In passing upon this question, the court said:

"Passing over several points of rather technical character urged by the defendants, which seem to me not well taken, the question on which the case turns, as I view it, is whether the act of 1912 opens the way for a suit like the present one against the collector under the general revenue statutes. R. S. §§ 3220, 3226, 3227, 3228. *United States v. Hvoslef*, 237 U. S. 1, 35 Sup. Ct. 459, 59 L. Ed. 813, Ann. Cas. 1916A, 286, expressly decided that the act of 1912 gave a new right of action against the United States, independent of the provisions of the Revised Statutes. In view of that decision, the only contention open to the plaintiffs is that the act has a double aspect, and also authorizes suit against the collector. The question is of practical importance, because, if the plaintiffs can maintain the present action, they would be entitled to interest, which as stated amounts to \$83,000. *Old Colony R. R. Co. v. Gill, Collector*, 257 Fed. 220 (D. Ct. Mass., June 28, 1916); *Boston & Providence R. R. Co. v. Gill, Collector*, 257 Fed. 221 (D. Ct. Mass. September 13, 1916). If they can only sue the United States, as the act of 1912 does not provide for the payment of interest, it cannot be recovered.

"In the *Hvoslef* Case, the Supreme Court, after referring to various refunding statutes which created rights of action against the United States, said:

"The same rule must obtain as to all claims described in the act of 1912, and in this view we are not concerned in the present case with questions arising under the general provisions of the internal revenue

laws.' *Hughes, J.*, 237 U. S. 11, 35 Sup. Ct. 462, 59 L. Ed. 813, Ann. Cas. 1916A, 286.

"An examination of the briefs in that case shows that the solicitor general made substantially the same contention as the present plaintiffs. It was with reference to that argument that the language quoted was used by the court. I understand it to mean that all claims under the act of 1912 are to be prosecuted in the same manner; i. e. by suit against the United States. So construed, the decision just referred to is decisive on the question before me. If I am in error in this, and the question is an open one, I should still reach the same conclusion. I do not think that the act contemplates two sorts of claims, one of which may be recovered with interest through suits against the collector based on the first section and the general revenue statutes (Rev. Stats. §§ 3220, 3226, 3227, 3228), while the other is to be recovered without interest through suits against the United States, based on the second section."

Vol. IV, p. 236, par. A, subd. 1.

[First ed., 1914 Supp., p. 185.]

Construction.—Where any language of this Act is regarded as of doubtful import, it should be construed most strongly against the government and in favor of the taxpayer. *U. S. v. Coulby*, (C. C. A. 6th Cir. 1919) 258 Fed. 27, 169 C. C. A. 165, *affirming* (N. D. Ohio 1918) 251 Fed. 982 in 1919 Supplement.

A stock dividend is not taxable under the various provisions of the Internal Revenue Tax Law, as it is capital and not income. The sixteenth amendment to the United States Constitution (see vol. XI, p. 1110) does not apply to it, and to be taxable under the Constitution the tax must be apportioned among the several states as required by art. I of the Constitution, secs. 1 and 9 (see vol. X, pp. 335, 887). *Eisner v. Macomber*, (1920) 252 U. S. 189, 40 S. Ct. 189, 64 U. S. (L. ed.) —, *following* *Towne v. Eisner*, (1918) 245 U. S. 418, 38 S. Ct. 158, 62 U. S. (L. ed.) 372. See to the same effect *U. S. v. Philadelphia, etc., R. Co.*, (E. D. Pa. 1920) 262 Fed. 188.

Lease construed to require lessee to pay income and war excess profits taxes. *Philadelphia City Pass. R. Co. v. Philadelphia Rapid Transit Co.*, (1919) 263 Pa. St. 561, 107 Atl. 329.

Vol. IV, p. 239, par. B. [First ed., 1914 Supp., p. 186.]

Losses "incurred in trade."—A loss incurred by the acceptance of stock, which later became worthless, in payment for goods sold, is a loss "incurred in trade" within the meaning of this paragraph and should be allowed as a deduction in computing net income for the purpose of the normal tax.

Bryce v. Keith, (E. D. N. Y. 1919) 257 Fed. 133.

State transfer tax.—In determining the amount of net income under the provisions of this paragraph, no deduction should be allowed for transfer taxes paid to a state upon an inheritance vesting within the year. *Prentiss v. Eisner*, (S. D. N. Y. 1919) 260 Fed. 589, wherein it was said:

"At the outset we have the important fact that property inherited or transmitted by will is not treated as income in the Income Tax Act, but, on the contrary, is not only not included, but specifically exempted. In other words, in the hands of the legatee, devisee, heir, or distributee such property is capital and not income. Under these circumstances it would seem inconsistent if charges against this capital, which accrued prior to, or simultaneously with, the devolution of it, could be deducted from income tax returns. Notwithstanding this, the language of the act would apparently make the transfer taxes a necessary deduction, if they are charges against the person receiving the property, or against either the property or the right accruing to him.

"The cases are extremely confused and their reasoning is unsatisfactory. It is admitted by them all that the tax is not upon the property itself which is transmitted. To avoid the unconstitutionality of a direct tax upon the property itself which was not apportioned among the states, the Court of Appeals of New York said as to the federal tax of 1898, in *Matter of Gihon*, 169 N. Y. 443, 62 N. E. 561:

"... The full amount of the legacy is in law paid to the legatee, and the deduction made from it and paid to the state or federal government is paid on account of the legatee from the legacy which he receives."

"It is argued that the personal liability of the executor or administrator under the New York law for the payment of the tax makes the view taken by the foregoing case erroneous; but, as Judge Cullen there said, the obligation of the executor or administrator to pay the tax is a mere rule of administration to insure its payment, and the imposition of such an obligation affords no proof that the tax is either on the right to transmit or upon the property itself. I do not think it follows, because the right to transmit or the right to receive the property of a decedent is a privilege granted by the state, and not a common right, that the tax is imposed upon either right. Judge Gray's statement in *Matter of Swift*, 137 N. Y. 77, 32 N. E. 1096, 18 L. R. A. 709, is an accurate description of what occurs:

"What has the state done, in effect, by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease, allowing only the balance to pass in the way directed by the testator, or permitted by its intestate law."

"To say that the legatee, devisee, heir, or

distributee receives the property without any deduction and then pays the tax is really a most artificial way of viewing the transaction. In the case of personal property he really only gets the balance, with a credit as a matter of convenient bookkeeping to the amount of the tax. In the case of real estate he receives properly speaking an equity. He can pay the tax and get the land freed from the incumbrance, or the state can foreclose the lien and he will receive the balance. In either case the only natural way to treat him is as a recipient of a net amount. The condition of the devolution of the property is the receipt of the transfer tax by the state.

"In *United States v. Perkins*, 163 U. S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 237, the testator bequeathed his property to the United States. The Supreme Court held that the New York transfer tax was upon the testator's right to dispose of his property, and thus sustained the tax, for, if it had been treated as upon any right of succession of the United States, the tax could not have been lawfully imposed. This case has been cited with approval in New York decisions, both under the old and new transfer tax acts.

"I have carefully examined the interesting briefs submitted by counsel, and am convinced that the tax cannot properly be regarded as an imposition upon either the property or the right to receive a gross amount of the property of a decedent represented by a legacy, devise, or distributive share, but that the property and the right to receive it passed, reduced by the amount of the tax measured by a percentage of the value of the gross share. It is impossible to reconcile the conflicting expressions in judicial opinions; but this treatment of the situation will, I think, accord with the results reached by the various cases. I can see no substantial difference between the New York Transfer Tax Act (Consol. Laws, c. 60, §§ 220-245) in operation in 1913, and the earlier act, and I do not regard any of the acts as imposing a tax upon the plaintiff's right of succession which is deductible in her income tax return."

Vol. IV, p. 241, par. D. [First ed., 1914 Supp., p. 187.]

Income from partnership.—To same effect as annotation in 1919 Supplement, see *U. S. v. Coulby*, (C. C. A. 6th Cir. 1919) 258 Fed. 27, 169 C. C. A. 165, *affirming* (N. D. Ohio 1918) 251 Fed. 982 in 1919 Supplement.

Vol. IV, p. 245, par. G. [First ed., 1914 Supp., p. 191.]

"Arising or accruing."—With respect to domestic corporations no change was intended by the use of the expression income "arising or accruing" instead of income "received," as used in the Corporation Excise

Tax Act of August 5, 1909 (see vol. 4, p. 255) and the tax should be levied "under both acts upon the income "received" during the year. *Maryland Casualty Co. v. U. S.*, (1920) 251 U. S. 342, 40 S. Ct. 155, 64 U. S. (L. ed.) —, *modifying* and *affirming* (1917) 52 Ct. Cl. 201, 288; (1917) 53 Ct. Cl. 81.

Insurance premiums collected by local agents and not turned over as gross income.—Insurance premiums collected by the local agents of an insurance company, but which, conformably to the agency contracts, were not transmitted to the company's treasurer within the calendar year, were nevertheless a part of the gross income of the company received by it during such year. *Maryland Casualty Co. v. U. S.*, (1920) 251 U. S. 342, 40 S. Ct. 155, 64 U. S. (L. ed.) —, *modifying* and *affirming* (1917) 52 Ct. Cl. 201, 288; (1917) 53 Ct. Cl. 81.

Deductions from gross income—"Loss claims reserve" of insurance company.—An insurance company's "loss claims reserve," intended to provide for liquidation of claims for unsettled losses (other than those provided for by the reserve for liability losses) which had accrued at the end of the tax year for which the return was made and the reserve computed, is one required by law to be maintained, within the meaning of the provision that "the net addition, if any, required by law to be made within the year to reserve funds," may be deducted from gross, in determining the amount of net income to be taxed, where a state insurance department, pursuant to statute, has, at all times since and including 1909, required the company to keep on hand, as a condition of doing business in that state "assets as reserves sufficient to cover outstanding losses." *Maryland Casualty Co. v. U. S.*, (1920) 251 U. S. 342, 40 S. Ct. 155, 64 U. S. (L. ed.) —, *modifying* and *affirming* (1917) 52 Ct. Cl. 201, 288; (1917) 53 Ct. Cl. 81.

Reserves of insurance company.—An insurance company's reserves required by rules or regulations of state insurance departments, promulgated in the exercise of an appropriate power conferred by statute, are "required by law," within the meaning of the provision that "the net addition, if any, required by law to be made within the year to reserve funds," may be deducted from gross, in determining the amount of net income to be taxed. *Maryland Casualty Co. v. U. S.*, (1920) 251 U. S. 342, 40 S. Ct. 155, 64 U. S. (L. ed.) —, *modifying* and *affirming* (1917) 52 Ct. Cl. 201, 288; (1917) 53 Ct. Cl. 81.

A decrease in the amount of reserves required by law of an insurance company for the year 1913 from the amount required in 1912, unless clearly shown to be due to excessive reserves in prior years, or to some other cause by which the free assets of the company were increased during the year 1913, cannot be treated by the government

as "released reserve" and charged to the company as income for 1913. *Maryland Casualty Co. v. U. S.*, (1920) 251 U. S. 342, 40 S. Ct. 155, 64 U. S. (L. ed.) —, *modifying* and *affirming* (1917) 52 Ct. Cl. 201, 288; (1917) 53 Ct. Cl. 81.

Insurance company's unpaid taxes, salaries, brokerage and reinsurance.—Unpaid taxes, salaries, brokerage, and reinsurance due other companies at the end of each tax year may not be deducted from the gross income of an insurance company, under the provision that "the net addition, if any, required by law to be made within the year to reserve funds," may be deducted from gross, in determining the amount of net income to be taxed, although various state insurance departments require that "assets as reserves" be maintained to cover "all claims," "all indebtedness," "all outstanding liabilities," where these departments in these expressions plainly used the word "reserves" in a nontechnical sense as equivalent to "assets." *Maryland Casualty Co. v. U. S.*, (1920) 251 U. S. 342, 40 S. Ct. 155, 64 U. S. (L. ed.) —, *modifying* and *affirming* (1917) 52 Ct. Cl. 201, 288; (1917) 53 Ct. Cl. 81.

Cash dividends to policyholders in mutual life insurance company.—The amounts paid by a mutual legal reserve level-premium life insurance company in cash dividends to its policyholders during any taxable year, representing excess in premiums over actual cost of insurance, if not applied by such policyholders during that period of reduction of renewal premiums, may not be excluded from gross income under the provisions of this paragraph, that life insurance companies "shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder within such year." *Penn Mut. L. Ins. Co. v. Lederer*, (1920) 252 U. S. 523, 40 S. Ct. 397, 64 U. S. (L. ed.) — (*affirming* (C. C. A. 3d Cir. 1919) 258 Fed. 81, 169 C. C. A. 167), wherein the court said: "The reason for the particular provision made by Congress seems to be clear: Dividends may be made, and by many of the companies have been made largely, by way of abating or reducing the amount of the renewal premium. Where the dividend is so made the actual premium receipt of the year is obviously only the reduced amount. But, as a matter of book-keeping, the premium is entered at the full rate, and the abatement (that is, the amount by which it was reduced) is entered as a credit. The financial result both to the company and to the policyholders is, however, exactly the same whether the renewal premium is reduced by a dividend, or whether the renewal premium remains unchanged, but is paid in part either by a credit or by cash received as a dividend. And the entries

in bookkeeping would be substantially the same. Because the several ways of paying a dividend are, as between the company and the policyholder, financial equivalents, Congress, doubtless, concluded to make the incidents the same also, as respects income taxation. Where the dividend was used to abate or reduce the full or gross premium, the direction to eliminate from the apparent premium receipts is aptly expressed by the phrase 'shall not include,' used in clause (c) above. Where the premium was left unchanged, but was paid in part by a credit or cash derived from the dividend, the instruction would be more properly expressed by a direction to deduct those credits. Congress doubtless used the words 'shall not include' as applied also to these credits because it eliminated them from the aggregate of taxable premiums as being the equivalent of abatement of premiums.

"That such was the intention of Congress is confirmed by the history of the non-inclusion clause, (c) above. The provision in the Revenue Act of 1913, for taxing the income of insurance companies, is in large part identical with the provision for the special excise tax upon them imposed by the Act of August 5, 1909, chap. 6. § 38, 36 Stat. at L. 112. By the latter act the net income of insurance companies was, also, to be ascertained by deducting from gross income 'sums other than dividends, paid within the year on policy and renewal contracts;' but there was in that act no non-inclusion clause whatsoever. The question arose whether the provision in the Act of 1913, identical with (c) above, prevented using in the computation the reduced renewal premiums instead of the full premiums, where the reduction in the premium had been effected by means of dividends. In *Mutual Ben. L. Ins. Co. v. Herold*, 198 Fed. 199, decided July 29, 1912, it was held that the renewal premium, as reduced by such dividends, should be used in computing the gross premium; and it was said (p. 212) that dividends so applied in reduction of renewal premiums 'should not be confused with dividends declared in the case of a full-paid participating policy, wherein the policyholder has no further premium payments to make. Such payments having been duly met, the policy has become at once a contract of insurance and of investment. The holder participates in the profits and income of the invested funds of the company.' On writ of error sued out by the government the judgment entered in the District Court was affirmed by the Circuit Court of Appeals on January 27, 1913, 120 C. C. A. 256, 201 Fed. 918; but that court stated that it refrained from expressing any opinion concerning dividends on full-paid policies, saying that it did so 'not because we wish to suggest disapproval, but merely because no opinion about these matters is called for now, as they do not seem to be directly involved.' The noninclusion clause in the Revenue Act of 1913, (c) above, was

doubtless framed to define what amounts involved in dividends should be 'nonincluded,' or deducted, and thus to prevent any controversy arising over the questions which had been raised under the Act of 1909. The petition for writ of certiorari applied for by the government was not denied by this court until December 15, 1913 (231 U. S. 755, 58 L. ed. 468, 34 Sup. Ct. Rep. 323); that is, after the passage of the act."

The deduction from the gross income of a mutual legal reserve level-premium life insurance company of cash dividends to policyholders, representing excess in premiums over actual cost of insurance, is expressly forbidden by the clause of this paragraph defining allowable deductions from gross income of insurance companies as "the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts," except in so far as such dividends are excluded from computation of gross income under the so-called noninclusion clause of such section, as having been applied in reduction of renewal premiums. *Penn Mut. L. Ins. Co. v. Lederer*, (1920) 252 U. S. 523, 40 S. Ct. 397, 64 U. S. (L. ed.) —.

Recovery back of excessive corporation excise tax.—The right to recover back excessive corporation excise tax payments is barred where the corporation failed to appeal to the Commissioner of Internal Revenue, as required by R. S. sec. 3226 (see vol. 3, p. 1034), and also failed to observe the requirement of section 3227 (see vol. 3, p. 1037), that suit be begun within two years after the cause of action accrued. And the situation of the corporation is not helped by the fact that subsequent to the payments the original returns were amended and the assessments increased and the original payments credited upon the increased assessments. *Maryland Casualty Co. v. U. S.*, (1920) 251 U. S. 342, 40 S. Ct. 155, 64 U. S. (L. ed.) —, *modifying and affirming* (1917) 52 Ct. Cl. 201, 288; (1917) 53 Ct. Cl. 81.

Vol. IV, p. 255, sec. 38. [First ed., 1909 Supp., p. 829.]

I. Subdivision first.

3. Nature of tax.

5. "Carrying on," "engaged in" or "doing" business.

6. Income.

9. Action to recover tax wrongfully assessed.

II. Subdivision second.

I. SUBDIVISION FIRST

3. Nature of Tax (p. 261)

Excise and income taxes distinguished.—In *U. S. v. Philadelphia, etc., R. Co.*, (E. D. Pa. 1920) 262 Fed. 188, the court in distinguishing an excise tax under this Act

from an income tax, said: "We are concerned wholly with an excise tax. Whether it is a scientifically accurate concept of it or not, the concept of it as a charge for the privilege of following an occupation or trade, or carrying on a business, gives us a fairly good working idea of what it is. It is, in consequence, an indirect tax, and has no reference to earnings or income, except that the sum of such earnings or income may (as anything else may) be made the measure of the tax. An income tax, on the contrary, is a direct tax imposed upon the thing called income, and is as directly imposed as is a tax on land."

5. "Carrying On," "Engaged in" or "Doing" Business (p. 263)

What constitutes "carrying on," "engaged in" or "doing" business—*Leasing of property and franchise by corporation*.—To same effect as first paragraph of original annotation, see *Old Colony R. Co. v. Gill*, (D. C. Mass. 1916) 257 Fed. 220, also holding that taxes assessed against the lessor after the execution of the lease were illegal, and, having been paid under protest, could be recovered with interest. See also *Boston, etc., R. Corp. v. Gill*, (D. C. Mass. 1916) 257 Fed. 221.

The fact that a corporation is organized and all of its stock owned by two corporations does not exempt it from taxation under this section on the ground that it is not organized for profit and not doing business within the meaning of this section, where it is shown that it has accumulated money through its corporate activities. *Associated Pipe Line Co. v. U. S.*, (C. C. A. 9th Cir. 1919) 259 Fed. 800, 170 C. C. A. 94. Regarding this question, the court said:

"The return made by the Associated Pipe Line Company was as by a corporation organized for profit, and the return showed that it had accumulated money. It is hard to conceive that the formation of the corporation was had with a view other than the realization of profit. It may be that the stockholders in the Associated Pipe Line Company took the profit away from the corporation, but it is clear that the way in which the money was made was by a corporate organization; and the corporation having achieved the object of its creation, became subject to the imposition of the tax with respect to doing business. In *Von Baumbach v. Sargent Land Co.*, 242 U. S. 603, 37 Sup. Ct. 201, 61 L. Ed. 460, a corporation was created 'to unite in one ownership the undivided fractional interests of its various stockholders in land,' and to 'own such property, and, for the convenience of its stockholders, to receive, and distribute to them,' the proceeds of the disposition of such property at such times and in such amounts and in such a manner as determined by the board of directors. The Supreme Court found no difficulty in concluding that such a corporation was organized for profit and

did not come within the exceptional character of charitable or eleemosynary corporations, and the court after examining the earlier corporation tax cases held that the corporation was carrying on business and said:

"The fair test to be derived from a consideration of all of them [the cases] is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain, and such activities as are essential to those purposes."

"The court emphasized the view that the Corporation Tax Law requires no particular amount of business in order to bring a company within its terms. The activities considered brought the corporation there in question within that line of the decisions which have held that such corporations were doing business in a corporate capacity within the meaning of the law. *McCoach v. Mine Hill R. R. Co.*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, illustrates the distinction. There a railroad corporation turned over its entire property under a lease to another company, and even ceased to exercise its power of eminent domain. It was held not to be engaged in business. The Associated Pipe Line Company appears to have been active, and to be maintaining its organization for the purposes for which it was created; it has expended and received money, has borrowed money, has constructed pipe lines, has allowed itself to be charged interest, has had dealings with its stock and stockholders concerning moneys received, and in 1909 was actually transporting oil and performing its corporate functions."

6. Income (p. 267)

Profit only "as a matter of form and of bookkeeping," where in reality there was no profit whatever, was not taxable income. *Alpha Portland Cement Co. v. U. S.*, (C. C. A. 3d Cir. 1919) 261 Fed. 339, a case held to fall within the principle of the decisions in *Southern Pac. Co. v. Lowe*, (1918) 247 U. S. 330, 38 S. Ct. 540, 62 U. S. (L. ed.) 1142, and *Gulf Oil Corp. v. Lewellyn*, (1918) 248 U. S. 71, 39 S. Ct. 35, 63 U. S. (L. ed.) 133, and indistinguishable on principle from the decision in *Baldwin Locomotive Works v. McCoach*, (C. C. A. 3d Cir. 1915) 221 Fed. 59, 136 C. C. A. 660.

Dividends received by a corporation on stock held by it in another corporation are a part of its income during the year in which they are received and are subject to an excise tax under this Act, regardless of the fact that they are paid out of earnings of previous years. *U. S. v. Philadelphia, etc., R. Co.*, (E. D. Pa. 1920) 262 Fed. 188.

Excess premiums collected by an insurance company and apportioned to its policyhold-

ers by way of dividend are not taxable. *New York L. Ins. Co. v. Anderson*, (C. C. A. 2d Cir. 1920) 263 Fed. 527.

9. Action to Recover Tax Wrongfully Assessed (p. 269)

Recovery of penalty exacted for nonpayment of illegal tax.—The fact that taxes illegally assessed under this section were not paid within the time required by law does not prevent the corporation from recovering the penalty of one per cent per month paid by it for the nonpayment of the illegal tax, "for, if the tax was illegal, it was never due, and therefore the penalty was as much unauthorized as the tax itself." *Camp Bird v. Howbert*, (C. C. A. 8th Cir. 1919) 262 Fed. 114.

II. SUBDIVISION SECOND (p. 270)

Deductions—Interest on advances.—

Where a corporation at the time of making a return is indebted to another corporation on account of advances but has no paid-up capital stock, it is not entitled to deduct interest on the advances. *Associated Pipe Line Co. v. U. S.*, (C. C. A. 9th Cir. 1919) 258 Fed. 800, 170 C. C. A. 94.

Taxes paid on stock of other corporations.

—A corporation is not entitled under this section to deduct taxes paid on its behalf by various corporations upon shares of their stock owned by it. *U. S. v. Aetna L. Ins. Co.*, (D. C. Conn. 1919) 260 Fed. 333, wherein it was said:

"The deductions allowed a corporation by the Act of August 5, 1909, include 'all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein.' The taxes in question were not paid by the defendant, but in its behalf by other corporations.

"While it is true that 'a statute providing for the imposition of taxes is to be strictly construed, and all reasonable doubts in respect thereto resolved against the government and in favor of the citizen' (*Mutual Benefit Life Ins. Co. v. Herold* [D. C.] 198 Fed. 199, and cases therein cited), no doubtful meaning is here involved. The language of the act is clear and explicit. . . . If it had been the intention to permit such a deduction as defendant urges, the act would have provided that there be included 'all sums paid by it or in its behalf within the year. . . .'

"Defendant relies upon a decision by the Treasury Department rendered March 24, 1916, reading in part:

"You are advised that, when a corporation pays taxes for its stockholders, such payments represent a portion of the earnings of the corporation, which, instead of being distributed to the stockholders in the form of dividends, is used in payment of taxes which

the stockholders individually owe. Should you, instead of paying the taxes, pay over this sum to the stockholders, the stockholders would be required to return the amount as income received, and would then be entitled to deduct the same under the item of taxes paid during the year. Under the Excise Tax Law a stockholder which is a corporation is entitled to deduct from gross income all dividends received from another corporation subject to tax, and therefore is entitled to deduct as a dividend that portion of the earnings of the corporation in which it owns stock, which is represented by the stockholder's tax. For the years 1909 to 1912, inclusive, therefore, the corporation which is a stockholder will be entitled to an additional deduction on account of the taxes paid for it by the corporation issuing the stock, for the reason that it produces the same result as if the corporation owning the stock was required to return as income for these years the full amount of the dividend, including that portion of the dividend diverted to pay tax, and then took credit as a deduction for this entire amount under the item of dividends received from other corporations, and also took credit for the amount of taxes paid under that item. Under the Income Tax Law, however, a corporation is not entitled to deduct from gross income dividends received from other corporations. Consequently, if it claims the benefit of deducting from gross income taxes paid for it by another corporation, it must include such amount in income, as the deduction counterbalances the receipt. As you, the stockholder in this case, did not return as income the amount in question, you are not entitled under the income tax law to deduct the same. The claim on account of the tax assessed for the year 1913 is accordingly rejected, and you will find inclosed notice of demand for payment of this tax. The claim for the abatement of the additional tax assessed for 1912 has received favorable consideration for the reason above stated.'

"This decision points out that a corporation, making a claim such as is advanced by defendant, must have included in its return as income the taxes which were paid in its behalf by other corporations. No such return was made by defendant herein; therefore the decision is not in point, even if it were controlling on the court.

"There was no refusal nor neglect to make a return within the meaning of the act, and therefore no penalty will be allowed."

Depreciation of securities.—A corporation is entitled to deduct the depreciation in value of its securities. *New York L. Ins. Co. v. Anderson*, (C. C. A. 2d Cir. 1920) 263 Fed. 527, wherein the court said:

"It is here admitted that, judged by any standard familiar to business men, the securities of plaintiff were worth at the end of 1910 several million dollars less than they were at the beginning of that year. It is

further admitted that, not only was it the business custom of plaintiff to revalue its securities in accordance with the market annually, but that such procedure was and is a reasonable business conservatism, and a frequent, though not universal, statutory requirement.

"Under this taxing act the question is not strictly whether depreciation in market value is a loss, but whether, when Congress specifically includes within 'losses actually sustained within the year, . . . a reasonable allowance for depreciation of property,' depreciation does not become a loss, no matter what persons other than Congress may think on the subject.

"We have no doubt that this loss in market value is depreciation. The word means, by derivation and common usage, a 'fall in value; reduction of worth;' and it seems to us to require mention only to prove that the average citizen, for whom statutes are assumed to be made, would judge depreciation of his own bonds by the opinion of the public, however thoroughly convinced of the ultimate wisdom of holding on to what had depreciated."

But the term "depreciation," as used in this subdivision, does not include the depreciation of securities purchased at market value by a corporation during the year. *New York L. Ins. Co. v. Anderson*, (S. D. N. Y. 1919) 262 Fed. 215. Regarding this question the court said:

"It is quite apparent that, if this depreciation be accepted as a deduction, and no appreciation be added, the insurer may slowly, over a series of years, credit itself with possibly the whole value of its securities and without any corresponding offset. This is obviously an unreasonable result, which could not have been intended. The question is whether the depreciation falls within the deductions covered by paragraph 2 of section 38 of the Act of 1909 (36 Stat. 112, c. 6). Of the deduction so allowed the only one appropriate is:

"All losses actually sustained within the year, and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property if any."

"This clause of the statute undoubtedly goes to 'depreciation' which has not yet been realized by sale of the depreciated property; so much one must allow. If the securities had been sold, I need not say that the loss would not have been a proper item of allowance. The clause is not intended to cover that situation. The question is whether it should be limited to the loss in actual use value, due to wear and tear, reflected in a fall in money value. It seems to me quite clear that it should be so limited. The fluctuations in the market value of a commercial security, as in the case of a stock of goods, are constant from month to month. No one regards them as a final depreciation in value from which the property will not recover. It may or may not; but, if there has been no certain deterioration in those

elements which contribute to the beneficial use of the property, and which prevent it from ever commanding the same opinion of its value as before, the loss has not, I think, been 'actually sustained.' When consumable goods are in part worn out, they can never recover their earlier condition. It is true that their value may recover, owing to the increased value of all their class, new and used; but the proportion between the value of new and used goods of that kind is presumptively unchanged. The loss has then been 'actually sustained,' in the sense that it cannot be recouped. This is what I think the language means. It refers to such goods as by reason of their physical deterioration are permanently impaired in use, from which impairment there was no chance of recovery.

"Such an interpretation, moreover, accords with common business understanding. A manufacturer charges his profits with the loss to his machinery and buildings, due to wear and tear, recognizing that the necessity of the upkeep of his capital will in the end inevitably require some such allowance. A merchant, on the other hand, does not ordinarily include the variations in the market values of his stock in counting his profits. They may shortly be restored to their value, and the time to charge his profit with them is when they are sold, and the gain or loss finally ascertained.

"Cases like *Stratton's Independence v. Howbert*, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285, and those which follow it, or *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179, 38 Sup. Ct. 467, 62 L. Ed. 1054, and those which follow it as well, are quite different. The question was how the gross income was to be estimated, particularly what allowance should be made for the original value of the raw material, which had been worked up and sold as a finished product. *Hays v. Gauley Mountain Coal Co.*, 247 U. S. 189, 38 Sup. Ct. 470, 62 L. Ed. 1061, was a case where securities were actually sold, and the question was also one of gross income. It did not determine what was to be considered the proper deduction for depreciation not realized by conversion into cash. Nor do any of the cases cited in the lower courts seem to me to be in point. While the case appears, therefore, to be one of first impression, I do not hesitate to hold that the defendant is right upon this item."

Depreciation of equipment.—In *Camp Bird v. Howbert*, (C. C. A. 8th Cir. 1919) 262 Fed. 114, a mining corporation was held to be entitled to recover excess taxes paid by it by reason of the collector's failure to allow a sufficient amount for depreciation of its equipment.

Money set apart to meet discount in sale of bonds.—Money set apart by a corporation upon its books each year until the maturity of certain of its bonds to meet a loss caused by selling the bonds below par, is not a payment of interest, nor does it represent a loss actually sustained within the year, and may

not be deducted under paragraph 2 of this section in ascertaining the corporation's net income. *Southern Pac. R. Co. v. Muentner*, (C. C. A. 9th Cir. 1919) 260 Fed. 837, 171 C. C. A. 563.

Vol. IV, p. 278, sec. 4. [First ed., 1916 Supp., p. 74.]

Buyers' and sellers' slips as sufficient memorandums.—Buyers' and sellers' slips which conform to the provisions of this section and section 5, are sufficient memorandums and evidence of contracts to comply with the provisions of this Act, although such contracts were made verbally, under a rule of the cotton exchange, before they were reduced to writing. *Thorn v. Browne*, (C. C. A. 8th Cir. 1919) 257 Fed. 519, 168 C. C. A. 469.

Memorandum by whom signed.—A memorandum in order to comply with this section need not be signed by both parties to the contract, but only "by the party to be charged or his agent." *Thorn v. Browne*, (C. C. A. 8th Cir. 1919) 257 Fed. 519, 168 C. C. A. 469, wherein the court said:

"It is a general rule of law that a written contract signed by both parties to it is valid, and that a written contract between two parties signed by one of them is likewise valid and enforceable against him who signed it by the other party to it, who accepts and seeks to enforce it, although he has never signed it. If Congress had intended to require every transaction in the sale of cotton futures to be evidenced by a writing or by written memoranda signed by both parties to it, it would naturally have required the writing of which it treats to be signed by the parties to it or their agents in their behalf, and not 'by the party to be charged or by his agent in his behalf' only. This provision of the statute states clearly and without ambiguity that the contract must be signed by the party to be charged or his agent in his behalf. The selection of one party is the exclusion of the other, and the strong legal presumption is that the Congress intended what it so plainly declared, that the statute ought to be held to mean what it expresses, and that the signature of no one but the party to be charged is requisite to it to evidence a valid contract. . . .

"When a legislative body selects and uses in a statute words or clauses which before the enactment of the law had acquired by judicial interpretation or common consent and use a well-understood meaning and legal effect, the legal presumption is that it intended that they should have that meaning and effect in the statute it enacts. *Butler v. United States* (D. C.) 87 Fed. 655, 661; *United States v. Trans-Missouri Freight Association*, 58 Fed. 67, 7 C. C. A. 15, 71, 24 L. R. A. 73. For many years before the Cotton Futures Act was passed, the statutes of fraud of England and of many of the states of this nation had provided that

certain classes of contracts specified therein should be void unless they were evidenced by a writing or by a written memorandum 'signed by the party to be charged or his agent,' and long before the passage of the act under consideration it had become the universal and well-understood judicial construction of these statutes that the signature of the party to be charged alone was sufficient to evidence a valid contract thereunder, and that the other party to the contract, although he had not signed it, could enforce it in the courts against him who had signed it. . . .

"Congress took this well-adjudicated clause, 'signed by the party to be charged or by his agent,' and inserted it in the Cotton Futures Act in the form 'signed by the party to be charged, or by his agent in his behalf,' and it is incredible that it intended thereby that this clause should have a meaning so radically different from that which it then had as to require the writing or memorandum to be signed by others than that one of the parties so clearly designated by the law.

"And when the fact is considered that, if this section 4 be construed to mean that the writing or memorandum must be signed by both parties to the contract, one who makes or takes a contract of sale of cotton futures signed by the party to be charged only becomes guilty of the penal offense denounced by section 14 of the Cotton Futures Act, there remains no doubt that the meaning of the clause under consideration may not lawfully be extended by construction, so as to require every writing or written memorandum of a contract for the sale of cotton futures to be signed by both parties to it. For courts may not lawfully extend the denunciation of a penal statute to a class of persons excluded from its effect by its plain terms, even though in their opinion the acts of the latter are as heinous as those of the members of the class whose deeds the statute penalizes."

Vol. IV, p. 284, sec. 5. [First ed., 1916 Supp., p. 89.]

Constitutionality.—The imposition of a stamp tax under this Act on certificates of shares of the capital stock of a manufacturing company organized in the form of a trust under the common law, is constitutional. *Malley v. Bowditch*, (C. C. A. 1st Cir. 1919) 259 Fed. 809, 170 C. C. A. 609, 7 A. L. R. 608. The court said:

"The suggestion of constitutional difficulties in adopting the construction for which the collector contends, and which we think right, does not seem of weight. It involves 'no distinction founded upon an immaterial difference between two kinds of partnerships,' since the stamp tax is contingent upon the original issue of 'certificates of stock,' just as a stamp tax on checks is contingent upon the issuing of checks.

"A stamp tax on documents discriminates

between those who do and those who do not issue documents; and a distinction between unincorporated companies and associations which do and those which do not issue certificates of shares of stock is not unreasonable, nor founded upon an immaterial difference between two kinds of partnerships. *Thomas v. United States*, 192 U. S. 363, 371, 24 Sup. Ct. 305, 48 L. Ed. 481; *Hatch v. Reardon*, 204 U. S. 152, 158, 159, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736.

"The Massachusetts cases cited (*Gleason v. McKay*, 134 Mass. 419; *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259; *Opinions of Justices*, 196 Mass. 603, 85 N. E. 545) in our opinion do not give rise to any constitutional difficulty. The opinion of Chief Justice Rugg (196 Mass. 619, 620, 85 N. E. 545) tends to support the view that the words 'association' and 'company' include organizations not regulated by statute, and that a statute including these in an excise tax does not involve a discrimination founded on an immaterial difference.

"Nor do we regard it useful to consider whether the right of the certificate holder or shareholder is a chose in action or in the nature of a chose in action, or an equitable interest in property.

"The certificate is but a muniment of title—documentary evidence of ownership—and not the share itself.

"The thing taxed is not a chose in action, though it may be evidence of it. In a remote sense both a share of corporate stock and a certificate of a share in an unincorporated company may be said to represent an interest in property. It is equally true that both may represent an interest in a share of a capital fixed in amount, whether fixed by statute or by agreement.

"In *Eliot v. Freeman*, 220 U. S. 178, 31 Sup. Ct. 360, 55 L. Ed. 424, construing the Corporation Tax Law (Act Aug. 5, 1909, c. 6, 36 Stat. 11), it was held that the tax was imposed upon doing business in a corporate or quasi corporate capacity. But that case is clearly distinguishable from the present case, since the present statute does not impose a franchise tax, but imposes a stamp tax upon various kinds of documents, which may be issued by companies neither incorporated nor quasi incorporated, 'or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them are written or printed,' etc. See section 5, 38 Stat. pt. 1, p. 753.

"In interpreting the statute we find no sufficient reason for limiting the terms 'association' and 'company' to those which derive their powers from legislation.

"We have examined, also, the opinion of the Supreme Court in *Crocker et al. v. Malley*, March 17, 1919, 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. —, reserving the judgment of this court. In that case the Supreme Court found that:

"The declaration of trust on its face is an ordinary real estate trust of the kind fa-

miliar in Massachusetts, unless in the particular that the trustees' receipt provides that the holder has no interest in any specific property and that it purports only to declare the holder entitled to a certain fraction of the net proceeds of the property when converted into cash "and meantime to income."

"It was stated, however, in that case:

"The function of the trustees is not to manage the mills, but simply to collect the rents and income of such property as may be in their hands,' etc.

"Under the present declaration of trust it is provided that the name of the trust shall be Pepperell Manufacturing Company, and the trustees may be so designated, and in that name the trustees shall, so far as practicable, conduct the business of the trust; that the trustees shall employ and use the trust property and assets in the carrying on of the business of manufacturing textile or other fabrics, etc. This is essentially different from an ordinary real estate trust of the kind familiar in Massachusetts. If, under the decision of the Supreme Court, there may be doubt whether the term 'association' is applicable, there seems no ground for serious doubt of the applicability of the term 'company,' used in the statute and made a part of the name and description of those persons who are to conduct the manufacturing business of the organization.

"In applying this stamp tax we find no substantial reason for a distinction between this textile manufacturing company and other textile manufacturing companies."

Vol. IV, p. 286, sec. 6. [First ed., 1916 Supp., p. 89.]

Failure to attach stamps to deeds as invalidating it or making it inadmissible in evidence.—The absence of the internal revenue stamps required on deeds neither invalidated the deeds nor made them inadmissible as evidence. *Cole v. Ralph*, (1920) 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, reversing (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

Vol. IV, p. 296. [Bonds, etc.] [First ed., 1916 Supp., p. 95.]

Certificates of shares in a manufacturing company, organized in the form of a trust under the common law, and deriving none of its rights, qualities or benefits from any statute, are subject to a stamp tax of five cents on each \$100 of face value or fraction thereof. *Malley v. Bowditch*, (C. C. A. 1st Cir. 1919) 259 Fed. 809, 170 C. C. A. 609, 7 A. L. R. 608.

Vol. IV, p. 311, sec. 3450. [First ed., vol. III, p. 795.]

Innocence of automobile owner.—Where the owner of an automobile puts it in the possession of a prospective purchaser but

retains title as security for the balance of the unpaid purchase money, the use of the automobile by the purchaser for the purpose of removing goods in violation of this section, makes it subject to forfeiture, although the owner has no knowledge of such illegal use. *Logan v. U. S.*, (C. C. A. 5th Cir. 1919) 260 Fed. 746, 171 C. C. A. 484. The court said:

"It is conceded that the automobile and the mule were used for the removal of non-tax paid spirits, and would have been subject to forfeiture if they had belonged to the user. It is conceded that the automobile was sold to the user by the plaintiffs in error in the first case; they retaining title to secure the balance of unpaid purchase money. It is conceded that the claimant in the second case sold the forfeited mule to the user in whose possession it was seized, taking a mortgage back to secure the balance of unpaid purchase money. It is conceded that neither claimant had knowledge of the illegal use to which their property was put.

"The case of *United States v. Mincey*, 254 Fed. 287, 166 C. C. A. 575, decided by this court, would seem to be controlling of both cases. The plaintiffs in error ask us to reconsider the *Mincey* Case, and also to distinguish each of the present cases from that case.

"In deference to the earnest argument of plaintiffs in error, we have again considered the question involved in these appeals, but without being convinced that there is any good legal reason for departing from our previous decision. The cases of *Dobbins Distillery v. United States*, 96 U. S. 395, 24 L. Ed. 637, and *United States v. Stowell*, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, so far as they relate to personal property, are not distinguishable from the cases now under consideration, and control their decision. In the *Dobbins Distillery* Case, mention is made, in the court's opinion, that the lessor committed his property to the custody of the lessee for a business necessarily under strict regulations, viz., a government distillery. However, this was a lawful disposition of his property, and we cannot see how it could be said to charge him with knowledge of his lessee's subsequent infractions of the internal revenue laws. The statute forfeiting realty provides for proof of knowledge of the violation in the owner, but no such requirement rests upon the government as to personalty. In the *Stowell* Case, personal property of a third person, in custody of the offender, was forfeited, though the owner was ignorant of the fact that a distillery was being operated on the premises where the property was seized, and in connection with which it had been used, without the owner's knowledge or consent. Reference is made to sections 3460 and 3461 of the Revised Statutes, as being inconsistent with the construction given section 3450 in the *Mincey* Case, both because

of a supposed lack of good reason for protecting an absent claimant, since it is contended that, if present, he is permitted to say nothing to prevent the forfeiture, and because of a supposed discrimination against a present claimant, because he could not prevent a forfeiture by showing an absence on his part of willful negligence and an intention to defraud, though the absent claimant is relieved from the forfeiture by making such a showing to the Secretary of the Treasury.

"The first contention loses sight of the right of a claimant to be heard in denial of the guilt of the property sought to be forfeited, as well as his possible right to show that the guilty user of it acquired possession of it without claimant's knowledge or consent.

"The second contention ignores the provisions of section 5292, R. S., which provide a remedy by which any person whose property is forfeited may have the forfeiture remitted, if the Secretary of the Treasury is of the opinion that it was incurred without willful negligence or any intention of fraud in the person incurring it. Section 3461 applies to an application for relief from forfeiture, after condemnation and sale, where the owner, through absence or other cause, was ignorant of the seizure until after the sale. Section 5292 is open to any person who can make the requisite showing, whether absent or not, and before condemnation as well as after. Under it, as under section 3461, the endeavor is not to prevent forfeiture, but to obtain relief from it. Neither section offers a defense to the judicial declaration of a forfeiture, but only an appeal to the discretion of the Secretary for a remission of it. The fact that section 5292 authorizes the application to the Secretary, while the government's suit to condemn is pending, is persuasive that Congress recognized that a showing of absence of willful negligence or fraud would not prevent the judicial declaration of the forfeiture, but was only to be addressed with effect to the clemency of the Secretary. . . . We regard it as settled that personal property voluntarily committed by the owner to the possession of a third person, for use by him, becomes subject to forfeiture, under section 3450, though the owner has no knowledge of the illegal use to which it is put by the possessor."

Rights of creditor of automobile owner.—Where an automobile is forfeited and sold under this section because it has been used to transport intoxicating liquor on which the tax has not been paid, a creditor of the automobile owner who holds a deed of trust on it is not entitled to have the proceeds of the sale applied to the payment of his debt but the whole amount should be paid into the treasury. *U. S. v. One Saxon Automobile*, (C. C. A. 4th Cir. 1919) 257 Fed. 251, 168 C. C. A. 335.

1918 Supp., p. 282, sec. 407. [*Corporations, etc.*]

"Special excise tax" as used in this section is a condition placed upon the right of a corporation to do business of any kind and is not the tax meant by a provision in a contract for the leasing by a railroad of terminal facilities that the lessor would pay one-third of all taxes or assessments, special or otherwise, and public charges of every kind and nature that should or might be taxed or assessed against the Des Moines Company or its property during the aforesaid term of years. *Des Moines Union R. Co. v. Chicago Great Western R. Co.*, (Ia. 1920) 177 N. W. 90.

1918 Supp., p. 293, sec. 402 (g).

General construction.—Under this section the Commissioner of Internal Revenue was authorized, by proper rules and regulations, to be approved by the Secretary of the Treasury, to adopt and prescribe for use at fruit distilleries meters, locks and seals, to be purchased at the expense of the distiller, before such distiller might legally engage in the business of manufacturing distilled spirits from fruits. (1917) 31 Op. Atty.-Gen. 115.

1918 Supp., p. 296, sec. 300.

Import tax.—The provision of this section, levying an additional tax upon imported distilled liquor and directing that it shall be collected under existing law, describes an import tax and not an internal revenue tax. *U. S. v. Shallus & Co.*, (1919) 9 U. S. Cust. App. 168; *U. S. v. Billin & Co.*, (1919) 9 U. S. Cust. App. 286.

1918 Supp., p. 305, sec. 200.

Nature of tax.—The tax is one imposed on the power to transfer property upon death. *People v. Bemis*, (Colo. 1920) 189 Pac. 32.

The tax levied by these provisions differs in its character from the legacy taxes levied by the federal government during the Civil and Spanish wars, and from the general run of state inheritance tax laws; although it is in some respects similar to the act of New York construed in *Matter of Estate of Swift*, 137 N. Y. 77. It seems to have been modeled as to its main intent and incidence on the English finance act of 1894 (57 and 58 Vict. ch. 30, Pt. I), though differing in material respects from that act. (1918) 31 Op. Atty.-Gen. 287.

Validity of act sustained in New York *Trust Co. v. Elsner*, (S. D. N. Y. 1920) 263 Fed. 620, wherein the court said:

"Clearly the tax is not one on the property of the decedent, but, as it purports to be, on the privilege of transfer by death. Equally clearly it is not on the individual

legacies or on the right of the individual legatees to receive them, measured by the entire net estate, but on the right of decedent to have the estate pass by will or intestacy. *Plunkett v. Trust Co.*, 233 Mass. 471, 124 N. E. 265, and cases cited. While, as pointed out by White, C. J. (then Justice), in *Knowlton v. Moore*, 178 U. S. 41, 77, 20 Sup. Ct. 747, 762 (44 L. Ed. 969), there is a clear 'distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death,' there is no distinction whatsoever in the power of Congress, under article 1, § 8, of the Constitution, 'to collect taxes, duties, imposts and excises,' to provide for either kind of tax. The doubt as to validity expressed in that case, was limited to measuring a tax upon the succession of each individual legatee to a specific legacy by the value, not of his legacy, but of the entire net estate of the decedent; it did not extend to the power of Congress expressly to impose an estate tax rather than a legacy tax—to measure it by the value of the net estate and to cast the burden upon the residuary personal estate.

"Concededly, under *Knowlton v. Moore*, Congress may levy inheritance taxes on the privilege of succession to property transferred by death of the owner. It is contended, however, that a tax, not on the right of the beneficiary to receive, but on the privilege of transfer by will or intestacy, is unconstitutional, as upon an operation of the means provided by the state for the performance of functions exclusively within state control; that in some way, because ordinarily the rights which cease at death do not pass immediately, but only subject to the probate processes prescribed by the state, such a tax becomes a tax on the instrumentalities of a state. As both the right to receive a succession at or by death and the right to transfer at death are subject to exclusive state control, there is no basis, in my judgment, for any such distinction between them in respect to the constitutional power of Congress.

"Again, it is urged that, until there occurs some exercise of some right as to which a private option of renunciation exists, there is nothing to which the federal taxing power can constitutionally be applied. There is, however, ordinarily no right of renunciation under intestacy laws. Moreover, the option itself is derived from the state in the exercise of its exclusive control."

1918 Supp., p. 305, sec. 201.

Deduction before allotting share of widow.—Where a widow is entitled to one-half the personal estate of the decedent, her share is to be awarded to her subject to the payment of its proportion of the tax. The tax is not to be deducted before estimating her share. *Hampton v. Hampton*, (Ky. 1920) 221 S. W. 496.

1918 Supp., p. 306, sec. 202.

Income earned during administration, and appreciation during that period.—The government has no authority to require the inclusion in the gross estate, for the purpose of determining the net estate, of income earned during administration and appreciation during that period in the value of the property left by the decedent. (1916) 31 Op. Atty-Gen. 64.

Foreign real estate.—Real estate as such, located outside of the United States, belonging to a decedent resident within the United States, should not be included in determining the value of the gross estate of such decedent. (1918) 31 Op. Atty-Gen. 297, wherein it was said: "The generality of language in section 201 is clearly, for the purposes of the question propounded by you, limited by the subdivisions of section 202. While that section begins by including in the value of the gross estate of the decedent 'all property, tangible or intangible, wherever situated' it immediately explains that this is only to the extent of the 'interest' subject to the payment of the charges against the estate of the decedent and expenses of its administration, and subject to distribution as a part of it. Without in any way committing myself to an opinion as to the proper scope of these words, I do not think it can be denied that they are not exactly the words which Congress would have used had it intended to include foreign real estate. Subdivisions (b) and (c) are, in their main provisions, broad enough to cover foreign real estate, but the last paragraph of the section explicitly provides that 'for the purpose of this title . . . any property of which the decedent has made a transfer or with respect to which he has created a trust, within the meaning of subdivision (b) of this section, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or the creation of the trust, or at the time of the decedent's death.'

"Clearly these words are meaningless if Congress intended by its previous provisions to tax real estate whether situated in the United States or not. This being so, there is equally little reason to suppose that Congress intended to tax real estate situated outside of the United States passing by testate or intestate transfer, instead of by transfer in contemplation of death.

"Paragraph (1) of subdivision (a) of section 203 permits as a deduction from the gross estate charges against the estate allowed by the laws of the jurisdiction under which the estate is being administered, whether such jurisdiction is national or foreign. Here the intent is clear to levy a tax upon an estate which may for some reason be subject to a foreign jurisdiction; but, as was said above in regard to subdivision (a) of section 202, the language is not that which would naturally have been used if foreign real estate was meant to be included,

and may be fairly satisfied by an application to foreign personality.

"The sections in regard to the filing of a return (205) and to the payment of the tax (207, 209) are applicable to foreign real estate, to the extent of applying the rule of effectiveness (Dicey Conflict of Laws, 2d ed., p. 40, General Principle No. III; Blackstone v. Miller, 188 U. S. 189). That is to say, the above sections imposed a personal duty on the 'executor,' transferee, or trustee within the jurisdiction to pay the tax upon certain property, which duty, so far as the language of the sections in question goes, is broad enough to extend to foreign real estate.

"On the other hand, by the same sections a lien is created on the estate for the unpaid taxes, and by section 208 a suit to subject the property of the decedent to the payment of the taxes is authorized in the United States courts, neither of which provisions can, of course, apply to foreign real estate."

Trust estate for benefit of decedent.—Where a decedent disposes of a spendthrift trust estate, created for his benefit under the will of his mother who died previous to the passage of this Act, by a power of appointment under her will, such estate should not be included in determining the value of his estate under this section. Pearce v. Lederer, (E. D. La. 1919) 262 Fed. 993.

1918 Supp., p. 307, sec. 203.

State inheritance taxes are not to be deducted. New York Trust Co. v. Eisner, (8. D. N. Y. 1920) 263 Fed. 620, wherein the court said: "The question presented is whether this clause permits of the deduction of state inheritance taxes paid by the executor in a number of states and allowed to him in his accounting in the Surrogate's Court of decedent's domicile. On November 17, 1916, the Treasury Department ruled (T. D. 2395), that as 'state inheritance taxes are a primary charge against an estate and allowable as credits to executors and administrators, . . . they are clearly deductible.'

"Subsequently on September 10, 1917, this ruling was revoked and on an exhaustive study of the nature of state inheritance taxes they were declared not deductible.

"While doubts in a taxing statute are to be resolved in favor of the taxpayer the mere fact that the Treasury Department changed its original interpretation is not conclusive that the language of the act is so doubtful as to compel the application of this canon of construction.

"If this were a tax on the right of succession, an intention to tax only that which eventually passes to a beneficiary would be presumed. But, as a tax on the cessation of decedent's interest, such a presumption would extend at best to the entire net estate without deduction of any charges levied, not on it, but on the right or on the share of individual beneficiaries. What, then, are the 'charges against the estate as are allowed by the laws of the jurisdiction' included in

clause? Not all charges which under the laws an executor or administrator may or even must pay, whether for his own protection or otherwise, but only such charges, like all the other deductions, which affect the estate as a whole, only charges against the estate.

"Estate taxes or probate duties levied by the state would fall within this clause. Northern Trust Co. v. Lederer (D. C.) 257 Fed. 812. But taxes levied on the shares to be received by beneficiaries, reducing, not the estate, but the individual's share, cannot be deemed a charge upon the estate merely because the duty, with the corresponding liability and right to account in respect thereto in his estate accounts, is imposed upon the executor or administrator to pay the tax before distributing the share itself. The nature of the tax, as a succession, not an estate, tax, remains unchanged, despite the additional obligation thus imposed.

"The changes made by the present law (Act Feb. 24, 1919, § 403 [see 1919 Supp. p. 132]) afford no basis for interpreting the former law, for, while it excludes state succession and legacy taxes, it also expressly excludes state estate or inheritance taxes.

"In my judgment, the later interpretation of the act by the Treasury Department is sound, and the demurrer must be sustained."

Compare Lederer v. Northern Trust Co., (C. C. A. 3d Cir. 1920) 262 Fed. 52, *affirming* 257 Fed. 812, which was considered and reconciled in the above quoted opinion.

1918 Supp., p. 313, sec. 2.

Stock dividends as income.—Stock dividends are not "income" and therefore are not taxable under this section. They are not included in the sixteenth amendment to the United States Constitution (see vol. XI, p. 1110) providing that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states" and can only be taxed under a statute complying with art. 1, sec. 2, cl. 3 (see vol. X, p. 335) and art. 1, sec. 9, cl. 4 (see vol. X, p. 887) of such Constitution. *Eisner v. Macomber*, (1920) 252 U. S. 189, 40 S. Ct. 189, 64 U. S. (L. ed.) —.

Improvements as income—time of accrual.—Improvements affixed by a tenant which under the loan become the property of the lessor accrue to him at the time they are made, and a rule of the Treasury Department that they shall be deemed to accrue as of the date of the termination of the lease is invalid. *Cryan v. Wardell*, (N. D. Cal. 1920) 263 Fed. 248.

Building acquired under lease as income.—Where, under the terms of a lease, a building erected by the lessee on the leased premises becomes the property of the lessor immediately upon its construction, and some years thereafter the lessor acquires possession of the premises because of the lessee's

default in paying rent, the building cannot be regarded as income accruing to the lessor during the year in which he acquired possession of it and taxed as such under this section. *Miller v. Gearin*, (C. C. A. 9th Cir. 1919) 266 Fed. 225, 160 C. C. A. 293, wherein it was said:

"The lessor acquired nothing in 1916 save the possession of that which for many years had been her own. The possession so acquired was not income. It was not a gain, but was a loss. Assuming that the building was income derived from the use of the property, we think it clear that the time when it was 'derived' was the time when the completed building was added to the real estate and enhanced its value. At that time it represented a prepayment to the lessor of a portion of the rental, distributable over a period of 23 years. The lease provided that the ownership of all buildings or improvements put upon the premises was to vest in the lessor immediately upon the construction of the same, subject to the provisions of the lease. The decision in *Edwards v. Keith*, 231 Fed. 111, 145 C. C. A. 298, L. R. A. 1918A, 498, is not contrary to this view. In that case the court held that the commissions of an insurance broker, earned before the Income Tax Law was passed, but received thereafter, constituted income taxable in the year in which they were actually received."

Proceeds of accident insurance policy as income.—The proceeds of an accident insurance policy received by an individual on account of personal injuries sustained by him through accident are not income taxable under the provisions of this section. (1918) 31 Op. Atty.-Gen. 304, wherein it was said: "It is evident that if the proceeds of an accident insurance policy are to be brought within the provisions of the Act of September 8, 1916, as amended, it must be under the general words of subdivision (a) of section 2, *supra*: 'gains or profits and income derived from any source whatever.'

"In *Doyle v. Mitchell Brothers Company*, (247 U. S. 179), decided by the Supreme Court May 20 last, the question of the correct meaning of 'income' as used in the corporation excise tax act of August 5, 1909, was carefully considered. It was stated:

"'Whatever difficulty there may be about a precise and scientific definition of "income," it imports, as used here, something entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax; conveying rather the idea of gain or increase arising from corporate activities. As was said in *Stratton's Independence v. Howbert*, 231 U. S. 399, 415, "Income may be defined as the gain derived from capital, from labor, or from both combined." Understanding the term in this natural and obvious sense, it cannot be said that a conversion of capital assets invariably produces income. If sold at less than cost, it produces rather loss or outgo. Nevertheless, in many if not in most cases there results a

gain that may properly be accounted as a part of the "gross income" received "from all sources," and by applying to this the authorized deductions we arrive at "net income." In order to determine whether there has been gain or loss, and the amount of the gain if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.

"It is true that this decision deals with income earned from the business activities of corporations, and not in terms with the unearned income of individuals from investments. The principles laid down, however, seem general in their application. Moreover, the corporation tax act provided as a basis of the levy merely 'gross income from all sources,' whereas the corresponding general basis in the Act of September 8, 1916, is 'gains or profits and income derived from any source whatever'—language more apt for the exclusion of 'capital' receipts than the other. . . . Are the proceeds of an accident insurance policy 'gains or profits and income' according to the principles thus laid down by the Supreme Court? The proceeds of life insurance policies are expressly exempted from the act by section 4, nor does the fact that the section refers to them as 'income' seem significant. 'The value of property acquired by gift, bequests, devise, or descent' is treated in the same way, and yet the 'income' from such property is included. This seems to imply that the property itself is capital. As to fire, marine, and casualty insurance, paragraph (a) of section five impliedly prohibits the deduction of losses when compensated for by such insurance."

1918 Supp., p. 320, sec. 8 (g).

An inventory taken by a manufacturer of or dealer in merchandise at cost or market value, whichever is lower, is permitted by subdivision (g) of this section and by subdivision (d) of section 13 (see 1918 Supp. p. 334) subject, of course, to regulations made in accordance with said act. The same rule applies to a dealer or merchant in securities; and it is a matter for regulations issued by the Treasury Department under the authority of the aforesaid act to determine what constitutes a dealer or merchant in securities. (1918) 31 Op. Atty.-Gen. 301, wherein it was said:

"In *Doyle v. Mitchell Brothers Company*, (247 U. S. 179), decided by the Supreme Court on May 20 last, the general meaning of the term 'income' as used in the income-tax acts was defined, and it was held, affirming the opinion of the Court of Appeals for the Sixth Circuit in *Doyle, Collector, v. Mitchell Brothers Company*, 235 Fed. 686, as follows:

"In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross

proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration."

"Applying this rule to the case before the court, it was stated that the Mitchell Bros. Co. deducted from its gross receipts the inventory valuation as of December 31, 1908, of the stampage cut and converted during the year covered by the tax, and that 'this was in accordance with the true intent and meaning of the act.'"

"It follows necessarily from this opinion that an inventory taken by a manufacturer of or dealer in merchandise at cost or market value, whichever is lower, is permitted by subdivision (g) of section 8 of the Act of September 8, 1916, and by subdivision (d) of section 13, since it cannot be said that this method of computation is upon a basis which does not clearly reflect income, subject, of course, to regulations made in accordance with the act."

"I therefore answer your first question in the affirmative."

"As no valid distinction can be suggested between a dealer in merchandise and a dealer or merchant in securities, I answer your second question likewise in the affirmative. What constitutes a dealer or merchant in securities is a matter for regulations issued by yourself under the authority of the act."

1918 Supp., p. 327, sec. 11 (a).

Association of agriculturists acting as purchasing agents for members.—An association known as "Houlton Grange," composed of persons engaged in agriculture, which acts as the agent of its members for the purchase of goods needed by them, reselling the goods to them at prices fixed by the association, is not exempt from the income tax imposed by this act, because it does not operate under the lodge system or provide for benefits to its members, and because it does not operate as sales agent for the purpose of marketing the products of its members. As far as this tax is concerned the association in question stands upon the same footing as any individual, partnership, or corporation whose business it is to buy and sell merchandise, and the tax is levied not upon the gross income but the net income. (1919) 31 Op. Atty.-Gen. 403, wherein, commenting on subdivisions "First" and "Eleventh," it was said: "The first exception manifestly was intended to apply to well-known classes of associations, the purpose of whose organization—or, at least, one of its purposes—is to provide for the payment of life, sick, accident, or other benefits to the members. Laws providing for the organization of such associations have been enacted in nearly all of the states. They are in substance quasi insurance companies. The act in question has defined in very plain language the associations to which reference is made. They are to be fraternal beneficiary societies or orders, they are to operate under the lodge

system, and they are to provide for the payment of life, sick, accident, or other benefits to members. To come within the exemption of the act any association must possess these characteristics. In the present case, as stated by you, the association does not operate under the lodge system and it does not provide for the payment of life, sick, accident, or other benefits such as are usually provided for in a quasi insurance company, which Congress manifestly had in contemplation. Such associations, so far as they are engaged in business at all, are engaged in a species of insurance business. The association now under consideration is actively engaged in the business of buying and selling goods—that is, dealing in merchandise. It has a relief committee, whose members visit sick members and render assistance to them when the association so directs. This is an incident of the fraternal rather than the beneficiary feature of an association. The association in question, in my opinion, is excluded from the exemption both because it does not operate under the lodge system and because it does not, as contemplated by the act, provide for benefits to members.

"The association, it is equally plain, is excluded from the benefits of the second paragraph of the act quoted above. That paragraph manifestly intended to exempt from the tax certain associations of farmers and fruit growers. It did not, however, exempt all such associations. On the contrary, it limited the exemption to such associations as should operate as sales agent for the purpose of marketing the products of its members. This association does not do this. It acts as the agent of its members for carrying on the business of purchasing such goods as the members need and reselling them to the members. In other words, it is not a sales agent, but a purchasing agent. It, in fact, is a dealer in merchandise."

Credit union as "cooperative bank."—Credit unions organized under the laws of the Commonwealth of Massachusetts, being in substance and in fact the same as "cooperative banks . . . organized and operated for mutual purposes and without profit," come within the provisions of the fourth paragraph of this section. (1917) 31 Op. Atty-Gen. 176, wherein it was said: "The similarity between credit unions and cooperative banks, as they exist in Massachusetts, is striking. Having in mind the history of the insertion of the fourth paragraph of section 11 of the income tax law, it must be conceded that although credit unions do not come within the letter of the paragraph, such associations are wholly within the intention and meaning of Congress as therein expressed. Because the words 'credit union' were not specifically used is certainly no reason for saying that such organizations are subject to the tax imposed by the act, if on examination of the purpose and object of such associations it appears that they are substantially identical with domes-

tic building and loan associations or cooperative banks 'organized and operated for mutual purposes and without profit.' It is to be presumed that Congress intended that the general terms used in section 11 should be so construed as not to lead to injustice, oppression, or an absurd consequence. *Holy Trinity Church v. United States*, 143 U. S. 457.

"The history of credit unions in the United States is a brief one, the first credit union being organized in Massachusetts in 1910 under the provisions of chapter 419, acts of 1909, and since that time more than 50 credit unions have commenced operations in that state. The legislatures of New York, Wisconsin, and Texas have authorized the establishment of the system."

Income belonging to a charity.—Income received by a decedent's estate which is bequeathed under the will to a charity is not taxable under this Act, since this section specifically provides that income which belongs to a charitable institution shall not be subject to the tax. *Stockton v. Lederer*, (E. D. Pa. 1919) 262 Fed. 173. In passing upon this question, the court said: "The argument of counsel for the United States, concisely and perhaps inadequately stated, is that, the estate being an entity or person having an income within the meaning of the tax laws, this income is taxable as such notwithstanding the fact that it ultimately goes to the charity. The thought upon which the argument is based is supported by the statement that, notwithstanding the fact that the estate is large and the income therefrom many times the sum required to meet the annuities, there is no legal certainty that anything will go to the charity. The income as income belonging to the estate is taxable under the provisions of the taxing statute, and is exempt only so far as it goes to the charity. Therefore, if it does not go to the charity, there is no ground of exemption, and as it cannot now be determined with legal certainty that it will go to the charity, it remains taxable. There are at least two obstacles in the way of the acceptance of this argument as sound. One is that there are two grounds of exemption from taxation. A part of the income is exempt because of the exemption in favor of charity. The other part is exempt because it is below in amount the taxable limit. The two take in the whole income, and it is difficult to escape the conclusion that if the whole income is exempt, none of it is taxable. The other obstacle is really the same viewed from a different standpoint. It is that this income is not the income of the estate, but of the parties to whom it is given. The legal representatives of the testator are nothing more than the reservoir and conduit pipe through which the income reaches the beneficiaries of the testator's bounty. If that income is cut off, so that it does not arise or is lost in the hands of the trustees, the loss is the loss of the beneficiaries. This is nothing more than

the emphatic statement that the income which the United States is proposing to tax is their income. Moreover, it may be stated in addition that the fact theory upon which counsel for the United States base their argument is wholly fanciful and artificial. Practically speaking, there is a surplus of income which goes to charity, so that the whole fabric of the argument is based upon a legal figment, and to recur to the thought already expressed, as no part of the income is taxable if it is the income of the beneficiaries, we do not see how the fact that the charitable beneficiary may not receive its share in any way affects the question.

"We have dealt with the case as to its facts on the basis of the corpus of the residuary estate, together with the accumulations of income going under the will to the charity. Of course, if there were here an intestacy as to the whole or any part of the estate an entirely different question would arise, because the income which is claimed to be taxable would not be within the exception to the act. We have viewed the question of intestacy as a closed question for the reason that this will has been construed by the state courts, and the finding made thereon fixes the status of all possible claimants. As a consequence we must perforce accept this finding, inasmuch as a finding by this court that any portion of the estate, either corpus or income, passed to distributees under the intestate laws would be the finding of something which does not exist and which legally cannot possibly come into existence. As a further consequence we have not taken up the subject of intestacy, but accept the ruling made that the decedent did not die intestate as to any part of his estate.

"It may be conceded that the income from this estate is within the general taxing clause of the act of Congress because all persons who receive income which ultimately goes to another are required to withhold out of the income a sum equivalent to the normal income tax and render a return thereof, etc. It is to be observed, however, that the income out of which this tax sum is to be withheld is the income of some one who is subject to the tax, and subclause (a) of clause G (38 Stat. 172) provides that income moneys which go to charity and other named institutions of like general character are not within the taxing clause of the act. This statement is made with respect to the provisions of the taxing act of 1913 (Act Oct. 3, 1913, c. 16, 38 Stat. 114) assuming it to include the incomes from unsettled decedents' estates which were included by the act of 1916 (Act Sept. 8, 1916, c. 463, 39 Stat. 756).

"The act of 1917 (Act Oct. 3, 1917, c. 63, 40 Stat. 329), so far as we have been able to discover, does not change the situation. The language employed in the act of 1916, which makes clear the inclusion of incomes from decedents' estates as taxable, is open to a construction which would include the income which is derived from the assets of this

estate, but section 11 (a) of the same act specifically provides that income which belongs to a charitable institution shall not be subject to the tax. The part of the income which goes to the sole remaining annuitant is not taxable because of the provision which is in every one of the acts declaring incomes up to a certain amount not to be taxable under the act."

1918 Supp., p. 328, sec. 11 (b).

The Pennsylvania workmen's compensation fund, which is established to insure employers against the liability imposed by the state workmen's compensation act, is exempt from taxation under this section and paragraph. (1918) 31 Op. Atty-Gen. 303.

1918 Supp., p. 334, sec. 13 (c).

Liability of trustee in bankruptcy to tax. — Only net income earned by a trustee while operating the business of a bankrupt corporation is taxable under paragraph (c) of this section. Accordingly, where a trustee is not carrying on the business of the bankrupt corporation, funds, alleged to constitute net income, which are the result of a compromise made by the trustee with a foreign corporation of a claim for nonpayment of salary and commissions by the foreign corporation to the bankrupt corporation as its agent, are not taxable under this section. *In re Heller*, (C. C. A. 2d Cir. 1919) 258 Fed. 208, 169 C. C. A. 276.

1918 Supp., p. 334, sec. 13 (d).

An inventory taken by a manufacturer of or a dealer in merchandise at cost or market value.— See annotation under sec. 9(g) *supra*, p. 555.

1918 Supp., p. 335, sec. 14.

Right of state officers to access to returns. — The act of the state of New York (Laws 1917, ch. 726), which imposes a franchise tax on manufacturing and mercantile corporations, does not impose "a general income tax" within the meaning of the proviso of this section authorizing proper state officers to have access to and abstracts of income returns of corporations. Therefore the Secretary of the Treasury is not authorized to grant the request of the governor of New York to have access to the returns of income made to the Federal Government or to abstracts thereof in so far as the request is based upon the aforesaid proviso. (1917) 31 Op. Atty-Gen. 148.

1918 Supp., p. 339, sec. 600.

Sales in foreign commerce.— The tax levied by this section, and by the analogous sections, upon articles sold by a manufacturer, producer, or importer, does not apply to sales in foreign commerce by a manufacturer, producer, or importer located in one of the several states of the United States.

(1918) 31 Op. Atty-Gen. 299, wherein it was said:

"In my opinion to you of March 12 last (31 Op. 239) I held that section 500 of the Act of October 3, 1917, levying a tax upon the transportation of property from one point in the United States to another should not be held applicable to property in the course of transportation to foreign countries, because such a construction would cause grave doubt as to the validity of that portion of the act, in view of the constitutional prohibition against a tax upon articles exported from any state.

"Since that opinion was rendered the Supreme Court, in the case of *Peck v. Lowe*, decided May 20 last, has announced at length the principles governing this subject, so as to leave nothing except their intelligent application.

"In the case referred to the court, having before it the unlimited power of Congress to lay taxes on the one hand and the constitutional prohibition that no tax shall be laid on articles exported from any state on the other, stated that the amendment prohibiting a tax on articles exported—

"'Excepts from the range of that power articles in course of exportation, . . . the act or occupation of exporting . . . , bills of lading for articles being exported . . . , charter parties for the carriage of cargoes from state to foreign ports . . . , and policies of marine insurance on articles being exported In short, the court has interpreted the clause as meaning that exportation must be free from taxation, and therefore, as requiring "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which *directly* burdens the exportation."'

"The court then announced as a general principle governing the validity of a tax claimed to be on articles exported that—'The true test of its validity is whether it "so directly and closely" bears on the "process of exporting" as to be in substance a tax on the exportation.'

"Finally, in deciding that a tax on the net income of an exporter was not a tax on the articles exported by him, the court, explaining the extent to which it was prepared to go, stated that such a tax upon the net income of the individual engaged in the business of exporting was not a tax 'on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes.'

"The inference necessarily and justly is that a tax upon anything which inherently or by the usages of commerce is embraced in exportation or any of its processes is a tax upon 'articles exported' within the meaning of the Constitution.

"The tax levied by section 600 of the Act of October 3, 1917, and by the analogous sections is clearly one on sales, and it is measured by the price for which the article is sold. If, therefore, this tax be held to

apply to sales in foreign commerce, its incidence will be directly upon a process inherently embraced in exportation to as full an extent as a tax on freights, on the charter party, or on the policy of insurance.

"The subject matter of your question is therefore governed by my opinion to you of March 12 last, confirmed by the principles stated by the Supreme Court in *Peck v. Lowe*, 247 U. S. 165, 173, 174."

1918 Supp., p. 339, sec. 600 (a).

Sale of truck in parts.—No tax is imposed by this section on the sale by different persons of parts of automobile trucks to be assembled for the purchaser. *Rech-Marbaker Co. v. Lederer*, (E. D. Pa. 1919) 263 Fed. 593.

1918 Supp., p. 351, sec. 301.

Who is "manufacturer of shells."—A corporation which, having contracted to manufacture and deliver to a foreign government high explosive shells, enters into contracts with others for the performance of the necessary operations to produce a completed shell, doing none of the work itself except the manufacturing of steel in bar form suitable for the shells, and the furnishing its subcontractors with certain other materials such as "transit plugs," "fixing screws," and "copper tubing," is subject to the munitions manufacturers' tax imposed upon every person manufacturing projectiles, shells, or torpedoes of any kind. *Carbon Steel Co. v. Lewellyn*, (1920) 251 U. S. 501, 40 S. Ct. 283, 64 U. S. (L. ed.) — (affirming (C. C. A. 3d Cir. 1919) 258 Fed. 533, 169 C. C. A. 473), wherein it was further held that the question whether the subcontractors of a corporation which has contracted to manufacture and deliver to a foreign government high explosive shells were correctly assessed under the munitions tax did not concern the corporation in its efforts to resist such a tax on the profits made by it.

The net profits received by a corporation from the manufacture and sale of certain steel forgings to be used by the vendee to fulfill the latter's contract to supply a foreign government with high explosive shells are taxable under this section, imposing a tax on any person manufacturing shells or any part of them. *Forged Steel Wheel Co. v. Lewellyn*, (1920) 251 U. S. 511, 40 S. Ct. 285, 64 U. S. (L. ed.) 1, affirming (C. C. A. 3d Cir. 1919) 258 Fed. 533, 169 C. C. A. 473.

A corporation which, under inspection in behalf of the French government, made the steel for and did the forging on certain shell bodies under an order from another corporation, to enable the latter to carry out its contract with such government for certain explosive shells, was engaged in manufacturing a part of such shells within the meaning of the Munition Manufacturers' Tax Act imposing a tax upon the profits of every per-

son manufacturing projectiles, shells, or torpedoes, or any part of any such articles. *Worth Bros. Co. v. Lederer*, (1920) 251 U. S. 507, 40 S. Ct. 282, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 3d Cir. 1919) 258 Fed. 533, 169 C. C. A. 473.

1918 Supp., p. 355, sec. 500.

Freight on articles in course of exportation is not covered by this section. And the question whether articles are in course of exportation does not depend upon the bill of lading or like formal matters, but upon the real substance and intent of the shipment. (1918) 31 Op. Atty-Gen. 239.

1918 Supp., p. 358, sec. 504 (c).

Policies of insurance issued by state under State Workmen's Compensation Act.—Policies of insurance issued by the state of Pennsylvania under the provisions of the State Workmen's Compensation Act are not subject to the special tax imposed upon policies of insurance by this section and paragraph. (1918) 31 Op. Atty-Gen. 308.

1918 Supp., p. 371, Schedule A, par. 4.

Borrowing and return of shares.—The stamp tax imposed by this section applies to the so-called borrowing and return of shares or certificates of stock. (1918) 31 Op. Atty-Gen. 256, wherein, answering a letter of the Secretary of the Treasury, it was said:

"You inclose a copy of an opinion rendered you by the Solicitor of Internal Revenue to the effect that the transfer of the stock from the lender to the borrower, and later from the borrower to the lender in fulfillment of the former's obligation, are both subject to the tax. With this conclusion I agree for the following reasons:

"1. The act by its express terms, it will be observed, covers every transfer of the legal title to shares of stock with certain specific exceptions. There can certainly be no doubt that there is a transfer of the legal title from the lender to the borrower and later from the borrower to the lender under the circumstances stated. Shares of stock are fungible things, and their loan with an agreement to return things of the same class is the mutuum of Roman law, as to which no one can doubt that title passed from the lender to the borrower and vice versa. . . .

2 It cannot be said that the borrower is a mere agent between the lender and the vendee, so as to make what is in appearance two transactions in reality only one. There is no privity between the lender and the vendee. The former looks merely to the borrower and assumes no relationship further. There are, therefore, in substance, two transactions, a transfer by the lender to the borrower, and a transfer by the latter to the vendee, and the tax must be paid on each. . . . 3. As for

the provisos in subdivision 4, they should receive a fair interpretation in connection with the whole, but there must be clear language before it can be assumed that exemption from taxation was intended. . . . The first proviso deals with deposits of stock as collateral security for a loan, and the second with the transfer of stock between a broker and his customer. Under no fair interpretation can either be held to cover the loan of stock under the circumstances now under consideration.

"A loan of stock cannot be called a pledge thereof within the meaning of the first proviso. The transaction is, in effect, the reverse of that covered by the proviso. In the latter case, money is loaned, and stock is deposited as collateral for its return. In the case now in question stock is loaned and money is deposited as collateral for its return. In one case the debt is money, in the other stock. . . . As to the second proviso, it is sufficient to say that the relationship between the lender and the borrower in the present case is not, in any sense, that of a broker buying and selling stocks for a customer."

1918 Supp., p. 373, Schedule A, par. 7.

A sheriff's deed given on mortgage foreclosure is not subject to the stamp tax prescribed by this paragraph. *Boise Title, etc., Co. v. Pfost*, (1920) 32 Idaho 743, 188 Pac. 36.

1918 Supp., p. 379, sec. 29.

"Net income" as used in this section does not affect the definition of the term as given elsewhere in the act. *People v. Knapp*, (1919) 227 N. Y. 64, 124 N. E. 107.

1919 Supp., p. 97, sec. 213.

Constitutionality of provision affecting judge.—The provision of this section imposing an income tax on the salaries of United States judges is unconstitutional as in violation of art. III, sec. 1 (see vol. XI, p. 72), providing that all federal judges shall at stated times receive for their services a compensation "which shall not be diminished during their continuance in office." *Evans v. Gore*, (1920) 253 U. S. 245, 40 S. Ct. 550, 64 U. S. (L. ed.) —, *reversing* (W. D. Ky. 1919) 262 Fed. 550.

Salaries and wages of state officials and employees are not subject to an income tax. (1919) 31 Op. Atty-Gen. 441, wherein it was said:

"In my opinion the Solicitor of Internal Revenue has reached the correct conclusion. This conclusion rests upon the well-settled rule that the governmental agencies of the states are not subject to taxation by the Federal Government, just as the governmental agencies of the Federal Government are not subject to taxation by the states. Col-

lector v. Day, 11 Wall. 113; Pollock v. Farmers' Loan & Trust Company, 157 U. S. 429; McCulloch v. Maryland, 4 Wheat. 316, 427; Dobbins v. Commissioners of Erie County, 16 Pet. 435.

"The Act in question provides that the taxable income shall include, among other things, gains, profits, and income derived from salaries, wages, or compensation for personal service. It does not specifically mention, by way either of inclusion or exclusion, salaries or wages of state officials or employees. Since, however, there cannot be any doubt that such wages and salaries are beyond the taxing power of Congress, it cannot be assumed that they were intended to be included under the general head of wages and salaries mentioned in the Act. The Act must be construed as applying only to such wages and salaries as can be constitutionally taxed by the Federal Government."

1919 Supp., p. 107, sec. 223.

Who may administer oaths to returns.—Section 406 of the regulations promulgated under this Act authorizes commissioners of deeds to take oaths to individual income tax returns. U. S. v. Benowitz, (S. D. N. Y. 1919) 262 Fed. 223, wherein it was said:

"Section 406 begins by the bare statement that all returns must be verified on oath, in that respect merely repealing the statute. Yet it very clearly intended—though it must be confessed it is very blindly worded—to cover the whole matter, because it at once proceeds to particulars, providing that soldiers and sailors may take oaths before any one generally authorized to administer oaths to soldiers and sailors and that persons abroad may go to consular officers. It is, of course, absurd to suppose that the section taken as a whole meant to say that only such officers might administer oaths. If so, no one need, or indeed could, verify his return unless it were soldiers and sailors and persons abroad. This would repeal the statute in substance; indeed, such a regulation would be illegal.

"Finally, the section concludes with a provision for the certification of oaths taken by a 'foreign notary or other official having no seal.' This, of course, directly implies that foreign notaries may take such oaths, and that there are also officials so authorized who have no seals other than they. It is perfectly apparent from this language that those who drafted the section must have supposed that the first sentence authorized some officers to take oaths, for the last sentence from which the question was taken would be without any conceivable meaning if they did not, just as the second and third sentences, while logically possible, would be absurd and indeed invalid in law. If so, the only question is as to what officers the draftsmen of the section must have meant.

"Much the most rational, and, so far as I can see, the only possible, interpretation is that they meant to include all such as were authorized by the local law to take oaths in their several districts. If I do not so interpret the language, I must suppose that the regulation which was meant to put the statute into effect illegally defeated it by applying it in a whimsically capricious way. I interpret the regulation, therefore, as intended to allow a commissioner of deeds, among other officials, to take such an oath."

Return by executor.—If a person is deceased and his estate is subject to the tax the return must be made by the executor of the estate if there is one. *In re Hazard*, (1920) 228 N. Y. 26, 126 N. E. 345.

1919 Supp., p. 110, sec. 234.

Contributions to charities, etc.—Corporations are not entitled to deduct from their gross income for the purposes of the income tax the amount of contributions made to religious, charitable, scientific, or educational corporations or associations, even though such contributions are made to the Red Cross or other war activities. (1919) 31 Op. Atty-Gen. 617, wherein it was said:

"The question presented is not whether corporations may lawfully make such contributions or gifts, but whether they fall within one of the deductions allowed to be made from gross income in ascertaining the net incomes of corporations subject to the tax. It is clear that there is no express deduction permitted of such contributions or gifts, and unless, therefore, they fall within the definition of some item of deduction allowed to corporations by section 234, Part III, Title II, of said Revenue Act, they are not permitted.

"The only head within which it might be suggested that such contributions could be included is that of expenses.

"The language used in this exemption is very guarded, and permits the deduction only of—

"All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments required to be made as a condition to the continued use or possession of property to which the corporation has not taken or is not taking title, or in which it has no equity." (40 Stat. 1077.)

"It will be observed that all expenses are not allowed, but only ordinary and necessary expenses; also, of ordinary and necessary expenses, only those paid or incurred in carrying on any trade or business, including reasonable salaries or compensation, rentals, and payments for use of property as above defined. Practically these same deductions are permitted in section 214 in the case of individuals; and had such words included

the contributions or gifts mentioned in paragraph 11 of section 214, it would have been unnecessary to put in such paragraph, as they would have been covered by paragraph 1 of said section. It is also evident that the ordinary and necessary expenses contemplated by paragraph 1 of sections 214 and 234, allowing deduction of ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business in the case of both individuals and corporations, were not intended to include all necessary expenses, because the two immediately succeeding paragraphs provide for deducting interest and taxes, both of which will be recognized as necessary expenses; also the provision in regard to allowance for salaries, compensation, rentals, etc., indicates that all of the expenses, which are contemplated under the terms used in paragraph 1 of these two sections, are expenses incurred directly in the maintenance and operation of the business, and not all those which may be beneficial or even necessary in the broader sense.

"In addition to the above considerations, and to the fact that there is express provision for deducting contributions or gifts in the case of individuals, which is wanting in the section providing for deductions to be made by corporations, the Congressional Record shows that when the revenue bill was under consideration an amendment was offered providing that corporations might make deductions of contributions or gifts as in the case of individuals. This amendment came to a vote and was defeated, the principal reason assigned in the debate being that it would be dangerous to authorize directors to be generous with the money of their stockholders even for such laudable purposes. This presents, therefore, a legislative history, not only showing the impressions of individual members, but an action by one of the Houses of Congress expressly refusing to permit the deduction under consideration in the case of corporations."

1919 Supp., p. 130, sec. 401.

Tax as payable out of estate rather than legacies.—The tax imposed by this section is payable out of the estate and is not a tax on legacies to be paid by legatees. *Plunkett v. Old Colony Trust Co.*, (1919) 233 Mass. 471, 124 N. E. 265, 7 A. L. R. 696; *In re Hamlin*, (1919) 226 N. Y. 407, 124 N. E. 4, 7 A. L. R. 701.

1919 Supp., p. 140, sec. 503 (c).

Policies issued on weekly or monthly payment plan.—In calculating the tax imposed by the proviso of this section, on casualty insurance policies, issued on the weekly or monthly payment plan, only the regular weekly or monthly premium can be included and the policy fee must be excluded. (1919) 31 Op. Atty.-Gen. 398 wherein it was said: "In the case of casualty insurance generally, the tax is a fixed per cent of 'the premium

charged' under each policy. In the case of industrial insurance, however, it is a fixed per cent of the amount of the first weekly or monthly premium. In this class of insurance there is a fixed sum, the payment of which is to recur each week or each month, and which is known as a weekly or monthly premium. In addition, upon the issuance of the policy a fixed sum is charged and called a policy fee, and this is paid to the agent for his services. In a sense, at least, this may be called a premium, since it is a part of the consideration paid for the issuance of the policy. And in the case of marine, inland, and fire insurance, as well as casualty insurance in general, where the tax is levied on 'the premium charged,' it would probably be treated as a part of the premium. But in the case under consideration the language used is different. It is a fixed per cent of the amount of the first weekly or monthly premium. A weekly premium is one which must be paid each week during the life of the policy. Manifestly, the amount of the weekly premium is the amount which must be paid regularly week after week. The tax is not levied on the first payment, but on the first weekly or monthly premium. The first payment, as actually made, consists of two items: a fixed sum or policy fee, and the amount which must be paid regularly each week or each month thereafter. Congress could, of course, have made the amount which the insured is required to pay upon the delivery of the policy the basis for the tax. On the other hand, it could, if it saw fit, measure the tax by the amount to be paid regularly each week or month. Every person taking such insurance understands that what is meant by a weekly premium is the amount which he must pay at weekly intervals. I think Congress has manifested a clear intention to make this amount the basis for the tax and that the policy fee is entirely separate and distinct from the weekly or monthly premium. I am therefore of opinion that in calculating the tax only the regularly weekly or monthly premium can be included and that the policy fee must be excluded."

1919 Supp., p. 145, sec. 608.

Beer removed from government custody prior to passage of Act.—Beer upon which the tax imposed by previously existing law had been paid, and which had been removed from government custody prior to the passage of this act, was not subject to the additional tax imposed by the section. (1919) 31 Op. Atty.-Gen. 615.

Beer containing one-half of one per centum, or more, of alcohol manufactured and sold after May 1, 1919, was subject to the tax imposed by this section. (1919) 31 Op. Atty.-Gen. 442.

1919 Supp., p. 146, sec. 611.

Cider is subject to the wine tax when sold as wine, and is subject to the soft drink tax

when sold not as wine but in bottles or other closed containers, but it is not otherwise subject to the internal revenue laws. (1919) 31 Op. Atty.-Gen. 491.

1919 Supp., p. 160, sec. 900.

Sales to state or political subdivision.—The excise tax imposed by this section upon sales by manufacturers, producers, or importers of the articles enumerated in said section, applies to sales of such designated articles to a state or a political subdivision thereof, except those articles specified in subdivision 10 of the section. (1919) 31 Op. Atty.-Gen. 520, wherein it was said: "The United States, of course, cannot tax the property or the instrumentalities of a

state, but here the tax is not laid upon either the property or the instrumentalities of the state. If it reaches the state at all it does so only in an indirect manner. The tax is laid upon the manufacturer, and while it is probable that he will pass it on to the consumer, the tax itself is not laid upon the consumer. The burden, therefore, if it falls upon the state, does so indirectly. Such an incidental and indirect effect results from the payment of all taxes, and while this tax may be traced more directly into the cost to the state, yet the fact remains that it is an incidental and indirect burden upon the state and not the taxation of either its property or its instrumentalities."

INTERSTATE COMMERCE

Vol. IV, p. 337, sec. 1 [A]. [First ed., vol. III, p. 809.]

VI. Validity of state statutes.

VIII. Persons, etc., subject to act.

2. Telegraph companies.

IX. Commerce as interstate or intrastate.

VI. VALIDITY OF STATE STATUTES (p. 340)

Statute of limitations.—In the absence of a federal statute or a rule of the Interstate Commerce Commission the state statute of limitations governs as to the time for beginning an action by a carrier to recover the difference between an undercharge and the established rate. *St. Louis Southwestern R. Co. v. Shields Grain, etc., Co.*, (Tex. Civ. App. 1920) 220 S. W. 183.

VIII. PERSONS, ETC., SUBJECT TO ACT

2. Telegraph Companies (p. 343)

In general.—To the same effect as the original annotation, see *Western Union Tel. Co. v. Hanlin*, (Ind. App. 1920) 125 N. E. 45.

The federal government has assumed charge of the field of interstate commerce, and by the Act of Congress approved June 18, 1910, has assumed charge of interstate commerce by telegraph, and thereby has removed and exempted the same from the field of state regulation or interference. Congress has conferred upon the Interstate Commerce Commission full power over rates, charges, facilities, classifications, and practices of telegraph companies engaged in interstate commerce, and has given to the Interstate Commerce Commission power to approve, alter, or acquiesce in existing rates or classifications. *Klotz v. Western Union Tel. Co.*, (Ia. 1920) 175 N. W. 825.

Restriction on state authority—Penalizing delay on delivering message.—Congress has so far taken possession of the field by

enacting the provisions of the Act of June 18, 1910, bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, as to prevent a state from thereafter penalizing the negligent failure of a telegraph company to deliver promptly an interstate telegram in that state. *Western Union Tel. Co. v. Boegli*, (1920) 251 U. S. 315, 40 S. Ct. 167, 64 U. S. (L. ed.)—, (reversing (1917) 187 Ind. 238, 115 N. E. 773) wherein the court said: "The Telegraph Company challenged the right to subject it to a penalty fixed by a law of Indiana for failure to deliver promptly in that state a telegram sent there from a point in Illinois, on the ground that the Act of Congress of June 18, 1910 (36 Stat. 539, 545, c. 309), amending the Act to Regulate Commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379), had deprived the state of all power in the premises. The court conceding that if the act of Congress dealt with the subject the state statute would be inoperative, imposed the penalty on the ground that the act of 1910 did not extend to that field. The correctness of this conclusion is the one controversy with which the arguments are concerned.

"The proposition that the act of 1910 must be narrowly construed so as to preserve the reserved power of the state over the subject in hand, although it is admitted that that power is in its nature federal and may be exercised by the state only because of nonaction by Congress, is obviously too conflicting and unsound to require further notice. We therefore consider the statute in the light of its text and, if there be ambiguity, of its context, in order to give effect to the intent of Congress as manifested in its enactment.

"As the result of doing so, we are of opinion that the provisions of the statute bringing telegraph companies under the

Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the court below erred, therefore, in imposing the penalty fixed by the state statute.

"We do not pursue the subject further; since the effect of the Act of 1910 in taking possession of the field was recently determined in exact accordance with the conclusion we have just stated. *Postal Telegraph Co. v. Warren-Godwin Lumber Co.*, 251 U. S. 27, 40 Sup. Ct. Rep. 69. That case, indeed, was concerned only with the operation, after the passage of the Act of 1910, of a state statute rendering illegal a clause of a contract for sending an interstate telegram limiting the amount of recovery under the conditions stated in case of an unrepeatd message; but the ruling that the effect of the Act of 1910 was to exclude the possibility thereafter of applying the state law was rested, not alone upon the special provisions of the Act of 1910, relating to unrepeatd messages, but upon the necessary effect of the general provisions of that act, bringing telegraph companies under the control of the Interstate Commerce Act. The contention as to the continuance of state power here made is therefore adversely foreclosed. Indeed, in the previous case the principal authorities here relied upon to sustain the continued right to exert state power after the passage of the Act of 1910 were disapproved, and various decisions of state courts of last resort to the contrary, one or more dealing with the subject now in hand, were approvingly cited."

State statutes imposing a penalty for delay in transmission are inapplicable to an interstate message. *Foster v. Western Union Tel. Co.*, (Mo. App. 1920) 219 S. W. 107.

Telegram to point in same state relayed at office in another state as interstate telegram.—A message addressed to a point within the state but sent to a point without and thence relayed to destination is an interstate message. *Keippel v. Western Union Tel. Co.*, (Kan. 1920) 186 Pac. 993.

It has been held, however, that where a telegram is sent from a point in a state to another point in the same state it is an intrastate telegram if unnecessarily relayed at an office of the company in another state. *Speight v. Western Union Tel. Co.*, (1919) 178 N. C. 146, 100 S. E. 351, which further held that where a telegraph company has direct available facilities for transmitting an intrastate telegram altogether within the state, and relays it at offices in another state, the burden of proof is upon it to show that it was not done to evade the jurisdiction of the state court.

Mental anguish is not an element of recovery for failure to deliver an interstate message. *Western Union Tel. Co. v. Kilgore*, (Tex. Civ. App. 1920) 220 S. W. 593.

Punitive damages.—Punitive damages will not lie against a telegraph company for alleged negligent failure to properly transmit and promptly deliver a message sent by the plaintiff where even assuming that the conduct of the defendants' agent showed a reckless disregard of the rights of the plaintiff, the testimony failed to show that the principal either expressly or impliedly participated in the wrongful act. *Western Union Tel. Co. v. Norman*, (Miss. 1920) 83 So. 465, wherein the court said: "Whether or not the plaintiff is entitled to recover punitive damages in this case is to be governed by the law announced by the United States Supreme Court. *Byers' Case*, *supra* [240 U. S. 612, 36 Sup. Ct. 410, 60 L. Ed. 825, L. R. A. 1917A 197]. In the case of *Railroad Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97, the leading case of that court upon the subject of the recovery of punitive damages, it is held that punitive damages are not recoverable against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed."

IX. COMMERCE AS INTERSTATE OR INTRA-STATE (p. 348)

Shipment passing out of state en route.—

A shipment from one point to another in the same state but which en route passes through another state is interstate. *St. Louis Southwestern R. Co. v. Shields Grain, etc., Co.*, (Tex. Civ. App. 1920) 220 S. W. 183.

Effect of division of territory.—When after the passage of the Interstate Commerce Act the territory of Oklahoma was carved out of Indian territory, commerce between Oklahoma and the remaining Indian territory became interstate and was thereafter governed by the Act. *Chicago, etc., R. Co. v. Gist*, (Okla. 1920) 190 Pac. 878.

Vol. IV, p. 355, sec. 1 [C]. [First ed., 1912 Supp., p. 113.]

II. "Just and reasonable" charges.

7. Effect of published schedule rate.
8. Telegraph messages.

II. "JUST AND REASONABLE" CHARGES

7. Effect of Published Schedule Rate (p. 358)

Failure to post in stations.—"When a freight rate has been filed for the required length of time with the Interstate Commerce Commission, and by that commission authorized and adopted, it then becomes effective, although not filed with the station agents or posted in the different stations." *Bush v. Miller*, (Mo. 1919) 216 S. W. 989.

8. *Telegraph Messages* (p. 358)

Addressee of telegram as bound by conditions between sender and telegraph company.—All just and reasonable conditions and regulations, prescribed in a contract between a telegraph company and the sender of a message, are binding on the addressee, whether his action to recover damages for breach of duty be in tort or in assumpsit on the contract. *Durham v. Western Union Tel. Co.*, (W. Va. 1920) 102 S. E. 113.

Rates for use of private wires as discriminatory.—In *Postal Tel.-Cable Co. v. Associated Press*, (1920) 228 N. Y. 370, 127 N. E. 256 (*affirming* (1918) 184 App. Div. 590, 171 N. Y. S. 791), the action was on contracts to recover compensation for the use by the defendant of private wires of the plaintiff. The contracts provided for a fixed rate of compensation, but thereafter and during the time of the contract the plaintiff reduced its rates for like service to others. It was held that the recovery should be limited to the then prevailing rates. The court said: "In August, 1912, the Postal Telegraph-Cable Company made a contract to furnish to the Associated Press the use of two private wires between Omaha, Neb., and San Francisco, Cal., for five years from November 1, 1912, one wire to be used day and night, except between the hours of 5 a. m. and 8 a. m., and the other to be used at night from 6 p. m. to 11 p. m., at the yearly rate for each wire of \$24 per mile for service by day, and \$12 per mile for service by night. On December 29, 1912, there was a like contract for two private wires between Chicago and Omaha. On January 1, 1915, there was a contract at the same rates, but for the term of one year, for a private wire between Lincoln and Omaha, Neb., and Sioux City, Iowa. On March 14, 1915, there was a contract of indefinite duration, but at the same rates, for a private wire between Omaha and Sioux City. In September, 1915, the telegraph company established new rates for night service upon private wires used by press associations and newspapers. Rates for press associations or news agencies were reduced on September 1, 1915, from \$12 to \$6, and on September 15, 1915, from \$6 to \$3. Rates for newspapers were reduced from \$10 to \$5, and from \$5 to \$2.50. The benefit of these reductions was refused by the telegraph company to the news agency conducted by the defendant under the name of the Associated Press. This action is brought to recover compensation, at the rates fixed in the contracts, for the use by the defendant of private wires in August, September, and October, 1915. The judgment of the Trial Term, affirmed by the Appellate Division, limits the recovery during the months of September and October to the then prevailing rates. The plaintiff, complaining of the limitation, appeals to this court.

"The Act of Congress regulating inter-

state commerce imposes upon the plaintiff, an interstate telegraph line, the duty of fairness and equality in the treatment of its customers (Interstate Commerce Act, § 1, subd. 3, and sections 2 and 3). It must serve them at reasonable rates and without unjust discrimination. *Western Union Tel. Co. v. Call Co.*, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765. Discrimination between the defendant and its competitors there has been. The plaintiff denies, however, that the discrimination is unjust. The argument is twofold. There was no duty, we are told, to extend the new schedule to unexpired contracts. That excuse, if valid, applies to all the leases. If it fails, there was still no duty, we are told, to extend the new schedule to the contract for service between Omaha and San Francisco, because of extraordinary conditions permitting extraordinary charges.

"I think the plaintiff cannot justify discrimination among customers by dividing contracts into new and old, and applying a different rate to each. The law says that under like conditions of service, charges shall be equal. The customer who covenants to pay in accordance with a schedule does not put himself outside of the protection of the statute, and give license to the carrier to show favor to his rivals. His covenant is made in contemplation of the carrier's duty so to operate a public business that discrimination will be avoided and equality maintained. I do not mean, of course, that equality must be absolute. By express permission of the statute, messages may be divided 'into day, night, repeated, unrepeatd, letter, commercial, press, government, and such other classes as may be just and reasonable,' and different rates may be charged for the different classes (Interstate Commerce Act, § 1, subd. 3; *Matter of Private Wire Contracts*, 50 *Interst. Com. Com'n R.* 731). But classes are not 'just and reasonable' when the only principle of classification is one of order in time, with a resulting division between old customers and new. Favoritism would be unchecked if such a classification were accepted. Authority, which the statute gives, to distinguish between press messages and others, is not authority to distinguish between the press of to-day and the press of to-morrow, any more than between the press of here and the press of there. Division into classes is not the same thing as division into strata. No one would assert that a contract for a term of years would permit a carrier to discriminate in favor of old customers to the prejudice of new. Congress did not mean that it should be used as an excuse for discriminating in favor of new customers to the prejudice of old. A schedule that cannot be maintained against a revision of rates upwards will not be interpreted as intended to survive a revision of rates downwards. The obligation of the law qualifies, and, in case of conflict, over-

rides, the obligation of the contract. For this conclusion, I think, the authorities are ample."

Limitation of liability.—Congress has so far occupied the entire field of the interstate business of telegraph companies by enacting this provision respecting interstate telegraph rates, as to exclude state action, invalidating a contract limiting the liability of a telegraph company for error in sending an unrepeat interstate message to the refunding of the price paid for the transmission of the message. *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, (1919) 251 U. S. 27, 40 S. Ct. 69, 64 U. S. (L. ed.) —(reversing (1917) 116 Miss. 660, 77 So. 601), wherein the court said: "We come at once therefore to state briefly the reasons why we conclude that the court below mistakenly limited the Act of Congress of 1910 and why therefore its judgment was erroneous.

"In the first place, as it is apparent on the face of the Act of 1910, that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent and it may be conflicting local laws.

"In the second place, as in terms the Act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited of course by such control, carried with it the primary authority to provide a rate for unrepeat telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the *Primrose Case* [154 U. S. 1], the right to contract on such subject was embraced within the grant of the primary rate-making power.

"In the third place, as the Act expressly provided that the telegraph, telephone or cable messages to which it related may be 'classified into day, night, repeated, unrepeat letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages,' it would seem unmistakably to draw under the federal control the very power which the construction given below to the act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that as pointed out by the Interstate Commerce Commission (*Clay County Produce Co. v. Western Union Telegraph Co.*, 44 I. C. C.

670) from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeat message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

"But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the Act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the Eighth Circuit dealing with the same subject (*Gardiner v. Western Union Telegraph Company*, 231 Fed. 405, 145 C. C. A. 399); and by the numerous and conclusive opinions of state courts of last resort which in considering the Act of 1910 from various points of view reached the conclusion that that Act was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph companies and therefore was an occupation of the field by Congress which excluded state action." See to the same effect *Western Union Tel. Co. v. Hanlin*, (Ind. App. 1920) 125 N. E. 45; *Western Union Tel. Co. v. Wright*, (Fla. 1920) 84 So. 604; *Western Union Tel. Co. v. McDavid*, (Tex. Civ. App. 1920) 219 S. W. 853. See *contra Bowman, etc., Co. v. Postal Tel.-Cable Co.*, (1919) 290 Ill. 155, 124 N. E. 851, decided prior to the decision of the United States Supreme Court considered above.

The liability of a telegraph company for a negligent error in sending an unrepeat message may be limited to the amount paid for the transmission of the message in accordance with a stipulation contained on the back of the telegraph blank. *Western Union Tel. Co. v. Norman*, (Miss. 1920) 83 So. 465, wherein the court said:

"The second plea of the appellate company alleged, in substance, that the message in question was delivered to and accepted by the appellant company subject to the terms of a certain contract in writing, a copy of which is attached and made a part of this plea; that one of these terms and conditions is that the company should not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeat message beyond the amount received for sending the same, and that the message in this case was an unrepeat message; that by the Act of Congress approved June 18, 1910 (36 Stat. 530, c. 309), the Congress of the United States assumed charge of regulating the field of interstate communication by telegraph, and conferred upon the Interstate Commerce Commission full power over the rates, charges, and practices of telegraph companies engaged in interstate commerce with reference to such interstate

commerce, and conferred on the Interstate Commerce Commission power to approve, alter, or acquiesce in existing rates and classifications; that the Interstate Commerce Commission prior to the filing of the message in question had approved the rates of the appellant company, and for these reasons that the stipulations in the contract, subject to which the message was accepted, which limit the defendant's liability to the price of the message, were reasonable, and valid and binding. The record does not show that a demurrer was filed to this plea, neither does it show that issue was taken upon it, but from the entire record it is apparent that the case was tried upon the assumption that this plea was insufficient as a matter of law. In fact at the time of the trial of the case the cases of *Dickerson v. Western Union Tel. Co.*, 114 Miss. 115, 74 So. 779, and *Warren-Godwin Lumber Co. v. Postal Tel. & Cable Co.*, 116 Miss. 660, 77 So. 601, the latest announcements of this court upon this question, expressly held that these stipulations appearing upon the back of the telegraph blanks were unreasonable and void, and the learned circuit judge followed the ruling as announced in these two cases in so holding in this case. The question was further submitted to the jury as to whether or not punitive damages could be recovered by the plaintiff. The jury rendered a verdict in favor of the plaintiff in the court below for \$450, from which judgment this appeal is prosecuted.

"This court held in the case of *Western Union Tel. Co. v. Showers*, 112 Miss. 411, 73 South. 276, that Congress by the Act of June 18, 1910, had taken possession of the field of interstate commerce by telegraph to the exclusion of the power of the state to legislate with reference thereto. This decision was subsequently overruled by the *Dickerson Case*, *supra*. The question decided in the case of *Warren-Godwin Lumber Company, supra*, is the identical question now before us, namely, whether or not the liability of the telegraph company for a negligent error in sending an unrepeatable message would be limited to the amount paid for the transmission of the message in accordance with the stipulation contained on the telegram. This court, following its decision in the *Dickerson Case*, held that this stipulation was void. This *Warren-Godwin Lumber Co. Case* has been lately decided by the Supreme Court of the United States, and the judgment of this court is by it reversed. 25 U. S. 27, 40 Sup. Ct. 69, 64 L. Ed. —. In this opinion the Supreme Court of the United States holds that the Act of 1910 'was intended to control telegraph companies by the Act to Regulate Commerce,' and that this Act subjects telegraph companies 'as to their interstate business to the rule of equality and uniformity of rates, which it was manifestly the dominant purpose of the Act to Regulate Commerce to

establish, a purpose which would be wholly destroyed if . . . the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subject to the control of divergent, and it may be conflicting, local laws.' This opinion holds that the stipulation in the contract above referred to is a valid and binding one. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883. . . . It follows that the special plea referred to is a good plea as a matter of law. The cases of *Dickerson v. Western Union Tel. Co.*, 114 Miss. 115, 74 South. 779, and *Warren-Godwin Lumber Co. v. Postal Tel. & Cable Co.*, 116 Miss. 660, 77 South. 601, or such parts of them as are in conflict with this opinion, are hereby expressly overruled."

In *Klotz v. Western Union Tel. Co.*, (Ia. 1920) 175 N. W. 825, which was an action by the sendee of a telegram against the telegraph company sending it for failure to deliver it within a reasonable time after it was received by the company, a written contract on the back of the telegram was held valid which limited the company's liability to fifty dollars and contained statements that it had filed its tariff rates with the Interstate Commerce Commission, and these rates had been approved; that its messages were classified therein as messages valued at fifty dollars and messages valued in excess of fifty dollars; that its tariff rates were based upon the value of the message so fixed; that when the value was more than fifty dollars an additional charge was made. The court said: "That the regulation of interstate commerce by telegraph has been taken over and is exclusively within the jurisdiction of the federal law has been settled by the Supreme Court of the United States. It has been settled by that tribunal that a sender of a telegram is bound by the conditions and limitations in the telegram as to the amount for which the company shall be liable in case of a failure to exercise reasonable care in delivering the telegram. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, in which it was held that such a contract was not one exempting the company from liability for its negligence, but merely a reasonable condition, approximately adjusting the charge, for services rendered, to the duty and responsibility exacted for its performance. The doctrine of the *Primrose Case*, so far as it affects the question under consideration, has been recently reaffirmed in *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.*, decided at the October term, 1919, of that court, 25 U. S. 27, 40 Sup. Ct. 69, 64 L. Ed. —. The opinion was written by Chief Justice White. . . .

"It was there held that the Act of Congress was an exertion by Congress of its authority to bring under federal control the interstate business of telegraph com-

panies, and therefore was an occupation of the field by Congress which excluded state action.

"Without repeating the reason upon which these decisions rest, we are bound by them."

This section warrants a telegraph company in inserting, as a condition of its contract with the sender of a message, that in no event shall it be liable for damages "for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent thereof." Such a condition is a reasonable regulation within the purview of the federal statute. *Dunham v. Western Union Tel. Co.*, (W. Va. 1920) 102 S. E. 113, which further held that a condition in a contract for the transmission of a telegram, prescribing free delivery limits to the radius of one mile in cities of five thousand population or more, and to one-half mile in smaller towns, is a reasonable regulation, and that a condition in such contract, relieving a telegraph company from liability for damages unless the claim therefor is presented in writing within sixty days, is also a reasonable and valid regulation.

"By the Act of Congress approved June 18, 1910, telegraph companies, as to their interstate and foreign business, have been placed under the supervision of the Interstate Commerce Commission, and . . . the Act has occupied the entire field and taken complete control of the regulation of telegraph companies to the exclusion of state laws." *Rasher-Kingman-Herrin Co. v. Postal Tel.-Cable Co.*, (1919) 108 Wash. 543, 185 Pac. 947, 1119, holding to be valid a limitation of liability for error in an unrepeatable message.

Vol. IV, p. 359, sec. 1 [D]. [First ed., 1912 Supp., p. 113.]

Suit to enjoin change in classification.—The issuance of a supplement to the general classification whereby certain commodities are excluded from shipment, may be enjoined without resort to the Interstate Commerce Commission. *Viscose Co. v. Hines*, (E. D. Pa. 1920) 263 Fed. 726, wherein the court said:

"If the commission has power to pass upon the question, that power must appear somewhere in the acts of Congress. There is no question here of reasonableness of rates, nor of classification affecting rates, nor of discrimination, nor of undue preference or advantage, nor of the construction

of tariffs. All of such questions are committed to the commission under the policy requiring uniformity of decision upon these matters. What the defendant has done is the same thing that is denominated in *Louisville & Nashville Railroad Co. v. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355, as the announced purpose of the railroad company to abjure its function and duty as a common carrier in respect of interstate shipments, which threatened the ruin of complainant's business, and relief by injunction against such a continued course of conduct was held to be one which in such circumstances might be granted. If a carrier may, through the filing of notice, or through cancellation of a classification, or through inclusion of one commodity among articles not accepted for transportation, exclude that commodity from transportation, it may by like means exclude from transportation any other commodity which has become an established subject of interstate commerce, to the ruin and destruction of the established business of any shipper. And if the railroad company may not justify its exclusion through obedience to a state law, as in *Louisville & Nashville Railroad Co. v. Cook Brewing Co.*, *supra*, how can it justify it by its own voluntary act?

"As the question in this case only involves the right of the railroad to exclude from transportation a commodity which has for years been accepted and recognized by the defendants as proper for transportation, and is not included within the powers conferred upon the Interstate Commerce Commission to hear and determine in the first instance, it is held that the court has jurisdiction, and primary resort to the Interstate Commerce Commission is not necessary."

Vol. IV, p. 359, sec. 1 [E]. [First ed., 1912 Supp., p. 114.]

IV. INJURIES RECEIVED WHILE RIDING ON FREE PASS

2. Limitation of Liability (p. 362)

Facts when insufficient to show one an interstate passenger.—The mental purpose of a railway employee traveling on an annual pass, good only over a line wholly within the state, to continue his journey into another state, using another carrier to a point still within the state, where he expected to find awaiting him another pass from the first carrier which would be good for the interstate part of his journey, does not make him an interstate passenger while traveling on the first pass, so as to validate, contrary to local public policy, a stipulation in such pass releasing the carrier from liability for negligence. *New York Cent. R. Co. v. Mohney*, (1920) 252 U. S. 152, 40 S. Ct. 287, 64 U. S. (L. ed.) —.

Exemption from ordinary negligence in a pass permitted by this section is valid. *Mis-souri, etc., R. Co. v. Zuber*, (1919) 76 Okla. 146, 184 Pac. 452, 7 A. L. R. 840.

Vol. IV, p. 363, sec. 1 [F]. [First ed., 1912 Supp., p. 115.]

VI. OWNERSHIP BY RAILROAD OF STOCK IN MINING COMPANY (p. 365)

The combination in a single corporation of the ownership of all of the stock of a carrier and of all of the stock of a coal company violates this section, making it unlawful for any railway company to transport in interstate commerce any article mined or produced by it or under its authority, or which it may own, or in which it may have any interest, direct or indirect, where all three companies have the same officers and directors, and it is under their authority that the coal mines are worked and the railway operated, and they exercise that authority in the one case in precisely the same character as in the other; viz., as officials of the holding company, the manner in which the stock of the three is held resulting, as intended, in the abdication of all independent corporate action by both the railway company and the coal company, involving, as it does, the surrender to the holding company of the entire conduct of their affairs. *U. S. v. Reading Co.*, (1920) 253 U. S. 26, 40 S. Ct. 425, 64 U. S. (L. ed.) —, *affirming in part and reversing in part* (E. D. Pa. 1915) 226 Fed. 229.

While the ownership by a railway company of shares of the capital stock of a mining company does not necessarily create an identity of corporate interest between the two such as to render it unlawful, under this section, for the railway company to transport in interstate commerce the products of such mining company, yet, where such ownership of stock is resorted to, not for the purpose of participating in the affairs of the corporation in which it is held in a manner normal and usual with stockholders, but for the purpose of making it a mere agent, or instrumentality, or department of another company, the courts will look through the forms to the realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as the justice of the case may require. *U. S. v. Reading Co.*, (1920) 252 U. S. 26, 40 S. Ct. 425, 64 U. S. (L. ed.) —, *affirming in part and reversing in part* (E. D. Pa. 1915) 226 Fed. 229.

A combination of competing interstate railway carriers and competing coal companies, found to violate both the Sherman Anti-trust Act (see vol. IX, p. 644) and this section, must be so dissolved as to give each of such companies its entire independence, free from stock or other control. *U. S. v. Reading Co.*, (1920) 252 U. S. 26,

40 S. Ct. 425, 64 U. S. (L. ed.) —, *affirming in part and reversing in part* (E. D. Pa. 1915) 226 Fed. 229.

Vol. IV, p. 371, sec. 2. [First ed., vol. III, p. 813.]

III. UNJUST DISCRIMINATION

2. What Constitutes (p. 373)

An absolute and unconditional contract to furnish cars is invalid as an agreement for a special and discriminatory service. *Underwood v. Hines*, (Mo. App. 1920) 222 S. W. 1037.

Special agreement to heat car for a shipment of potatoes is discriminatory and void. *Clemons Produce Co. v. Denver, etc., R. Co.*, (Mo. App. 1920) 219 S. W. 660.

Vol. IV, p. 379, sec. 3. [First ed., vol. III, p. 816.]

III. Undue or unreasonable preference or advantage.

3. Allotment of cars.

9. Miscellaneous.

III. UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE

3. Allotment of Cars (p. 384)

Jurisdiction in claims for damages.—The cases clearly and unmistakably lay down the rule that, when the action is for damages due to the carrier's failure to furnish cars when reasonably demanded, the shipper may proceed in the state court; that, when the action is for damages occasioned by discrimination practiced by the carrier in the distribution of cars during a period of car shortage, and such distribution has been made pursuant to a rule of the carrier and in conformity with it, the shipper must first proceed before the Interstate Commerce Commission to establish the discriminatory character of the rule; but that where the discrimination is caused by a breach of the rule, and the discrimination results from its nonobservance, then the state courts have jurisdiction in an action brought by the shipper to recover damages occasioned by such discrimination. *Anderson v. Chicago, etc., R. Co.*, (Mich. 1919) 175 N. W. 246.

Evidence held to show discrimination.—In *Weber v. Pennsylvania R. Co.*, (E. D. Pa. 1920) 263 Fed. 945, the evidence was held to sustain a finding of discrimination in the allotment of coal cars.

9. Miscellaneous (p. 392)

Agreement to transport cattle with reasonable despatch coupled with request that time of confinement of cattle without being unloaded be extended for thirty-six hours, which request was acceded to by carrier, has been held to be not a preferential contract. *Baltimore, etc., R. Co. v. Bower*, (Ind. App. 1920) 127 N. E. 458.

Vol. IV, p. 406, sec. 6 [A]. [First ed., 1909 Supp., p. 260.]

- II. State statutes.
- III. Shipments and rates affected.
- IV. Contents, construction and sufficiency of schedules.
 - 4. Demurrage.
- V. Publication of schedules.
 - 1. Necessity.
- VI. Effect of published rates.
 - 1. In general.
 - 3. Contracts of transportation.

II. STATE STATUTES (p. 407)

Validity of state statute of limitations.—A state statute limiting the time within which an action for an undercharge may be brought is not invalidated by the federal legislation prohibiting deviation from the published rates. *Chicago, etc., R. Co. v. Frye*, (Wash. 1919) 186 Pac. 668.

III. SHIPMENTS AND RATES AFFECTED (p. 407)

Foreign shipments.—“Beyond controversy, transportation by ocean carriers between the United States and nonadjacent foreign countries is not included in or affected by the Act to Regulate Commerce, and the jurisdiction of the Interstate Commerce Commission, or the classification and schedule of rates and charges, pursuant to the act, cannot extend to carriers engaged in that transportation. *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 Interst. Com. Com'n R. 266; *Chamber of Commerce of N. Y. v. N. Y. C. & H. R. R. Co.*, 24 Interst. Com. Com'n R. 55. Interstate rates and charges to and from ports of entry must be published and filed as independent from the ocean transportation. Ocean transportation may be conducted under through bills of lading, issued at a foreign port, but the classifications and schedules of rates and charges of the inland carrier or carriers must be limited to inland transportation and services, and cannot relate to liability, service, or obligation of the ocean carrier.” *Burke v. Union Pac. R. Co.*, (1919) 226 N. Y. 534, 124 N. E. 119.

IV. CONTENTS, CONSTRUCTION AND SUFFICIENCY OF SCHEDULES

4. Demurrage (p. 410)

No departure from the established policy manifested in the Uniform Demurrage Code to treat the single car as the unit in applying the allowance of free time and the charges for demurrage, just as in the making of carload freight rates, can be inferred from the declaration in such Code that no demurrage charges shall be collected when shipments are frozen while in transit so as to prevent unloading during the prescribed free time, provided a diligent effort to unload is made. If each car containing frozen shipments could

have been unloaded, considered separately, within the free time, any relief from the hardship resulting from excessive receipts of such cars on the same day must be found, either under the so-called bunching rule, under which the shipper is relieved from demurrage charges if, by reason of the carrier's fault, the goods are accumulated and detention results, or under the average-agreement rule, under which a monthly debit and credit account is kept of detention, and the shipper is relieved of charges for detaining cars more than forty-eight hours by credit for other cars released within twenty-four hours. *Pennsylvania R. Co. v. Kittaning Iron, etc., Mfg. Co.*, (1920) 253 U. S. 319, 40 S. Ct. 532, 64 U. S. (L. ed.) —, reversing (1919) 263 Pa. St. 205, 106 Atl. 207, wherein the court said: “The purpose of demurrage charges is to promote car efficiency by penalizing undue detention of cars. The duty of loading and of unloading carload shipments rests upon the shipper or consignee. To this end he is entitled to detain the car a reasonable time without any payment in addition to the published freight rate. The aim of the Code was to prescribe rules, to be applied uniformly throughout the country, by which it might be determined what detention is to be deemed reasonable. In fixing the free time the framers of the Code adopted an external standard; that is, they refused to allow the circumstances of the particular shipper to be considered.”

V. PUBLICATION OF SCHEDULES

1. Necessity (p. 413)

Place of filing and publishing schedule.—Under the interstate commerce rule a carrier is required to file with the commission its schedule of rates and tariffs, and to promulgate and distribute the same so that shippers may have access thereto and ascertain its terms. And to establish and render operative a \$5 rental for a refrigerator car in which potatoes are shipped from points in Minnesota to points in Oklahoma, over connecting lines, the tariff schedule must be filed and published at the point of origin. *Schaff v. J. C. Famechon Co.*, (Minn. 1920) 176 N. W. 197.

VI. EFFECT OF PUBLISHED RATES

1. In General (p. 415)

Relief from unreasonable freight charge.—After the passage of the Interstate Commerce Act, a shipper could not maintain an action against a common carrier to obtain relief from an alleged unreasonable freight charge exacted from him for an interstate shipment or shipment from one territory to a point of destination in another territory, without reference to any previous action by the Interstate Commerce Commission, where such rate had been filed with that commission and promulgated as provided by the Commerce Act as the rate which it was the duty of the carrier under that Act to

enforce against the shipper until changed in accordance with the provisions of that statute. *Chicago, etc., R. Co. v. Gist*, (Okla. 1920) 190 Pac. 878.

A subsequent reduction by the commission does not establish the unreasonableness of a rate so as to warrant an action by a shipper for the overcharge. *Morgan Co. v. Great Northern R. Co.*, (N. D. Ill. 1919) 263 Fed. 611.

3. *Contracts of Transportation* (p. 416)

Generally.—To same effect as first paragraph of original annotation, see *Mobile, etc., R. Co. v. Laclede Lumber Co.*, (1919) 202 Mo. App. 630, 216 S. W. 798.

Tariff rate for special service as constituting contract rate.—The publication by a railroad of a net tariff rate for an expedited or special service covering camp equipment and impedimenta, without further deduction for land grant roads, constitutes a contract rate binding on the government when it orders and secures the services specified by the tariff without stipulating for a different rate or objecting to the published rate as unreasonable and unjust. *Yazoo, etc., Valley R. Co. v. U. S.*, (1919) 54 Ct. Cl. 165.

Vol. IV, p. 421, sec. 6 [G]. [First ed., 1909 Supp., p. 261.]

I. In general.

III. Greater or less or different compensation.

1. In general.

I. IN GENERAL (p. 421)

Necessity of filing schedule for switching services.—A carrier can neither recover freight charges, nor pay the owner any allowance for services in connection with such transportation, except as provided in schedules previously filed. *Pittsburgh, etc., R. Co. v. South Shore R. Co.*, (1919) 264 Pa. St. 162, 107 Atl. 680, wherein it was held that until schedules were filed, switching services could not lawfully be paid for.

Necessity of filing stipulations limiting time for suit in consideration of lower rate.—Stipulations limiting the time for suit on a contract of carriage in consideration of a lower rate must be filed. *Shroyer v. Chicago, etc., R. Co.*, (Tex. 1920) 222 S. W. 1095, wherein the court said: "The Supreme Court has indicated to us that the stipulation in the bill fixing the short period of six months for the institution of the suit was clearly a determinative element of the rate charged the shipper; indeed, was in a chief measure the consideration, the justification for the rate; that the statute declares that any regulation which in any wise affects or determines the rate shall be filed with the Interstate Commerce Commission as a part of the carrier's schedule of rates. The purpose of this must

have been to acquaint the shipper with any rule or regulation having the character of a determinative factor in the making of the rate, and by which, because of this, the shipper would be bound if he accepted the rate. In fairness, he would be entitled to that knowledge so as to enable him to choose properly between the higher and the lower rate, and it should therefore be assumed that the intention of the statute was to afford it to him."

III. GREATER OR LESS OR DIFFERENT COMPENSATION

1. In General (p. 422)

Payment of less compensation than that fixed by tariff rates.—Only upon payment of the applicable published rate is the consignee of an interstate shipment entitled, under the equal rates requirement of the Interstate Commerce Act, to receive the shipment, and he is liable to the carrier for the difference between the freight charges erroneously specified in the waybill and paid by him upon receipt of the goods and the larger amount due under the applicable published rates, although by virtue of his agreement with the consignor he did not become the owner of the goods until after delivery. The principle of estoppel cannot be invoked by the consignee in such a case. *Pittsburgh, etc., R. Co. v. Fink*, (1919) 250 U. S. 577, 40 S. Ct. 27, 64 U. S. (L. ed.) —, reversing 19 Ohio Cir. Ct. (U. S.) 103.

Contract for less rate than prescribed by law as unenforceable.—The intent and purpose of this section is to prevent any discrimination as to interstate freight rates for the transportation of commodities of the same classification among shippers and an agreement for the carrier to receive or the shipper to pay a rate of freight different from or less than that determined on by the Interstate Commerce Commission, directly or indirectly, whether existing with or without the knowledge of either or both of the contracting parties at the time, and irrespective of any representations made, is unenforceable and void; and where the shipper has contracted in his bill of lading to pay a less rate than that prescribed by the law, and, relying upon the assurance of the carrier to endeavor to obtain a refund, pays the difference between that and the lawful rate, he may not recover this difference in the courts of our state, the contract sued on being an illegal one as encouraging rebates and unlawful discrimination and not recognizable therein. *Edenton Cotton Mills v. Norfolk Southern R. Co.*, (1919) 178 N. C. 212, 100 S. E. 341, which further held that where the carrier in interstate commerce has failed in its promise to present duly and in proper form the shipper's claim for an alleged overcharge of freight rate which the latter had paid to the carrier, and thus prevents the shipper from pre-

senting his own claim within the time allowed by the statute, and consequently said commission, having then no authority, refuses to pass upon the matter at all, our courts may not adjudicate the question, the same being for the determination of said commission upon whatever evidence may have been introduced before it, and as its determination thereon, favorable or unfavorable, cannot be anticipated or foreseen, any assessment of damages based upon it would be purely speculative and not allowable.

Vol. IV, p. 448, sec. 12. [First ed., vol. III, p. 838.]

II. POWERS AND DUTIES OF COMMISSION (p. 451)

Power to prescribe terms of bills of lading.—This Act does not confer upon the Commission the right to prescribe the terms of the carriers' bills of lading. *Alaska Steamship Co. v. U. S.*, (S. D. N. Y. 1919) 259 Fed. 713, wherein it was said: "That the Commission has power under section 12 of the Act to investigate as to the fairness of the carriers' bills of lading we have no doubt, but we discover nowhere any authority conferred upon it to draw the carriers' bills of lading either in whole or in part. If they are in any respect unjust or unreasonable or unlawful, the courts are open to the parties injured; if they contain any limitation of liability for loss or damage which Congress has declared to be void, the courts will say so. *Missouri, Kansas & Texas Ry. v. Harriman*, 227 U. S. 668, 33 Sup. Ct. 397, 57 L. Ed. 690.

"The question is one of power to make the order, and not one of its expediency. Therefore we shall not inquire whether the alterations the Commission has prescribed in the bills of lading are reasonable or not, because we think it has no power to make them. In any event, there was no power to prescribe an inland bill of lading in form or substance depriving the carriers of the benefits of the statutes limiting the liability of vessel owners and of Harter Act Feb. 13, 1893, c. 105, 27 Stat. 445. These statutes still survive, unless repealed by implication, and this result we are of opinion was neither intended nor accomplished.

"Indeed, section 15 prescribes:

"... Nor shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this act shall be subject to the laws and regulations applicable to transportation by water."

Contesting of order of Commission by common carriers under federal control.—The fact that common carriers are under federal control does not prevent them from contesting the validity of an order of the Commission on the ground that it is without authority to issue the order. *Alaska*

Steamship Co. v. U. S., (S. D. N. Y. 1919) 259 Fed. 713. The court said:

"It is said that the petitioners, except the five water carriers above mentioned, are unaffected by the order, because now in the actual control of the Director General of Railways. This control is expected to cease within the current year, and they will be subject to the order the moment their properties are returned to them, whether the Director General complies with the order or not. If it was right to subject them presently to the order, it is right that they should be allowed presently to dispute it, and we think there can be no doubt that the water carriers, who can only escape from the order by withdrawing from joint arrangements with the land carriers and making entirely new dispositions, and all the carriers who will be bound by it when their properties are returned to them, will be subjected to damage irreparable within the meaning of the law. It would be impossible for the carriers in many cases to collect what they have paid out or lost, if the Supreme Court were to hold that the order was not within the power of the Commission."

Vol. IV, p. 458, sec. 15 [A]. [First ed., 1912 Supp., p. 119.]

II. REGULATION OF RATES

2. Power of Courts (p. 462)

State courts.—State courts have jurisdiction in an action against a common carrier to recover the difference between illegal and excessive freight charges and the established rate prescribed by law, the issue involved being one of fact, though in passing on the facts it may be necessary for the court to construe the rate established by law. *Chicago, etc., R. Co. v. Gist*, (Okla. 1920) 190 Pac. 878.

Vol. IV, p. 476, sec. 16 [B]. [First ed., 1912 Supp., p. 123.]

II. Enforcement of orders.

1. Jurisdiction.

V. Venue.

VII. Petition, complaint or declaration.

VIII. Hearing.

4. Evidence.

XI. Appeals and supersedeas.

II. ENFORCEMENT OF ORDERS

1. Jurisdiction (p. 478)

Action by assignee of reparation claim.—An assignee of the legal title to reparation claims may claim an award of reparation by the Interstate Commerce Commission, and recover the amounts awarded by an action at law, brought in his own name, but for the benefit of the equitable holders of the claim—especially where such is the real purpose of the assignments. *Spiller v.*

Atchison, etc., R. Co., (1920) 253 U. S. 117, 40 S. Ct. 466, 64 U. S. (L. ed.) — (*reversing* (C. C. A. 8th Cir. 1917) 246 Fed. 1, 158 C. C. A. 227; (C. C. A. 8th Cir. 1919) 249 Fed. 677, 161 C. C. A. 587) wherein it was also held that there is nothing in the letter or spirit of the Interstate Commerce Acts inconsistent with the view that claims for reparation because of the exaction of unreasonable freight charges are assignable.

V. VENUE (p. 480)

Contract with another railroad for use of tracks as affecting venue.—Where a railroad company, in order to conduct its business as a carrier of passengers, makes use of instrumentalities other than railroad track, and owned by others than itself, but which it has the contractual right to use in its business, and which are located in a certain district, this is enough to show venue in the District Court of that district in a suit under this section. Thus, where a railroad's line ends in one district at a river, but it contracts with a ferry boat corporation to ferry its cars across a river and with another railroad for the handling of its trains by the engines and engine crews of the latter, and for a joint use with it of a terminal in a city, located in another district, it may be sued under this section in the latter district. *Vicksburg, etc., R. Co. v. Anderson-Tully Co.*, (C. C. A. 5th Cir. 1920) 261 Fed. 741.

VII. PETITION, COMPLAINT OR DECLARATION (p. 480)

Sufficiency of complaint.—A complaint under this section which sets out the findings of the commission and its order, and claims damages due the plaintiff under it, is sufficient to withstand objection made for the first time after judgment that it shows no cause of action. *Vicksburg, etc., R. Co. v. Anderson-Tully Co.*, (C. C. A. 5th Cir. 1920) 261 Fed. 741, wherein it was said:

"The finding of the commission that the rate was unreasonable was made *prima facie* evidence of that fact. The plaintiff, to sustain his complaint, was required to offer no evidence, except the award and order of the commission. His averment was as broad as his proof was required to be. The action was a statutory one, to enforce the award of the commission, and by the statute proof of the award of the commission was *prima facie* sufficient to sustain the plaintiff's case. The statute requires the petition merely to set out the causes for which the plaintiff claims damages and the order of the commission in the premises. The defendants had full information from the complaint as to the cause of action they were required to meet. Technical rules of common-law pleading are inapplicable to the statutory form of action created by the Act to Regulate Commerce for the enforcement of order of the commission."

VIII. HEARING

4. Evidence (p. 482)

Findings and order in reparation proceeding.—The Interstate Commerce Commission is given a general degree of latitude in the investigation of reparation claims, and the resulting findings and order of the commission may not be rejected as evidence in a suit to recover the amounts of the reparation awards merely because of errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence. *Spiller v. Atchison, etc., R. Co.*, (1920) 253 U. S. 117, 40 S. Ct. 466, 64 U. S. (L. ed.) —, (*reversing* (C. C. A. 8th Cir. 1917) 246 Fed. 1, 158 C. C. A. 227; (C. C. A. 8th Cir. 1918) 249 Fed. 677, 161 C. C. A. 587).

In an action under this section to enforce an award of reparation against a railroad company, the evidence is sufficient to sustain a judgment against the defendant where it appears that the plaintiff offered the award and order of the commission in evidence, and that the defendants introduced no evidence, since this Act gives to the award and order of the commission *prima facie* effect, regardless of the correctness or incorrectness of the findings of the commission. *Vicksburg, etc., R. Co. v. Anderson-Tully Co.*, (C. C. A. 5th Cir. 1920) 261 Fed. 741.

Proof of handwriting of assignors of reparation claims.—Formal proof of the handwriting of the assignors of reparation claims by subscribing witnesses or otherwise was not necessary in a hearing before the Interstate Commerce Commission in the absence of objection or contradiction. *Spiller v. Atchison, etc., R. Co.*, (1920) 253 U. S. 117, 40 S. Ct. 466, 64 U. S. (L. ed.) —, (*reversing* (C. C. A. 8th Cir. 1917) 246 Fed. 1, 158 C. C. A. 227; (C. C. A. 8th Cir. 1918) 249 Fed. 677, 161 C. C. A. 587).

Expert testimony in reparation proceeding.

—Whether a witness called before the Interstate Commerce Commission had shown such special knowledge as to qualify him to testify as an expert was for the commission to determine, and its decision thereon is not to be set aside by the courts unless clearly shown to have been unfounded. *Spiller v. Atchison, etc., R. Co.*, (1920) 253 U. S. 117, 40 S. Ct. 466, 64 U. S. (L. ed.) —, (*reversing* (C. C. A. 8th Cir. 1917) 246 Fed. 1, 158 C. C. A. 227; (C. C. A. 8th Cir. 1918) 249 Fed. 677, 161 C. C. A. 587).

Hearsay in reparation proceeding.—Assertions by counsel during a hearing before the Interstate Commerce Commission in a reparation proceeding that there was a failure of proof, and suggestions that the proceeding ought to be dismissed, come too late and are too general in character to be equivalent to an objection to the reception of certain evidence as hearsay. *Spiller v. Atchison, etc., R. Co.*, (1920) 253 U. S. 117, 40 S. Ct. 466,

64 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1917) 246 Fed. 1, 158 C. C. A. 227; (C. C. A. 8th Cir. 1918) 249 Fed. 677, 161 C. C. A. 587.

The Interstate Commerce Commission is not to be regarded as having acted arbitrarily in making a reparation order, nor may its findings and order be rejected as wanting in support, simply because hearsay evidence introduced without objection and substantially corroborated by original evidence clearly admissible against the parties to be affected was considered with the rest. *Spiller v. Atchison, etc., R. Co.*, (1920) 253 U. S. 117, 40 S. Ct. 466, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1917) 246 Fed. 1, 158 C. C. A. 227; (C. C. A. 8th Cir. 1918) 249 Fed. 677, 161 C. C. A. 587.

XI. APPEALS AND SUPERSEDEAS (p. 486)

Ruling of trial court on validity of award.—The refusal of the trial court in a suit for the recovery of amounts awarded in a reparation order made by the Interstate Commerce Commission to treat the award as void in toto is not erroneous if, to any substantial extent, the award was legally valid. *Spiller v. Atchison, etc., R. Co.*, (1920) 253 U. S. 117, 40 S. Ct. 466, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1917) 246 Fed. 1, 158 C. C. A. 227; (C. C. A. 8th Cir. 1918) 249 Fed. 677, 161 C. C. A. 587.

Vol. IV, p. 495, sec. 19a [A]. [First ed., 1914 Supp., p. 204.]

Nonaction of Commission in matter purely ministerial.—The refusal of the Interstate Commerce Commission, when making the physical valuation of railway properties ordered by this section, to obey the command of that statute to investigate and find the present cost of condemnation and damages or of purchase in excess of original cost or present value of the railway company's lands, cannot be justified on the theory that such command involves a consideration by the Commission of matters "beyond the possibility of rational determination," and calls for "inadmissible assumptions," and the indulging in "impossible hypotheses" as to subjects "incapable of rational ascertainment," even if it be conceded that the subject-matter of the valuations in question, which the statute expressly directed to be made, necessarily opened a wide range of proof, and called for the exercise of close scrutiny and of scrupulous analysis and application. *Kansas City Southern R. Co. v. Interstate Commerce Commission*, (1920) 252 U. S. 178, 40 S. Ct. 187, 64 U. S. (L. ed.) —, wherein the court said:

"It is obvious from the statement we have made, as well as from the character of the remedy invoked, mandamus, that we are required to decide, not a controversy growing out of duty performed under the statute, but one solely involving an alleged refusal to

discharge duties which the statute exacts. Admonishing, as this does, that the issue before us is confined to a consideration of the face of the statute and the nonaction of the Commission in a matter purely ministerial, it serves also to furnish a ready solution of the question to be decided, since it brings out in bold contrast the direct and express command of the statute to the Commission to act concerning the subject in hand, and the Commission's unequivocal refusal to obey such command.

"It is true that the Commission held that its nonaction was caused by the fact that the command of the statute involved a consideration by it of matters 'beyond the possibility of rational determination,' and called for 'inadmissible assumptions,' and the indulging in 'impossible hypotheses' as to subjects 'incapable of rational ascertainment,' and that such conclusions were the necessary consequence of the Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18.

"We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious disregard on its part of the power of Congress and an unwilling assumption by the Commission of authority which it did not possess. And the significance which the Commission attributed to the ruling in the Minnesota Rate Cases, even upon the assumption that its view of the ruling in those cases was not a mistaken one, but illustrates in a different form the disregard of the power of Congress which we have just pointed out, since, as Congress indisputably had the authority to impose upon the Commission the duty in question, it is impossible to conceive how the Minnesota Rate ruling could furnish ground for refusing to carry out the commands of Congress, the cogency of which consideration is none the less manifest, though it be borne in mind that the Minnesota Rate Cases were decided after the passage of the act in question.

"Finally, even if it be further conceded that the subject-matter of the valuations in question which the act of Congress expressly directed to be made necessarily opened a wide range of proof and called for the exercise of close scrutiny and of scrupulous analysis in its consideration and application, such assumption, we are of opinion, affords no basis for refusing to enforce the act of Congress, or what is equivalent thereto, of exerting the general power which the act of Congress gave, and at the same time disregarding the essential conditions imposed by Congress upon its exercise.

"The judgment of the Court of Appeals [of the District of Columbia] is therefore

reversed, with directions to reverse that of the Supreme Court, and direct the Supreme Court to grant a writ of mandamus in conformity with this opinion."

Vol. IV, p. 506, sec. 20 [K]. [First ed., 1916 Supp., p. 124.]

- IV. Definition and construction, 574.
- V. Effect on state laws, 574.
- VI. Shipments affected, 574.
- VII. Receipt or bill of lading, 574.
- VIII. Who is initial carrier, 574.
- IX. Liability of initial carrier, 575.
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- XV. Parties, 579.
- XVI. Pleading, 579.
- XVII. Trial, 580.
 - 1. Burden of proof, 580.

IV. DEFINITION AND CONSTRUCTION (p. 510)

Interpretation by federal courts.—The controlling interpretation of this amendment rests with the federal courts. *Winget v. Grand Trunk Western R. Co.*, (Mich. 1920) 177 N. W. 273.

V. EFFECT ON STATE LAWS (p. 511)

In general.—To the same effect as the original annotation, see *Fay v. Chicago, etc., R. Co.*, (Ia. 1919) 173 N. W. 69; *Clemons Produce Co. v. Denver, etc., R. Co.*, (Mo. App. 1920) 219 S. W. 660; *Singer v. American Express Co.*, (Mo. App. 1920) 219 S. W. 662; *Cleburne Peanut, etc., Co. v. Missouri, etc., R. Co.*, (Tex. 1920) 221 S. W. 270; *Shroyer v. Chicago, etc., R. Co.*, (Tex. 1920) 222 S. W. 1095.

VI. SHIPMENTS AFFECTED (p. 513)

Shipments entirely by water are not affected by the Carmack Amendment, which is confined to shipments by rail, or partly by rail and partly by water. *Florida Cotton Oil Co. v. Clyde Steamship Co.*, (Mass. 1920) 125 N. E. 855.

Foreign shipments are not within the Act, and state laws govern as to the limitation of liability on such a shipment. *Brass v. Arkansas, etc., R. Co.*, (Tex. 1920) 218 S. W. 1040.

VII. RECEIPT OR BILL OF LADING (p. 514)

In general.—To the same effect as the original annotation, see *Mason v. Maine Cent. R. Co.*, (Me. 1920) 110 Atl. 425.

A parol agreement for shipment is "illegal." *Thee v. Wabash R. Co.*, (Mo. App.

1920) 217 S. W. 566. In that case, however, it appeared that a written bill of lading was given, and, while the foregoing statement was made by the court, the case appears to be authority only for the rule that the written bill governs to the exclusion of any parol agreement.

An oral agreement to furnish cars for use in interstate commerce is ineffective. *Underwood v. Hines*, (Mo. App. 1920) 222 S. W. 1037, wherein it was said: "However, if it can be said that the contract in question was separate from and merely preliminary to a contract for an interstate shipment which, when entered into, would be in writing, and that the breach relied on is not a breach of that contract, there is this further to be said: The sole purpose of the contract was, and is alleged to be, to enable a shipment in interstate commerce to be made. Again, a contract, absolute and unconditional, to have cars ready for plaintiffs' use at a certain place and date, irrespective of the government's needs or of the general service to the public, is one the station agent had no authority to make, and his lack of such authority was known to plaintiffs. Such a contract is special, and, if upheld, would give the shipper to whom it is made an unusual service different from that accorded to others. When such is the case, it is discriminatory, and violates the provisions of the Commerce Act."

VIII. WHO IS INITIAL CARRIER (p. 516)

In general.—The initial carrier is the one who first contracts to transport an interstate shipment, and the fact that the car was loaded on the tracks of another company and by it switched to the tracks of the company agreeing to transport it, does not convert the latter company into an intermediate carrier. *Houston, East, etc., R. Co. v. Houston Packing Co.*, (Tex. Civ. App. 1920) 221 S. W. 316.

Steamboat company.—There was evidence that an interstate carrier by water transported several carload shipments of potatoes to a point within the state, where the shipper had them assorted, and then they were taken in several carload lots to a point in another state, and thence, upon telegraphed instructions, one of them was reconsigned to a still further point, the transportation by rail being over connecting carriers. On one of these shipments originating by boat, which went to a place in the state and was reshipped from there under a new bill of lading by defendant, the destination was left blank in the bill of lading issued by the carrier by water. On these facts it was held that the steamboat company could not be held as the initial carrier, as a matter of law, and that it was properly left to the jury, under the conflicting evidence, to determine whether it or the first carrier by rail was the initial one, and therein the bills of lading were competent evidence of the

intent of the contracting parties and of the true contract of shipment. *Produce Trading Co. v. Norfolk Southern R. Co.*, (1919) 178 N. C. 175, 100 S. W. 316.

IX. LIABILITY OF INITIAL CARRIER

3. Period of Liability (p. 518)

Terminal carrier acting as warehouseman.—An initial carrier is liable for the negligence of a terminal carrier even though his responsibility as carrier for the transported goods has ceased and he is holding them as warehouseman. In such a case it is a question of law for the court whether the negligence complained of was that of a common carrier or a warehouseman. *Winget v. Grand Trunk Western R. Co.*, (Mich. 1920) 177 N. W. 273, wherein the court said: "The statute cast upon defendant as initial carrier responsibility for the completed transportation according to the original contract of shipment evidenced by the bill of lading, which included delivery. The negligence in this case was that of the terminal carrier. Whether the terminal carrier by reason of the consignee's delay in removing could be regarded as holding the consignment in the capacity of a warehouseman in other particulars is immaterial here, for it was not released from its delivery as a duty of transportation according to the terms of the shipping bill by which it received the goods and carried them to the terminal point."

4. Nature of Liability (p. 519)

Injuries to live stock.—The Carmack Amendment did not enlarge or change the common-law liability of carriers for injuries to live stock in interstate shipments. *Starr v. Chicago, etc., R. Co.*, (1919) 103 Neb. 645, 173 N. W. 682.

6. Liability for Delay (p. 519)

Delay in delivery—Failure to produce bill of lading.—The delivering carrier of a shipment by interstate carriage refused delivery to the person designated on account of his failure to produce the bill of lading, which had been mislaid or lost, and the goods were thereby damaged. There was evidence tending to show that the consignor arranged with the initial carrier for delivery without requiring the production of the bill of lading, which promptly informed the delivering carrier by telegram before the damages complained of had occurred. It was held that the delivering carrier was not exonerated by the mere failure of the consignee to produce the bill of lading under the evidence if found as facts by the jury, and that a motion as of nonsuit against the initial carrier was properly denied, such carrier being responsible for the acts of the delivering carrier under the Carmack and like amendments to the Interstate Commerce Act. *McCotter v. Norfolk Southern R. Co.*, (1919) 178 N. C. 159, 100 S. E. 326.

7. Wrongful Delivery or Diversion (p. 521)

Delivery without requiring production of bill of lading.—An initial carrier is liable to the lawful holder of a bill of lading for the negligence of the terminal carrier in delivering the goods to somebody else who claimed to be entitled to receive them. *Winget v. Grand Trunk Western R. Co.*, (Mich. 1920) 177 N. W. 273, wherein the court said: "Certainly no liability could attach to the carrier in this case for refusal to deliver without surrender of the original bill of lading, and we think, seldom, if ever, would liability arise in any case for such refusal, without reasonable identification and indemnity if demanded, under the present state of the law recognizing an order bill of lading, as in effect quasi negotiable paper representing the value of the shipment in the hands of the lawful holder. The latter proposition appears to be questioned by defendant, and in support of a doubt that the courts would protect the refusing carrier against demand of the consignor or owner cite *McCotter v. Norfolk South. R. Co.* (N. C.) 100 S. E. 326, where the owner shipped a carload of potatoes consigned to his own order, and recovered a judgment against the initial carrier for damage to the goods resulting from delay in transportation and refusal of the terminal carrier to deliver the same without production of the original bill of lading, which had become lost or delayed in transmission. Issues of fact were involved under both claimed causes of delay. The owner applied to the initial carrier for direction to its terminal carrier to deliver the consignment, with tender of a bond of indemnity, and such instructions were sent. Failure of the terminal carrier to deliver after receipt of such instructions was claimed. The terminal carrier was under the law but agent of the initial carrier and the Supreme Court of North Carolina held that on the facts presented 'a failure to deliver the potatoes to the owner or his agent on a telegraphic message from the initial carrier that this be done without presentation of the bill of lading, made at the request of the owner and consignor . . . would be sufficient to sustain the verdict on the issue.' We find no suggestion in this ruling that the terminal carrier's refusal would have been held culpable had no satisfactory protection by bond of indemnity been tendered, and no instruction to deliver received from the initial carrier. So far as any inference arises it is to the contrary.

"It is earnestly contended for defendant that *Nelson Grain Co. v. Ann Arbor Ry. Co.*, 174 Mich. 80, 140 N. W. 486, quadrates with the instant case and is controlling. Since that case was handed down by a divided court, the federal appellate courts, whose decisions are controlling in the final analysis, have in several decisions emphasized the important function of an order bill of lading in transportation and its significance as a test in these controversies, over wrongful

or non-delivery. In the recent case of *King v. Barbarin*, 249 Fed. 303, 161 C. C. A. 311, in which it is said the facts are practically the same as in the *Nelson Grain Co. Case*, cited by defendants, there, as here, as directly sustaining their contentions, the court did not find the *Nelson Grain Case* persuasive, and arrived at a contrary conclusion."

X. LIABILITY OF CONNECTING CARRIER (p. 522)

Rule stated.—"It is perfectly well settled that a connecting or delivering carrier may be sued for its own defaults." *Southern R. Co. v. Finley*, (Va. 1920) 102 S. E. 559.

But a connecting carrier is not primarily liable unless the loss, damage or destruction occurs on its line. *Baltimore, etc., R. Co. v. Maurer*, (Ind. App. 1920) 127 N. E. 294.

In *Faulk v. Seaboard Air Line R. Co.*, (S. C. 1919) 101 S. E. 641, it was held that an action against an interstate railroad for injuries to horses while being transported over several roads was properly brought against the terminal instead of the initial carrier, it being susceptible of a reasonable inference that the injuries occurred on the defendant's road although there was no direct and positive evidence to that effect.

"The Carmack Amendment did not deprive the shipper of any remedy he had under the common law against a connecting or terminal carrier." *Barry v. Los Angeles, etc., R. Co.*, (Utah 1920) 189 Pac. 70.

Presumption of receipt of goods from initial carrier in good condition.—In a suit against a connecting carrier in interstate commerce to recover for damage to goods received by it from a preceding carrier and delivered by the connecting carrier at the point of destination in a damaged condition, proof that the goods were delivered in a good condition to the initial carrier raises a presumption that they were received in a good condition by the connecting carrier. There is nothing in the acts of Congress, including the Carmack Amendment, fixing the liability for interstate carriers for goods damaged in transit, which relieves a connecting carrier of this presumption. *Central of Georgia R. Co. v. Scrivens*, (Ga. App. 1919) 100 S. E. 233.

XII. LIMITATION OF LIABILITY

1. In General (p. 524)

Effect of Cummins amendment—*In general.*—See generally on this subject annotations in 1919 Supp. p. 581. And as to the effect of the Cummins Amendment as qualified by the later amending act of Aug. 9, 1916, see *infra* this volume and title, p. 586.

Applicability to telegraphic and telephonic communications.—"The Cummins Act was not intended to apply to telegraphic and telephonic communications and the question whether or not a telegraph company may by contract limit its liability with ref-

erence to messages is not affected by it. *Klotz v. Western Union Tel. Co.*, (Ia. 1920) 175 N. W. 825, wherein the court said:

"Even under the Cummins Act the right is given to contract as to the value of the thing about to be shipped, and thereby limit the liability, when the value of the thing is not ascertainable because of concealment at the time of its sending. A telegraph company has no way of knowing the value of a message, and has no way of knowing the extent of liability that may attach to a failure to transmit it at once. The sender is in a better position to know approximately the value of the thing sent and the damages that may flow from a failure to send it correctly. An agreement between the sender and the company as to the value of the message sent is tolerable when it serves as a basis both for charge and for liability. The charges are supposed to be commensurate with the risk assumed. So we say the Cummins Act, which it is claimed was in force at the time this message was sent, does not change the rule in regard to telegraphic and telephonic communications, but is limited, in so far as it affects agreements between the shipper and the company, to those things which have an ascertainable value at the time they are received for shipment, and not to those things the value of which cannot be ascertained by the company, even by the exercise of reasonable care, at the time the contract for transportation is made."

No new liability created.—"The amendment did not affect the causes which would put liability for loss on the carrier; it only prevented a contract reducing totally or partially the amount of a loss for which the carrier was liable under the ordinary rules of law." *Clemons Produce Co. v. Denver, etc., R. Co.*, (Mo. App. 1920) 219 S. W. 660. See to the same effect *Singer v. American Express Co.*, (Mo. App. 1920) 219 S. W. 662.

Limitation after arrival at destination.—A clause in a bill of lading that goods shall be at owner's risk after they are unloaded from the cars or delivered on a private siding, does not conflict with the Cummins Act. *Chickasaw Cooperage Co. v. Yazoo, etc., R. Co.*, (Ark. 1919) 215 S. W. 897, wherein the court said:

"The only effect of the Cummins Act was to prevent common carriers from limiting their liability as to the amount to be recovered when goods are lost or destroyed in transportation, except in certain instances where goods are hidden from view; and the amendment also makes it unlawful for any such common carrier to provide by contract for a shorter period of time for giving notice of claims than 90 days, and for the filing of claims for a shorter period than four months, and for the institution of suits than two years. This is shown by the express language of the amendment, and we do not deem it necessary to set out the language of the Cummins Amendment, for the language relied upon by counsel for the plaintiff to

sustain their present contention is contained in the Interstate Commerce Act as it existed before the Cummins Amendment was adopted. The clause of the bill of lading relied upon by the railroad company to exempt it from liability in the case at bar is that property, when received on a private siding for shipment, shall be at the owner's risk until the car or cars containing it are attached to a train. This contract does not undertake to limit the railroad company's liability as a common carrier; it merely defines the circumstances under which delivery for shipment and acceptance by the railroad company shall be understood as having taken place between the parties. The liability of the railroad company, under the Interstate Commerce Act, attaches as soon as the goods are delivered to the carrier for immediate shipment and are accepted by it. By the clause in question the parties undertook to agree when the delivery and acceptance were complete, and the meaning and intent of the clause in question was that the delivery for shipment and acceptance should be complete when the car was removed from the siding and attached to a train."

Validity as to connecting carrier.—If a limitation is invalid as to the initial carrier it is likewise invalid as to a connecting carrier. *Wabash R. Co. v. Holt*, (C. C. A. 2d Cir. 1920) 263 Fed. 72, wherein the court said:

"The test of validity is to ascertain what the statute permitted the initial carrier to do in respect of making the bill of lading contract. That carrier cannot, by such a clause as was first above quoted, limit its own liability. Therefore such clause was invalid in toto; it never existed in legal effect."

"Thus, and thus only, can uniformity of bill of lading operation over a long line of carriers be secured, and we think this method has been insisted on in the ruling cases cited. Every bill, the moment it is signed, stands purged of all matters forbidden by statute, including language obnoxious to the Cummins Amendment. If such clause does not in legal effect exist when the bill is signed, it does not exist at all, and the bill is to be read without it."

3. Agreed Valuation (p. 526)

In general.—"The permissibility of limiting the recovery, in case of liability, to a valuation of the freight agreed upon or declared by the shipper is conclusively established. . . . The permissibility must, however, be shown or declared by the established and filed classifications and schedule of rates and charges, and in accordance with them invoked and executed." *Burke v. Union Pac. R. Co.*, (1919) 226 N. Y. 534, 124 N. E. 119.

Estoppel as ground for giving effect to stipulations for agreed value.—"Stipulations for an agreed value, when made the basis for the rate, are not agreements for exemptions from negligence, and are given

effect upon the ground of estoppel." *Burke v. Union Pac. R. Co.*, (1919) 226 N. Y. 534, 124 N. E. 119.

Computation of loss based on value of property at place and time of shipment, including freight charges.—The stipulation in the uniform bill of lading that the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment, including freight charges, if paid, which is sanctioned by the Interstate Commerce Commission as in no way limiting the carrier's liability to less than the value of the goods, but as merely offering the most convenient way of finding the value, but which does in fact prevent a recovery of the full actual loss, where the shipment would have been worth more at destination than at origin, is inconsistent with and invalidated by the provision of the Cummins Amendment of March 4, 1915, that carriers shall be liable to the holder of the bill of lading for the full actual loss, damage, or injury, notwithstanding any limitation of liability or limitation of the amount of recovery, or representation or agreement as to value. *Chicago, etc., R. Co. v. McCaull-Dinsmore Co.*, (1920) 253 U. S. 97, 40 S. Ct. 504, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 8th Cir. 1919) 260 Fed. 835, 171 C. C. A. 561.

The provision in the uniform bill of lading, in respect to an interstate shipment, that the amount of loss or damage for which the carrier shall be liable in case of loss shall be computed as of the value represented by the bona fide invoice price, if any, at the place and time of shipment, including the freight charges, if prepaid, is not a limitation of the carrier's liability for negligence. *Scowman-Kranz Lumber Co. v. Bush*, (Neb. 1920) 176 N. W. 91, wherein the court said: "Plaintiff argues that the provision in question is an attempt to limit the liability of the carrier for negligence, and that it is therefore void under the Cummins Amendment. The recent decisions seem to hold otherwise. This provision has been construed and held by the Interstate Commerce Commission and by the federal and state courts to be a reasonable rule by which to determine the value of a shipment in case of loss, and that it is not a limitation of the carrier's liability for negligence. *Shaffer & Co. v. Chicago, R. I. & P. R. Co.*, 21 Interst. Com. Com'n R. 8; *Springfield Light, Heat & Power Co. v. Norfolk & W. R. Co.* (D. C.) 260 Fed. 254; *Wallingford v. Atchison, T. & S. F. R. Co.*, 101 Kan. 544, 167 Pac. 1136, L. R. A. 1918B, 716. Under the Cummins amendment it has been upheld. *In re Cummins Amendment*, 33 Interst. Com. Com'n R. 682, at page 693. Some of the authorities point out that the rule is salutary, in that the invoice value of the shipment, with freight added where it has been prepaid, can be readily ascertained, and that prompt settlement can be made by the parties without resort to tedious and expensive litigation."

Relation of agreed value to actual value as test of validity of contract.—“The validity of a contract limiting the carrier's liability to an agreed valuation does not depend upon the relation of that value to the actual value.” *Burke v. Union Pac. R. Co.*, (1919) 226 N. Y. 534, 124 N. E. 119.

A choice of rates must be given the shipper before a carrier can successfully claim the benefit of an agreed valuation. *Burke v. Union Pac. R. Co.*, (1919) 226 N. Y. 534, 124 N. E. 119, wherein the court said: “There was neither two or more rates based upon valuation, nor the opportunity for a valuation by the shipper for the purpose of the rate and the liability. In this it differs from the case of *Cleveland, Cincinnati, Chicago & St. Louis Ry. v. Dettlebach*, 239 U. S. 588, 38 Sup. Ct. 177, 60 L. Ed. 453, in which the trial court found as a fact that the shipper, by consenting to the limited valuation, received a consideration in the shape of a substantial reduction in the freight rate.”

Admission in bill of lading as to alternate rates.—Where a bill of lading, duly delivered and accepted, declares that lawful alternate rates based on specified values were offered, such declaration constitutes an admission by the shipper and sufficient *prima facie* evidence of choice. *Burke v. Union Pac. R. Co.*, (1919) 226 N. Y. 534, 124 N. E. 119.

4. Notice of Claim (p. 529)

In general.—To the same effect as the original annotation see *Mason v. Maine Cent. R. Co.*, (Me. 1920) 110 Atl. 425, wherein the court said:

“One of the chief features of the Carmack Amendment was the requirement that the carrier must issue to the shipper a bill of lading in form approved by the Interstate Commerce Commission; and this bill of lading constitutes the contract between the parties and regulates and defines their respective rights and liabilities.

“The right of a carrier to reasonably limit, by express agreement with the shipper, its liability, so far merely as the time within which notice of loss should be given or suit brought, has always been recognized. *Express Co. v. Caldwell*, 21 Wall. 264, 22 L. Ed. 556.

“This right of special agreement was neither created nor destroyed by the Carmack Amendment, but was recognized as valid within certain specified limits, viz.: Notice of claims not to be fixed by contract at less than ninety days, filing of claims to be fixed by contract at not less than four months, and institution of suits at not less than two years. But this limit must be by stipulation.

“Acting within statutory authority, the bill of lading in this case was prepared in standard form, and was approved by the Interstate Commerce Commission by order of June 27, 1908. Section 3 of the condi-

tions printed on the back provided, among other things, as follows:

“Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin, within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery. Unless claims are so made the carrier shall not be liable.”

“Under the federal statutes this condition was a reasonable one, and, when assented to by the shipper, it became a valid stipulation or contract between the parties, and the shipper was bound by it. As it was fully printed and clearly expressed on the back of the bill, and as the shipper signed and accepted the bill of lading with this printed condition upon it, his assent is presumed, and the special contract was completed.

“If the shipper in this case had not given notice or filed his claim within the time specified in his contract, he would undoubtedly be precluded from recovery.”

Application of last proviso.—The proviso that notice of claim may not be required where the damage occurred in loading or unloading or by reason of carelessness or negligence in transit, does not apply where the liability is predicated solely on a failure to transport cattle safely, no negligence being averred. *Cunningham v. Missouri Pac. R. Co.*, (Mo. App. 1920) 219 S. W. 1003.

Waiver of limitation.—The carrier cannot waive or estop itself to urge a valid limitation. *Shroyer v. Chicago, etc., R. Co.*, (Tex. 1920) 222 S. W. 1095.

In *Fay v. Chicago, etc., R. Co.*, (Ia. 1919) 173 N. W. 69, it was held that a provision in a bill of lading “that claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after reasonable time for delivery has elapsed,” could not be waived. The court said:

“The design of that [Carmack] amendment was to avoid all possibility of discrimination by the carrier in dealing with shippers. That to permit waiver would open the door to preference seems self-evident. In *Phillips v. Grand Trunk Co.*, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774, the point considered was whether a carrier might waive a statute of limitations relative to the filing of claims with the Interstate Commerce Commission, and with reference thereto the court said: ‘The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Co. a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the commission and

the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction, or to permit a railroad company to plead the statute of limitations as against some and to waive it as against others, would be to prefer some and discriminate against others in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate, not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here,' etc.

"There a statutory limitation was involved, while here it is one by contract, but neither may be avoided under the Interstate Commerce Act by the 'giving of' preferences by means of consent judgments or the waiver of defenses open to the carriers. The precise point was covered in *Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, where the claim was based on the misdelivery of and injury to flour shipped, and the contention was that the limitation clause was inapplicable, and that the carrier, in making misdelivery, converted the flour, and thus abandoned the contract. The court, after deciding that this clause might not be obviated by the mere form of the action, observed with reference to abandoning the contract that—

"The parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

"See, also, *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501; *Olivit Bros. v. Penn. R. Co.*, 88 N. J. Law, 241, 96 Atl. 582; *Banaka v. Mo. Pac. R. Co.*, 193 Mo. App. 345, 186 S. W. 7.

"Under the rule of equality as sought to be established by the Carmack Amendment, the carrier may not say to one shipper, I will insist on the strict observance of the clause requiring you to file your claim within four months, and to another, I will release you entirely from that requirement. Surely this would be waiving a defense open to the carrier and a discrimination as between shippers. Whether the carrier might estop itself from raising the defense by misleading the shipper prior to the expiration of the time limit within which notice must be given we have no occasion to decide, as the point is not raised by pleading or in brief."

5. Time for Bringing Suit (p. 532)

Insufficient stipulation as to time for bringing suit, see *Mason v. Maine Cent. R. Co.*, (Me. 1920) 110 Atl. 425.

XV. PARTIES (p. 535)

Consignor as party aggrieved and entitled to sue.—The rule that where a shipment of goods is delivered to the carrier addressed to the consignee, the latter is the party aggrieved and the only one entitled to maintain his action against the carrier for loss or damage resulting to the shipment through the carrier's negligence, does not apply when it appears that the consignor and consignee have by their agreement or contract changed this ordinary rule, as where the consignee, with the consent of the consignor, has deducted the amount of such damage from the purchase price and the consignor had accordingly accepted the settlement, for such is, in effect, equitable assignment by the consignor of his right to recover of the carrier, and the consignor may maintain his action therefor. *Produce Trading Co. v. Norfolk Southern R. Co.*, (1919) 178 N. C. 175, 100 S. E. 316, which further held that a consignee of goods shipped to him has a reasonable right of inspection before accepting them from the carrier, and to reject them if damaged by the carrier's negligence; and that where the consignee has accepted such damaged shipment under an agreement with the consignor that such damages be deducted from the purchase price, the consignor may recover them from the carrier, as the party aggrieved.

Bill of lading held as security.—A "lawful holder" of a bill of lading is entitled to maintain an action for loss of the property represented by the bill, although he held the bill as security merely, not being the consignor or consignee. *Winget v. Grand Trunk Western R. Co.*, (Mich. 1920) 177 N. W. 273.

XVI. PLEADING (p. 535)

Election of remedies.—Although a shipper of horses damaged in transportation brings an action against the initial carrier at common law, sounding in tort, and claiming damages for the negligent manner in which the defendant performed its duties as a common carrier, it may take a nonsuit and proceed again under the provision of the Carmack Amendment, in an action sounding in contract. *Hayden v. Maine Cent. R. Co.*, (1920) 118 Me. 442, 108 Atl. 681, wherein the court said:

"In the case at bar the plaintiff first invoked an action which, as the facts proved, was inefficient to enforce liability on connecting railways, and hence was a mistaken selection of action; and he was not, by this selection, prevented from invoking the second and appropriate action. Upon this branch of the case the exceptions must also be overruled."

XVII. TRIAL

1. *Burden of Proof* (p. 535)

Damage from inherent defect of goods.—“The rule followed by the Supreme Court of the United States is that when it has been shown that damage results from inherent infirmity of the goods transported under circumstances not showing negligence, the burden of proving negligence devolves upon the plaintiff. *Hutchison on Carriers*, vol. 3, sec. 1355; *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 36 S. Ct. 469, 60 U. S. (L. ed.) 836. In view of the fact that liability in this case is predicated upon damage to an interstate shipment, and in recognition of the controlling force of the decisions of the United States Supreme Court in such cases, we are constrained in this instance to follow the national court rule, notwithstanding we think the established rule of this state the sounder and more just rule.” *Cleburne Peanut, etc., Co. v. Missouri, etc., R. Co.*, (Tex. 1920) 221 S. W. 270.

Vol. IV, p. 549, sec. 1 [A]. [First ed., vol. X, p. 170.]

II. Nature and purpose.

VI. Wilfulness and knowledge.

VIII. Rebates.

IX. Concession or discrimination.

XI. Indictment.

II. NATURE AND PURPOSE (p. 550)

Purpose of Act.—The purpose of Congress in passing this Act “was to cut up by the roots every form of discrimination, favoritism, and inequality.” *Dye v. U. S.*, (C. C. A. 4th Cir. 1919) 262 Fed. 6.

VI. WILFULNESS AND KNOWLEDGE (p. 563)

Knowledge.—A coal company which, under the obligation or supposed obligation of a covenant in a lease of its own railroad to a connecting carrier, has been receiving a “lateral allowance” from such carrier which was referred to in the latter’s published tariff, but not specified in figures therein, may, when criminally prosecuted for knowingly accepting, by any device whatever, transportation at less than the published rates, offer evidence that such allowance had been accepted in good faith, in the honest belief that the payment was justified by the lease, and in the honest belief, supported by an assurance that the payments had the sanction of the Interstate Commerce Commission, that the allowance was properly and legally noted and provided for in the published tariffs. *Lehigh Coal, etc., Nav. Co. v. U. S.*, (1919) 250 U. S. 556, 40 S. Ct. 24, 64 U. S. (L. ed.) —, wherein the court said:

“The way to a correct construction of the act was to an extent cleared by the case of *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428. Its evolution was there detailed. It was said that carrier and shipper are charged with an equal responsibility and liability,

and that the act ‘proceeded upon broad lines to accomplish’ this equality, and ‘that the only rate charged to a shipper for the same service under the same conditions should be the one established, published, and posted as required by law.’ And this was declared in various ways to be the test of obligation and liability, and the ‘form by which or the motive for which’ its evasion or disregard is accomplished is not of modifying or determining consideration. It was in effect decided that the purpose of the statute took emphasis and meaning from the use of the word ‘device,’ and ‘device’ was defined to be ‘anything which is a plan or contrivance,’ and is ‘disassociated’ from qualification, and ‘need not be necessarily fraudulent,’ and by it the act ‘sought to reach all means and methods by which the unlawful preference of rebate, or concession or discrimination is offered, granted, given, or received.’

“It is in effect the contention of the government that the language of the case exhausts definition and excludes the supposition of the questions of the circuit court of appeals. We are unable to concur. The language of the case is easily explained by the question that was presented for decision. The *Armour Packing Company* contended that the act was directed only at fraudulent conduct, the obtaining of a rebate by some dishonest or underhand method, concession, or discrimination. The language of the court was addressed to this contention, and its selection and adequacy are manifest.

“No such contention is made in the case at bar, and there are other distinguishing elements. It will be observed that by the statute and the decision the test of equality is the tariff rate. It was said in the opinion that it is ‘the purpose of the act to punish those who give or receive transportation, in the sense of actual carriage, at a concession from the published rates’ (*New York C. & H. R. R. Co. v. United States*, 212 U. S. 500, 505, 53 L. ed. 624, 627, 29 Sup. Ct. Rep. 309). And such was the offense of the *Armour Packing Company*. There was no evasion of the tariff rate in the case at bar. The filed tariff indicated the existence and obligation of the 10th covenant of the lease from the company to the railroad; that is, the fact of the allowance was declared, though it did not have specification in figures. The tariff, of course, would have been more definite and complete with such specifications, but its sufficiency was certainly believed in, for between 1906 and the date of the indictment it had 262 repetitions. The company was given besides the assurance that it had the sanction of the Interstate Commerce Commission.

“There was no attempt at deception. The Commission knew by examination of the company’s books of the allowance and the amount of the allowance. Such, then, is the situation, and distinguishes the case from the *Armour Packing Co. Case*. There there was an omission to comply with the statute,

and the omission was attempted to be justified by honesty of motive and purpose; here there was compliance or attempted compliance with the statute—a tariff filed—and if a question could be raised upon its legal sufficiency the belief of the company in its legality was supported by high authority, and those circumstances can bring into action and exculpating effect the provision of the statute which requires the acceptance of a rebate to be 'knowingly' done to incur the guilt of a misdemeanor. This conclusion gives no detrimental example against the efficacy of the law.

"We think this comment and conclusion enough to dispose of the questions asked, and that there is no necessity to review the cases cited by the company or the government."

VIII. REBATES (p. 554)

Refund of difference between local and through rates.—In *Pennsylvania Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 257 Fed. 261, 168 C. C. A. 345, it was held that refunds on cars of grain, allowed under a traffic arrangement whereby cars of grain coming into Chicago might be switched and unloaded into a local elevator and upon reloading the same or similar tonnage of like grain, for shipment to an eastern point, the shipper might, on surrendering his freight bill for the inbound shipment, secure a lower through rate from the western point of origin to the point of destination of the outbound shipment, violated the provisions of this section where nothing in the tariff provisions of the railroad, at the time the shipments were made, justified the refunds. To same effect, see *Pittsburgh, etc., R. Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 257 Fed. 265, 168 C. C. A. 349.

IX. CONCESSION OR DISCRIMINATION (p. 555)

Actual discrimination.—Actual discrimination between shippers is not a necessary element of a violation of this Act. *Pennsylvania Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 257 Fed. 261, 168 C. C. A. 345; *Pittsburgh, etc., R. Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 257 Fed. 265, 168 C. C. A. 349.

XI. INDICTMENT (p. 557)

Discriminating by device.—An indictment charging that the defendant violated this section by discriminating by a device in the allotment of freight cars to various mines, need not describe the device by which the discrimination was effected. *Dye v. U. S.*, (C. C. A. 4th Cir. 1919) 262 Fed. 6. In passing upon this question, the court said:

"In denouncing discrimination 'by any device' the statute does not mean that a device is necessary to the offense, but that if any device is used the courts are to look through it to the real nature of the transaction. *Armour Packing Co. v. United States*, 209 U. S. 56, 95, 28 Sup. Ct. 428, 52 L. Ed. 681. For the same reason there was no abuse of discretion in refusing the motion for a bill of particulars as to the nature of

the device. Besides, the letters of the defendant and other evidence show that the defendant could not have failed to know the transactions to which the indictment related."

Vol. IV, p. 573, sec. 1. [First ed., 1914 Supp., p. 203.]

Goods moving between points in same state through another state.—This section applies to goods moving between terminal points in a single state but by routings through other states. *U. S. v. Moynihan*, (C. C. A. 3d Cir. 1919) 258 Fed. 529, 169 C. C. A. 469. In passing upon the scope of this section, the court said:

"The first substantial question here involved is whether, under the facts proven and the inferences and findings the jury drew therefrom, Moynihan was guilty of violating the statute in question.

"The determination of that question depends on whether the bale of silk which Moynihan, and those confederating with him, were endeavoring to steal, was included under the broad term, 'any goods or chattels moving as, or which are a part of, or which constitute an interstate . . . shipment of . . . express.' That the bale of silk constituted 'goods and chattels' is a fact; that they were moving as and constituted a shipment of express is equally undeniable; and that the express company could only carry them to destination by taking the bale from its own dock in New York state and delivering it to a railroad's own cars at its terminus in New Jersey is also certain. Such being the unquestioned facts, it follows that the bale of silk was actually moving as an interstate shipment, and was the class of commerce Congress had power to protect from depredation in transit. It follows, therefore, that Moynihan's crime was punishable under the statute, unless we are to hold that, notwithstanding the facts found, this court shall hold that because the bale of silk started from, and was to be delivered to, points in New York state, the bale was thereby so theoretically fixed as an intrastate shipment that its compulsory interstate routings between those intrastate points did not confer an interstate character as it moved over this compulsory interstate route. To give this act, in its application to the particular case before us, the narrow construction here contended for, would result in such disastrous consequences to the safety of goods moving on many interstate routes over the country between shipping and delivery points situate in the same state as may well cause us to hesitate. Take, for example, a single instance in this circuit; the great traffic, by freight and express, carried over the Baltimore & Ohio System between Philadelphia and Pittsburgh. Both termini are in the state of Pennsylvania, but the routing is through Delaware, Maryland, and West Virginia. In such interstate tran-

sit, shipments between these two Pennsylvania terminals, during their movement through these other states, remain in terminal yards, may be transhipped, are handled by many employes, and are, by means of moving through such other states, in need of that protection which the federal government can alone afford to shipments passing outside the borders of a state. Although the shipment and delivery points of this particular traffic are both in Pennsylvania, yet, by reason of its necessarily interstate movement between those intrastate points, Pennsylvania is unable to protect such commerce, and for such interstate protection the interstate powers of the federal government are absolutely necessary.

"Now, over Moynihan's crime, committed, as it was, wholly in New Jersey, New York could have no jurisdiction. And in the country at large there must be a great many like instances of necessarily like interstate routings between intrastate points, in the minds of Congress when this statute was passed. That Congress meant, in the broad terms it used, 'goods or chattels moving as, or which are a part of, or which constitute an interstate . . . shipment of freight or express,' to exclude from federal jurisdiction and federal interstate protection the vast volume of freight and express thus moving between terminal points in a single state, but by routings through other states, is simply unbelievable."

Constructive possession.—To same effect as 1919 Supplement annotation, see *Le Fanti v. U. S.*, (C. C. A. 3d Cir. 1919) 259 Fed. 460, 170 C. C. A. 436, *affirming* (D. C. N. J. 1919) 255 Fed. 210.

Place from which goods are stolen.—The provisions of this section regarding the larceny of goods constituting an interstate or foreign shipment of freight or express, are limited to thefts from certain designated places. Accordingly, where the proofs in a prosecution under this section are insufficient to warrant the jury in finding that an allegation in the indictment that the goods in question were stolen from a depot of an express company, has been sustained, the conviction of the defendant must be reversed. *U. S. v. Moynihan*, (C. C. A. 3d Cir. 1919) 258 Fed. 529, 169 C. C. A. 469.

Indictment—Knowledge.—To same effect as original annotation, see *Grandi v. U. S.*, (C. C. A. 6th Cir. 1920) 262 Fed. 123.

Surplusage.—In an indictment for knowingly receiving goods stolen while in interstate transit, an averment of intent of the accused to convert the same to his own use is surplusage and may be disregarded. *Nichamin v. U. S.*, (C. C. A. 6th Cir. 1920) 263 Fed. 880.

Evidence—Admissibility.—To same effect as 1919 Supplement annotation, see *Le Fanti v. U. S.*, (C. C. A. 3d Cir. 1919) 259 Fed. 460, 170 C. C. A. 436, *affirming* (D. C. N. J. 1919) 255 Fed. 210.

Circumstantial evidence.—Conviction of the offense of having in possession goods and chattels, knowing them to have been stolen while in course of interstate commerce, may be established upon circumstantial evidence. *Chass v. U. S.*, (C. C. A. 3d Cir. 1919) 258 Fed. 911, 169 C. C. A. 631, wherein it was held that the evidence was sufficient to sustain a conviction.

Sufficiency.—In *Le Fanti v. U. S.*, (C. C. A. 3d Cir. 1919) 259 Fed. 460, 170 C. C. A. 436, *affirming* (D. C. N. J. 1919) 255 Fed. 210, it was contended that the evidence was insufficient to show guilty knowledge on the part of the accused in receiving stolen goods in violation of this section. Answering this contention, the court said:

"The statute (Act Feb. 13, 1913, c. 50, 37 Stat. 670) which makes the act charged a crime was passed to promote a policy of the law. The policy is to discourage thefts by making it difficult for the thief to dispose of stolen property. One dealing with property in the possession of another may deal with any one of several beliefs in mind. He may think the vendor to be the lawful owner of the property, or have other lawful right to sell. If such be his belief, he is not guilty of the crime of receiving, although the property be in fact stolen property. He may believe (and this is knowledge) that the one offering him the property is selling that of which he is not the owner, and of which he has no lawful right to dispose. He may not know from whom the property was stolen, or when it was stolen, or who stole it, or the circumstances under which it was stolen; but if with the guilty knowledge in his mind that the real owner has been deprived of his property, it is bought or otherwise received, and the fact is that the property was stolen, the receiver may be found guilty of the crime defined in the statute under which the defendants were indicted in this case. Such a receiver cannot exculpate himself, because he might have thought that the property had been embezzled. If the property was in fact stolen, and there is that guilty knowledge in the mind of the receiver which negatives the thought that he bought innocently what he thought he had the right to buy, the fact of actual theft, coupled with the fact of such guilty knowledge, supports a finding that he received the property knowing it to have been stolen. Inasmuch as the statute defines the crime as one including both the fact of theft and the fact of knowledge of the theft, it follows that, if there was no theft, the buying of the property is not criminal, even if the buyer believe the property to have been stolen.

"Here there was abundant evidence to find both the fact of theft and the knowledge of the receiver that the property had been stolen. The theoretical possibility (for this is all which is urged) that the information which brought home to him (as the jury has found) knowledge that the property was

stolen, might have induced him to believe that the property had been embezzled, does not disturb either the fact finding that it was stolen or the fact finding that the receiver knew it. The trial judge, in the opinion filed in this case, has made the soundness of this ruling so clear that further comment or citation of other authorities than those cited by him is unnecessary."

Vol. IV, p. 575, sec. 1. [First ed., 1916 Supp., p. 112.]

Purpose of Act.—It was the intent of Congress, by the passage of this Act, to exercise some of the powers vested in it by the Constitution to regulate interstate and foreign commerce. *U. S. v. Basic Products Co.*, (W. D. Pa. 1919) 260 Fed. 472.

Vol. IV, p. 577, sec. 5 [A]. [First ed., 1916 Supp., p. 114.]

Purpose and scope of section.—Unfair methods of competition between individuals are not contemplated by this section. The intent of this section is to provide a method of preventing practices unfair to the general public and very particularly such as if not prevented will grow so large as to lessen competition and create monopolies in violation of the Anti-Trust Acts. Thus, where firms selling steel ties used for binding bales of cotton, refuse to sell ties unless the purchaser also buys from them bagging to be used with the ties, the commission may not prohibit such practice on the ground that it is unfair competition. *Federal Trade Commission v. Gratz*, (C. C. A. 2d Cir. 1919) 258 Fed. 314, 169 C. C. A. 330.

Constitutionality.—This section is not unconstitutional as being an unlawful delegation of legislative and judicial power to the commission. *Sears v. Federal Trade Commission*, (C. C. A. 7th Cir. 1919) 258 Fed. 307, 169 C. C. A. 323, 6 A. L. R. 358. In passing upon the constitutionality of this section, the court said:

"With the increasing complexity of human activities many situations arise where governmental control can be secured only by the 'board' or 'commission' form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi legislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the commission in ordering distance may be counted quasi judicial on

account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court."

"Unfair methods of competition."—This section is not void for indefiniteness because it fails to define what constitutes "unfair methods of competition." *Sears v. Federal Trade Commission*, (C. C. A. 7th Cir. 1919) 258 Fed. 207, 169 C. C. A. 323, 6 A. L. R. 358, wherein the court said: "Petitioner urges that the declaration of section 5 must be held void for indefiniteness unless the words 'unfair methods of competition' be construed to embrace no more than acts which on September 26, 1914, when Congress spoke, were identifiable as acts of unfair trade then condemned by the common law as expressed in prior cases. . . . On the face of this statute the legislative intent is apparent. The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The commissioners, representing the government as *parens patriæ*, are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those trade practices that have a capacity or tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common-law cases. But the restraining order of the commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds hereinbefore recited are expected by Congress to control. This *prima facie* reading of legislative intent is confirmed by reference to committee reports and debates in Congress, wherein is disclosed a refusal to limit the commission and the court to a prescribed list of specific acts. Cong. Rec. 63d Cong. 2d Session, pp. 13, 18, 533, 12246. And this interpretation is not affected by the subsequent adoption of the Clayton Act, October 15, 1914 (38 Stat. 731, c. 323), condemning certain specific acts."

Scope of commission's power.—While the commission has no power under this section to restrain an owner of property from selling it at any price that is acceptable to him or from giving it away, it may prohibit him in making such a sale or gift from putting forward representations and committing acts which amount to unfair competition. *Sears v. Federal Trade Commission*, (C. C. A. 7th Cir. 1919) 258 Fed. 307, 169 C. C. A. 323, 6 A. L. R. 358.

Discontinuance of unfair methods as affecting issuance of order.—Under this section the Federal Trade Commission may issue an order prohibiting a company from practicing certain unfair methods of competition, despite the fact that the company has dis-

continued the methods in question at the time of the issuance of the order, where it appears that the company contends that the act is unconstitutional, that it is void for indefiniteness, and that, if valid, it was not infringed by the company's practices. *Sears v. Federal Trade Commission*, (C. C. A. 7th Cir. 1919) 258 Fed. 307, 169 C. C. A. 323, 6 A. L. R. 358.

Vol. IV, p. 578, sec. 5 [B]. [First ed., 1916 Supp., p. 114.]

Sufficiency of complaint.—A complaint issued by the Federal Trade Commission under this section, is wholly insufficient to charge respondents with practicing "unfair methods of competition in commerce" within the meaning of that section, and hence affords no foundation for an order of the commission directing them to desist from using such prohibited method of competition, where it alleges that respondents, engaged in selling cotton ties and bagging, refused to sell any ties unless the purchaser would buy from them a corresponding amount of bagging, but contains no intimation that they did not properly obtain their ties and bagging as merchants usually do, does not state the amount controlled by them, or allege that they held a monopoly of either ties or bagging, or had the ability, purpose, or intent to acquire one, averring nothing which would justify the conclusion that the public suffered injury, or that competitors had reasonable ground for complaint. *Federal Trade Commission v. Gratz*, (1920) 253 U. S. 421, 40 S. Ct. 572, 64 U. S. (L. ed.) — (*affirming* (C. C. A. 2d Cir. 1919) 258 Fed. 314, 169 C. C. A. 330), wherein the court said:

"When proceeding under § 5, it is essential, first, that, having reason to believe a person, partnership, or corporation has used an unfair method of competition in commerce, the Commission shall conclude a proceeding 'in respect thereof would be to the interest of the public;' next, that it formulate and serve a complaint stating the charges 'in that respect,' and give opportunity to the accused to show why an order should not issue directing him to 'cease and desist from the violation of the law so charged in said complaint.' If, after a hearing, the Commission shall deem 'the method of competition in question is prohibited by this act,' it shall issue an order requiring the accused 'to cease and desist from using such method of competition.'

"If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words, there is no foundation for an order to desist,—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the court.

"The words 'unfair method of competition' are not defined by the statute, and

their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

Vol. IV, p. 578, sec. 5 [C]. [First ed., 1916 Supp., p. 114.]

Review on certiorari of an order of the Circuit Court of Appeals annulling an order of the Federal Trade Commission, was had in *Federal Trade Commission v. Gratz*. (1920) 253 U. S. 421, 40 S. Ct. 572, 64 U. S. (L. ed.) —.

Vol. IV, p. 579, sec. 5 [D]. [First ed., 1916 Supp., p. 114.]

Printing the transcript.—In *National Harness Manufacturers' Assoc. v. Federal Trade Commission*, (C. C. A. 6th Cir. 1919) 261 Fed. 170, the court denied a motion of the association to dispense with printing the record; and the record not having been printed, the commission moved to dismiss the petition for review. It was held that rule 19 (202 Fed. xiii, 118 C. C. A. xiii), which provides for the printing of all records, contemplates only records in those proceedings to which the body of the rules is applicable, viz., records on writs of error or appeal or on some specified petitions, and that in the instant case there should be a revision and condensation of the transcript before it is printed, and that a satisfactory practice will be obtained by following the analogy of general equity rule 75 (198 Fed. xl, 115 C. C. A. xl). The court said:

"The order, therefore, will be that the former order refusing to dispense with printing be vacated; that the petitioner, within thirty days, prepare and serve upon the commission a statement of such parts of the record as the petitioner thinks should be printed, including a condensed narrative of so much of the testimony as is material to the points to be raised; that within thirty days thereafter the commission propose such amendments to such statement and narrative as it thinks proper; and that, if the parties do not thereupon promptly reach an agreement as to the record necessary to be printed, the matter be brought to the further attention of the court."

Vol. IV, p. 580, sec. 6 (a). [First ed., 1916 Supp., p. 115.]

Scope of investigations by commission.—This section does not authorize the Federal

Trade Commission to investigate the cost of producing a patented product and perhaps the amount of compensation which should be paid by the United States in order that the navy might acquire the same. *U. S. v. Basic Products Co.*, (W. D. Pa. 1919) 260 Fed. 472. Regarding the scope of the commission's powers, the court said:

"The commission relies upon subdivision (a) of section 6 of the act. Section 6 contains a further statement of particular powers vested in the commission, and appears to authorize proceedings in which no complaints against any person, partnership, or corporation are required to be served. The opening of that section, including subdivision (a), is as follows:

"That the commission shall also have power—

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.' . . . It is plain that Congress intended to give the commission a power unprecedented in its scope. In the argument on behalf of the plaintiff, it was insisted that under the act, the commission was given the right to investigate any question having to do with any business of any corporation, except banks and common carriers subject to the control of the Interstate Commerce Commission, to conduct a hearing at any point in the United States, and compel there the attendance of any witnesses and the production of any records from any other point in the United States. There was no suggestion of the limitations to be found in the acts themselves, other than the limitation just mentioned. In other words, it was probably assumed that every corporation, with respect to which the commission intended to conduct an investigation, was engaged in interstate commerce within the meaning of the act. In the argument, as well as in the petition, there was lacking the assertion of facts which would bring the defendant within the terms of the act of Congress. Nowhere has it been made to appear that the defendant is engaged in interstate commerce in any other way than any other corporation or any citizen may be so engaged, by making one or more shipments of manufactured goods from one state into another.

"The following quotation from the opinion of Judge Jackson, in *Re Greene*, (C. C.) 52 Fed. 104-113, contains not only a definition, but an elaboration thereof, which suggests not only the limitations upon the power of Congress, but also possibilities of the existence of activities by entities corporate or otherwise, which might be brought within the jurisdiction conferred by the act upon the Federal Trade Commission:

"'Commerce among the states, within the exclusive regulating power of Congress, "consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities." *County of Mobile v. Kimball*, 102 U. S. 691-702 [26 L. ed. 238]; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. 826 [29 L. ed. 158]. In the application of this comprehensive definition, it is settled by the decisions of the Supreme Court: That such commerce includes, not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation. That it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another. That such commerce begins, and the regulating power of Congress attaches, when the commodity or thing traded in commences its transportation from the state of its production or situs to some other state or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of the property in the state of its destination. When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. At that time the power and regulating authority of the states ceases, and that of Congress attaches and continues, until it has reached another state, and becomes mingled with the general mass of property in the latter state. That neither the production or manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another state, constitutes that interstate commerce which comes within the regulating power of Congress, and, further, that after the termination of the transportation of commodities or articles of traffic from one state to another, and the mingling or merging thereof in the general mass of property in the state of destination, the sale, distribution, and consumption thereof in the latter state forms no part of interstate commerce. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1 [24 L. Ed. 708]; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091 [29 L. Ed. 257]; *Coe v. Errol*, 116 U. S. 517-520, 6 Sup. Ct. 475 [29 L. Ed. 715]; *Robbins v. Taxing Dist.*, 120 U. S. 497, 7 Sup. Ct. 592 [30 L. Ed. 694]; and *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6 [32 L. Ed. 346]. In the latter case the

Supreme Court pointed out the distinction between commerce and the subjects thereof, and held that the manufacture of distilled spirits, even though they were intended for export to other states, was not commerce, falling within the regulating powers of Congress.

"Imagination, if not experience, can suggest that persons, partnerships, and corporations may be engaged in interstate commerce by the transportation of merchandise solely by water; that their activities may give them their income from lighterage; or they may be engaged in the sole business of forwarding goods, with no interest in the vessels or wagons on which they are transported. The foregoing are merely illustrations of activities which may perhaps be within the scope of the powers granted to the commission by the act as found in the fifth section thereof.

"Imagination, however, cannot suggest such an extension of constitutional limitation as may justify the investigation undertaken by the commission in this case. Indeed, so far as the matter has been brought to the attention of the court, no such assertion of power has ever been made to the courts. Investigation under subdivision (a), section 6, is limited to corporations engaged in interstate commerce. The defendant is engaged in manufacture."

1918 Supp., p. 387. [*Initial carrier of goods, etc.*]

This amendment conditionally qualifies the Cummins Amendment set out in 4 Fed. Stat. Ann. (2d ed.) 506, and under it a common carrier is required to obtain, by order of the Interstate Commerce Commission, the right to adopt alternative rates based on declared values of the shipment. If this is not done the shipper is not restricted, in an action to recover for loss of the shipment, to such declared value. *Western Assur. Co. v. Wells*, (1919) 143 Minn. 60, 173 N. W. 402, wherein the court, after setting out the Cummins Amendment, said:

"It is obvious from a reading of the foregoing amendment that it was the purpose of Congress to abolish the rule established by the courts restricting liabilities to the valuation upon which the rate paid was based. *McCaull-Dinsmore Co. v. Railway Co.* (D. C.) 252 Fed. 664; *In re The Cummins Amendment*, 33 Interst. Com. Comm. R. 682. Under that amendment the contract upon which the defendant claims the plaintiff's damages were limited in this case was void and of no effect. The Cummins Amendment was conditionally qualified by a subsequent act of

Congress passed August 9, 1916. [See 1918 Supp. Fed. Stat. Ann. 387.] As bearing upon this amendment the holding of the Interstate Commerce Commission in *Williams Co. v. Hartford & New York Transportation Co.*, 48 Interst. Com. Comm. R. 269, decided January 7, 1918, seems to be decisive of the case at bar. It is there stated that—

"By the amendment of August 9, 1916, the proviso last referred to was amended so as to provide that the provisions respecting liability for full actual loss, damage, or injury and declaring any limitation thereof to be unlawful and void shall not apply to baggage or to property, except ordinary live stock, on which the carrier has been or shall thereafter be authorized or required by order of the commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of the act. The rates assailed were in effect on August 9, 1916. No authority has ever been granted by us for their publication in terms of value."

"Under this rule the plaintiff in this action is entitled to recover the full value of the lost package regardless of the contract limitation relied upon by the defendant, unless it appears that the Interstate Commerce Commission, prior to the shipment, had made an order authorizing the carrier to enter into a contract limiting its liability in this particular class of cases. It follows that, the defendant being required to obtain, by order of the Interstate Commerce Commission, the right to adopt alternative rates based on declared or stated values of the shipment, and it not appearing to have done so, the decision that the plaintiff is restricted in its recovery to such stated value of the shipment is not warranted by the facts in the case, and a new trial must be granted."

Prospective operation.—The provision of this amendment to the Cummins Amendment that the declared liability of a carrier for the actual loss shall not apply to contracts of limitation authorized by order of the Interstate Commerce Commission is given a prospective operation and does not apply to orders made by the Commission prior to March 4, 1915, the date of the passage of the Cummins Amendment. *Western Assur. Co. v. Wells*, (1919) 143 Minn. 60, 173 N. W. 402.

INTOXICATING LIQUORS

Vol. IV, p. 593. [*Shipment of liquors, etc.*] [First ed., 1914 Supp., p. 208.]

V. State laws.

1. In general.

VI. Duties and liabilities of common carriers.

V. STATE LAWS

1. In General (p. 600)

Liquor in transit through state.—A state has no jurisdiction to punish the bringing into the state from another state of liquor in transit to a third state unless the sale thereof in the state of its destination would be illegal. *Haumschilt v. State*, (Tenn. 1920) 221 S. W. 196.

VI. DUTIES AND LIABILITIES OF COMMON CARRIERS (p. 601)

Liquor transported in bond as subject to seizure by state officials.—In *State v. Intoxicating Liquors*, (Me. 1920) 109 Atl. 257, liquor exported from Scotland had been withdrawn from a bonded warehouse at the port of Chicago for transportation to a bonded warehouse at the port of Bangor, Maine, where it was seized by a state sheriff at the inward freight shed of the transporting railroad at Bangor. Neither payment nor tender of the unpaid customs duties thereon was made by such sheriff. The liquor was duly libeled and claim was thereupon filed by the freight agent of the transporting railroad on behalf of the Director General of Railroads then operating such road. On appeal from a municipal court declaring the liquor forfeited it was held that the seizure was illegal and the liquor was ordered returned to the claimant. The court said:

"At the time this liquor was imported into the United States, which was before the adoption of the Eighteenth or Prohibitory Federal Amendment and the passage of laws thereunder, it was a legitimate and dutiable article of merchandise which the laws of the United States permitted to be entered at designated ports of entry. This was entered at the custom house and warehouse in Chicago. Under the then existing laws it could be legally rewarehoused in any other district in the United States, and that rewarehousing was as legal and valid as the original warehousing. The right to rewarehouse did not depend upon whether the new district was or was not within a prohibitory state. To hold that is to amend and partially nullify sections 5685, 5686, and all the other sections regulating rewarehousing. There is no such limitation. For illustration, suppose Bangor had been the port of original entry, would it be contended that in 1918 this whisky, arriving on board a vessel from Scotland,

and coming up the Penobscot river, could not have been entered in the custom house in that city and placed in a warehouse under bond, by complying with the customs laws and regulations? Would it not have been absolutely free from state interference until it had reached its final destination? If it could have been so entered at Bangor directly and originally, then it could first have been entered at Chicago and rewarehoused in Bangor, because the one is as fully protected from state interference as the other. The adoption of the Eighteenth Amendment and the enactment of legislation thereunder have changed the situation, because no duties can legally accrue upon the importation of goods prohibited by the federal government. They are not entitled to be entered at the custom house nor to be bonded. *McLane v. U. S.*, 6 Pet. 404, 8 L. Ed. 443. But prior to that adoption and legislation, intoxicating liquors, so far as import duties were concerned, stood on a plane with all other kinds of merchandise in the contemplation of the federal laws."

1918 Supp., p. 394, sec. 5.

Scope of section.—This section merely provides that liquor shall not be transported in interstate commerce into any state contrary to the laws of such state. It does not purport to make unlawful the distillation of spirituous liquor. *Pinasco v. U. S.*, (C. C. A. 9th Cir. 1920) 262 Fed. 400.

Necessity of state-wide prohibition.—To same effect as 1919 Supplement annotation, see *Laughter v. U. S.*, (C. C. A. 6th Cir. 1919) 250 Fed. 94, 170 C. C. A. 162.

Purchase with intent to transport.—The lawful purchase of liquor in a state does not violate the act because of an undisclosed intent of the purchaser to transport it to another state. *Collins v. U. S.*, (C. C. A. 5th Cir. 1920) 263 Fed. 657, wherein it was said:

"Neither the intent of the purchaser, nor any preparatory steps taken to transport the liquor to Texas, before its journey thence began, availed to take away the domestic character of the transaction. The subsequent movement of liquor from Monroe to Shreveport by the defendant could only serve to illustrate his undisclosed intent when he bought the liquor, and this intent was insufficient to make the order or purchase an interstate transaction. As there was no evidence that the intent of the defendant to take the liquor to Texas was in any way made known to or acquiesced in by the seller, we are not called upon to determine whether or not a purchase under such circumstances would be an interstate transaction. The order and purchase not being within the competency of Congress to punish,

and the defendant having been charged in the indictment with ordering and purchasing, and not with having caused to be transported in interstate commerce and into a state which prohibited the manufacture of liquor, the liquor described in the indictment, a verdict of acquittal should have been directed."

Transportation "into" state.—To same effect as first paragraph of 1919 Supplement annotation, see *Preyer v. U. S.*, (C. C. A. 4th Cir. 1919) 260 Fed. 157, 171 C. C. A. 193; *Bishop v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 195, 170 C. C. A. 263.

Transportation of liquors through a state as a mere incident to the transportation into another state, whether such transportation was by personal carriage or by common carrier was not affected by the Reed Amendment. *Martin v. Com.*, (Va. 1919) 100 S. E. 836.

Carrying liquor through the District of Columbia from Maryland for personal use in Virginia has been thought not to be a violation of this section. *Whiting v. U. S.*, (App. Cas. D. C. 1920) 263 Fed. 477. The court said:

"Whiting testified that he was engaged in the express and hauling business in Washington, and had been so engaged for the past 15 years; that he lived in Virginia, near Falls Church, and at the time of his arrest was taking the whisky from Baltimore, through the District, to his home, for his personal use. He was corroborated by two witnesses. If he told the truth, he had not violated the law under which he was being prosecuted. *United States v. Gudger*, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653. The only thing relied upon by the government to overcome the testimony in his behalf was the fact that he at the time of his arrest was in the express business in Washington, and had in his possession a business card and a motor operator's permit, which recited that his residence was in Washington. When the card was printed or the permit issued does not appear. Is this evidence enough to support a verdict that the destination of the liquor was not Virginia, but some point in the District of Columbia? While not deciding the matter, we think it proper to indicate our doubt concerning it."

Transportation of intoxicating liquors by automobile.—In *U. S. v. Simpson*, (D. C. Colo. 1919) 257 Fed. 860, it was contended that transportation of intoxicating liquors across a state by means of an automobile was a violation of this section. Answering this contention, the court said:

"It is said that the second count is bad because transportation by automobile is not a violation of the Act. An automobile may be used so as to become a common carrier in interstate commerce.

"The District Attorney stated in argument that the details of the transaction were set out in the third count for the purpose of testing, in the shortest and most inexpensive way, whether the bringing in of liquor in the

manner stated in that count is a violation. It is difficult to believe that the innumerable daily transactions, non-commercial in character and privately carried on across state lines, come within the reach of national regulatory power given by the Constitution; and yet I confess the broad language in some of the cases does not leave me entirely free from doubt. After all, my conclusion is reached from what is said about the Uncle Sam Oil Co. in the Pipe Line Cases, 234 U. S. 548, 561, 562, 34 Sup. Ct. 956, 959 (58 L. Ed. 1459). The facts there considered are apt. Justice Holmes for the majority said:

"There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two, which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is merely drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the Act, the transportation being merely an incident to use at the end."

"Of course the prime inquiry there was whether the Uncle Sam Oil Company was a common carrier; but to be a common carrier within the Act it was necessary that it be found to be engaged in transportation in interstate commerce, and the transportation in interstate commerce was the part of the inquiry to which Justice Holmes addressed himself. That this is so is demonstrated by the Chief Justice:

"The view which leads the court to exclude it [from the operation of the Act] is that the company was not engaged in transportation under the statute, a conclusion to which I do not assent. The facts are these: That company owns wells in one state from which it has pipe lines to its refinery in another state, and pumps its own oil through said pipe lines to its refinery, and the product, of course, when reduced at the refinery, passes into the markets of consumption [italics mine]. It seems to me that the business thus carried on is transportation in interstate commerce within the statute."

"I take it that the fact stated by the Chief Justice (in italics) was a necessary element to the conclusion he reached. That is to say, he did not agree with the majority that the transportation was 'merely an incident to use at the end,' but that the transportation from Oklahoma to Kansas, the refining of the oil in Kansas, and the passing of the refined oils into the markets of consumption should be viewed as one trans-

action, and that the three separate acts dealing with the subject constituted transportation in interstate commerce. *Kelly v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359.

"*Dan Hill's Case*, 248 U. S. 420, 39 Sup. Ct. 143, 63 L. Ed. —, recently decided by the Supreme Court, is not in point, as I view it. That also was a prosecution for violation of the Reed Amendment; but the indictment charged that Hill, while in Kentucky, boarded a trolley car being operated by a common carrier corporation engaged in interstate commerce, and by means thereof did cause himself and the said intoxicating liquor, then upon his person, to be carried and transported in interstate commerce into the state of West Virginia. The charge was exactly within the statute — 'cause intoxicating liquors to be transported in interstate commerce.' Hill caused the liquor to be transported in interstate commerce, in the manner charged in the indictment, as much so as if he had separately intrusted the liquor to the common carrier for transportation."

Transportation for personal use.—The transportation by the owner in his own automobile of intoxicating liquors for his personal use is comprehended by the prohibition of the Reed Amendment. *U. S. v. Simpson*, (1920) 252 U. S. 405, 40 S. Ct. 364, 64 U. S. (L. ed.) —, reversing (D. C. Colo. 1919) 257 Fed. 800.

Knowledge of interstate character of shipment.—A person who carries liquor in an automobile between two points in the same state cannot be convicted under this section unless it is shown that he knew that the carriage was a link in an interstate transportation of the liquor. *Ousler v. U. S.*, (C. C. A. 6th Cir. 1920) 263 Fed. 968.

Forfeiture of liquor.—Liquor brought into the District of Columbia in violation of this section but not in violation of the local act known as the Sheppard Law cannot be forfeited under the latter act. *District of Columbia v. Gladding*, (App. Cas. D. C. 1920) 263 Fed. 628.

Conspiracy to violate section.—Persons may be indicted under section 37 of the Penal Laws (7 Fed. Stat. Ann. (2d ed.) 534) for a conspiracy to violate this section. *Laughter v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 94, 170 C. C. A. 162.

Indictment—Sufficiency.—In a prosecution for a violation of this section the permissible purposes for which liquor may be transported need not be negatived in the indictment, since they are matters of defense. *U. S. v. Simpson*, (D. C. Colo. 1919) 257 Fed. 860.

Evidence.—In the following cases it was held that there was sufficient evidence to sustain a conviction for a violation of this section: *Jones v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 104, 170 C. C. A. 172; *Bishop v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 195, 170 C. C. A. 263; *Berryman v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 208, 170 C. C. A. 276.

1919 Supp., p. 199, sec. 1.

Constitutionality.—This act is a valid exercise of the war power of Congress. It is not rendered invalid by the fact that its duration extends through a period of purely technical war when the reasons giving rise to it have ceased to exist. *Maryland Distilling Co. v. Miles*, (D. C. Md. 1919) 263 Fed. 597. See to the same effect *Hannah v. Clyne*, (N. D. Ill. 1919) 263 Fed. 599.

Act as affecting state statutes.—This statute was not intended to suspend the operation of state statutes regulating the sale of intoxicating liquors. *Ex p. Guerra*, (Vt. 1920) 110 Atl. 224, wherein the court said: "In some of the war-time legislation Congress has expressly reserved to the states the exercise of police powers, and it is argued therefrom that the absence of such reservations in the War Prohibition Act indicates the intention of the federal government to occupy the whole field and thus suspend the operation of state legislation on the subject. But there was no need for Congress to authorize the continued exercise by the states of a power that had not been surrendered, and of which, as we have seen, they could by no means be deprived. *South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737; *Keller v. United States*, 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066. The cases cited support the following conclusions: In enacting war prohibition Congress was without authority to exercise and did not assume to exercise the police power. The right and duty to legislate in this field for the general welfare remained in the states unimpaired. Congress was at liberty to employ as a war measure the same means to accomplish its object as the state was using to accomplish an independent object. The mere fact that the federal act is similar to the state law in some of its provisions does not invalidate the latter. To have this effect, the state law must in operation interfere with the enforcement of the federal act. Though a state police regulation must yield to a valid act of Congress, it yields only when and to the extent that its enforcement conflicts therewith, or with the exercise of rights conferred, or the discharge of duties enjoined, by the paramount act. To the extent that the two are in harmony the acts are concurrent, the one supplementing the other. It follows that, as the enforcement of the prohibitory features of the state law does not obstruct or embarrass the execution of the act of Congress, there is no invalidating conflict.

"It is no objection to the concurrent validity of the two statutes that both penalize the same act, for it has been repeatedly held that the same act may constitute a criminal offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each, provided the act is one over which both sovereignties have jurisdiction. *Cross v. North Carolina*, 132

U. S. 131, 10 Sup. Ct. 47, 33 L. Ed. 287, 290; *Crossley v. California*, 168 U. S. 640, 18 Sup. Ct. 242, 42 L. Ed. 610; *Southern R. Co. v. Railroad Comm'rs*, 236 U. S. 439, 35 Sup. Ct. 304, 59 L. Ed. 661. It is unnecessary for present purposes to decide whether the acquittal or conviction of a violation of the federal statute would bar a prosecution under the statute of the state, or vice versa. The authorities are not in harmony upon this question. This court said in *State v. Randall*, 2 Aiken 89, 100, that such would be the result; but the question was not involved in the decision. It was recently held in *United States v. Porria* (D. C.) 255 Fed. 172, that a conviction in a state court for receiving stolen property is a bar to a prosecution under a federal statute for taking in possession such property, a foreign shipment, the same having been stolen, as the character and degree of proof was the same. On the other hand, it was held in *United States v. Casey* (D. C.) 247 Fed. 362, that a conviction under a state statute for maintaining a brothel located so near a military post as to fall within the prohibited zone prescribed by the Secretary of War under the Selective Service Act did not prevent a conviction under such act. We have not overlooked the fact that the offense for which the relator was convicted, viz., keeping intoxicating liquors with intent to sell, is distinct from the offense of selling prohibited by the act of Congress. This would furnish an additional and perhaps sufficient reason for upholding the conviction. However, we have thought best to dispose of the question on the grounds argued."

The federal War-Time Prohibition Act, while it forbade the sale of liquors for beverage purposes during its continuance, did not suspend the New Jersey statute authorizing the issuance of licenses to sell liquors, nor did the provision of the Constitution of the United States which forbids such sale after January 16, 1920, operate to avoid a license which was issued previous to the constitutional amendment taking effect; for, as the ban of federal statutory prohibition might have been removed pending the running of the license by the termination of the war and the proclamation of the President, the licensee in that event could have lawfully sold liquors under his license, issued pursuant to our statute, until the amendment of the Federal Constitution went into effect. *Wilson v. Jersey City*, (N. J. 1920) 109 Atl. 364.

State laws and regulations, however, were so affected by this section that municipalities could not license the sale of spirituous, vinous, malt, and brewed liquors. *Wilson v. Jersey City*, (N. J. 1919) 107 Atl. 797.

Cider.—The provision of this act which prohibited the importation of all alcoholic liquors included cider if it contained enough alcohol to render it intoxicating. But cider was not a vinous liquor within the meaning of the act, and, regardless of its alcoholic content, the manufacture or sale thereof

was not prohibited. (1919) 31 Op. Atty-Gen. 491.

Malt liquor containing less than one-half of one per cent of alcohol was not included in this section. (1919) 31 Op. Atty-Gen. 498.

Information as requiring allegation that beer was intoxicating.—An information charging the defendant with using cereals in the manufacture of beer contrary to the provisions of this section, need not allege that the beer was intoxicating. *U. S. v. Bergner, etc., Brewing Co.*, (1919) E. D. Pa. 260 Fed. 764. But see the original annotation wherein it appears that such contention has been overruled by the Supreme Court in *U. S. v. Standard Brewery*, (1919) 251 U. S. 210, 40 S. Ct. 139.

1919 Supp., p. 202, sec. 1.

Injunction to restrain enforcement.—In *Griesedieck Bros. Brewery Co. v. Moore*, (E. D. Mo. 1919) 262 Fed. 582, an injunction pendente lite was granted to restrain the collector of internal revenue and U. S. attorney for a certain district, from enforcing the provisions of this act pending a decision regarding its constitutionality.

1919 Supp., p. 206, sec. 3.

Constitutionality of provision as to alcoholic content of liquors.—Congress did not exceed its powers, under U. S. Const., 18th Amend. (see 1919 Supp. 839) to enforce the prohibition therein declared against the manufacture, sale, or transportation of intoxicating liquors for beverage purposes, by enacting the provisions of the Volstead Act, wherein liquors containing as much as one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, are treated as within that power. *National Prohibition Cases*, (1920) 253 U. S. 350, 40 S. Ct. 486, 64 U. S. (L. ed.) —, affirming *Feigenspan v. Bodine*, (D. C. N. J. 1920) 264 Fed. 186.

See generally on the subject of the Eighteenth Amendment annotations set out *post*, under notes on Constitution.

"Possess"—"Deliver."—A warehouse corporation which has leased a room in its warehouse for the storage of intoxicating liquors that are in the lessee's exclusive possession and control does not "possess" such liquors within the meaning of the provision of this section that "no person shall on or after the date when the 18th Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." Nor does the corporation, by permitting the owner of such liquors to have access to them for the purpose of taking them to his dwelling for lawful use, "deliver" them within the meaning of such

provision. *Street v. Lincoln Safe Deposit Co.*, (1920) 254 U. S. 88, 41 S. Ct. 31, 65 U. S. (L. ed.) —. The court said:

"Section 3, which is the omnibus section of the act, provides that:

"No persons shall on or after the date when the 18th Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

"It is argued that the declaration herein that no person shall 'possess,' 'transport,' or 'deliver' intoxicating liquors is applicable to this case, because the warehouse company is not 'authorized' by the act to 'possess' them, and because they cannot be used, even lawfully, by the plaintiff, unless delivered and taken away from the warehouse.

"By the admissions the appellant is lessee of the room in which the liquors are stored, and he 'is in the exclusive possession and control of them.' Thereby the relation of the warehouse company to the liquors is restricted to the public function of furnishing such police, fire, and other protection to its buildings and their contents as the law or its lease requires on the part of such company, and to allowing the plaintiff to have access to his property in order that he may remove it for an admittedly lawful purpose. The company could not sell, give away, or otherwise transfer the liquors to anyone other than, in this limited way, to the plaintiff owner.

"The purpose of the 18th Amendment and of this act considered, we cannot bring ourselves to the conclusion that such a relation to the liquors on the part of the storage company as is here disclosed constitutes a possession of them within the meaning of this section of the act.

"It is equally clear that to permit the owner to have access to the liquors to take them to his dwelling for lawful use is not a delivery of them within the meaning of this 3d section.

"That transportation of the liquors to the home of appellant, under the admitted circumstances, is not such as is prohibited by the section, is too apparent to justify detailed consideration of the many provisions of the act inconsistent with a construction which would render such removal unlawful, and that the act is understood by the officers charged with its execution as permitting such transportation is shown by the provision of the regulations of the Bureau of Internal Revenue, authorizing permits for the transportation of liquors from one permanent residence of an owner to another in case of his removal, although no such transfer is in terms provided for by the act.

"Clearly there is like administrative power under the act to so regulate the

transfer of such stored liquors from a warehouse to the dwelling of the owner as to prevent their being used to evade the prohibitions of the act, or to substantially interfere with its effective enforcement."

1919 Supp., p. 212, sec. 21.

"Kept"—Kept for sale or barter or other commercial purpose is what is meant by the word "kept," as used in this section, which declares that any room, house, building, or place where intoxicating liquor is manufactured, sold, kept, or bartered, in violation of the act, and all intoxicating liquor and property kept and used in maintaining the same, are a common nuisance, and provides penalties for the maintaining of such a place. *Street v. Lincoln Safe Deposit Co.*, (1920) 254 U. S. 88, 41 St. Ct. 31, 65 U. S. (L. ed.) —. In defining the word "kept" as used in this section, the court said:

"Section 21 declares that 'any room, house, building . . . or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance.' And for the maintaining of such a place penalties are provided.

"The word 'kept' in this section is the only one of possible application to the case at bar, and the words with which it is immediately associated are such that, as here used, it plainly means kept for sale or barter, or other commercial purpose. Its inapplicability to this case is apparent. *Noscitur a sociis*. *United States v. Louisville & N. R. Co.* 236 U. S. 318, 334, 59 L. ed. 598, 606, P. U. R. 1915B, 247, 35 Sup. Ct. Rep. 363."

1919 Supp., p. 213, sec. 25.

Application of section.—The declaration in this section that it shall be unlawful to have or possess any liquor intended for use in violating such act, obviously does not apply where the uses to which it is admitted that the owner intends to devote his liquor are those which § 33 of the act declares not to be unlawful. *Street v. Lincoln Safe Deposit Co.*, (1920) 254 U. S. 88, 41 S. Ct. 31, 65 U. S. (L. ed.) —, wherein it was said:

"Section 25 declares that: 'It shall be unlawful to have or possess any liquor . . . intended for use in violating this title . . .'

"But since § 33 declares that the uses to which it is admitted the plaintiff intends to devote his liquors are not unlawful, obviously this section does not apply to the case, for the unlawfulness declared by it is conditioned upon the intended use in violating the act."

1919 Supp., p. 216, sec. 33.

Storage in warehouse of liquors for private use.—There is nothing in this act which makes it unlawful for a warehouse corporation to permit the storage in its warehouse

after the effective date of such act of liquors theretofore lawfully acquired, which are so stored solely and in good faith for the purpose of preserving and protecting them until they shall be consumed by the owner and his family or bona fide guests,—uses declared by this section not to be unlawful.

Moreover, the implication is plain from the provision in this section, making the possession of liquors by any person "not legally permitted" under the act to possess liquor *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of the act, that, if such presumption is rebutted by appropriate testimony, the possession shall be considered not unlawful, even though it be by a person not holding a technical permit to possess it, such as is provided for in the act. *Street v. Lincoln Safe Deposit Co.*, (1920) 254 U. S. 88, 41 S. Ct. 31, 65 U. S. (L. ed.) —. The court said:

"May a warehousing corporation lawfully permit to be stored in its warehouse, after the effective date of the Volstead Act, liquors admitted to have been lawfully acquired before that date, and which are so stored, solely and in good faith, for the purpose of preserving and protecting them until they shall be consumed by the owner and his family, or bona fide guests?"

"Since the Volstead Act has been held by this court to be a valid law, the answer to this question must be found in its provisions, and the sections of it which it is argued sustain the negative answer to the question given by the court below are 3, 21, and 25 of title II.

"Since here, as always, the purpose of Congress in enacting a law is of importance in determining the meaning of it, it is noteworthy that title II of the Volstead Act was passed under the grant of power to enforce the 1st section of the 18th Amendment to the Constitution of the United States, which prohibits the manufacture, sale, and transportation of intoxicating liquors for beverage purposes, but does not indicate any purpose to confiscate liquors lawfully owned at the time the amendment should become effective, and which the owner intended to use in a lawful manner.

"Section 33 of the act is the only one which deals specifically with liquors lawfully acquired before it should take effect, and it is therefore of first importance in the consideration of the case before us. That section declares:

"It shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only, and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such

dwelling and of his bona fide guests when entertained by him therein."

"The admissions of fact under which this case is considered bring the liquors here involved precisely within these immunity provisions of § 33, except that they are stored in a public warehouse instead of in a private dwelling. . .

"The implication from another provision of § 33 than the one quoted above confirms this conclusion. It reads:

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title."

"Assuming that the unexplained presence of the liquors in the company's warehouse would give rise to the prescribed presumption, yet, if that presumption should be rebutted by appropriate testimony (as it is in this case by admissions) that the liquor to which it is applied is not being kept for the purpose of sale, barter, exchange, furnishing, or otherwise disposing of it in violation of the provisions of the title, the implication is plain that the possession should be considered not unlawful, even though it be by a person 'not legally permitted,'—that is, by a person not holding a technical permit to possess it, such as is provided for in the act.

"Without saying that there may not be other cases, the one at bar seems to be fairly within the scope of this obvious implication of § 33.

"It may be that the custody of liquors by a warehouse company was thus not declared to be unlawful because the writers of the act did not have such a case in mind; but it was more probably because Congress would not consent to allow lawful possession and use of liquors in dwellings having storage facilities for them, while denying the only possible means of preserving and protecting such liquors to persons with less commodious homes. The Congress was concerned with the great problem of preventing liquors for beverage purposes in the future, and it seems to have given but slight attention to the consumption of such relatively small amounts of such liquors as might be in existence in private ownership, and intended for consumption by the owner, his family or his guests, when the amendment and the act should take effect.

"An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for their operation in effecting a purpose clearly indicated and declared."

JUDGMENTS

Vol. IV, p. 606, sec. 967. [First ed., vol. III, p. 4.]

Necessity of recording.—Under this section a federal judgment in Louisiana be-

comes a lien only when recorded as required by the statutes of that state. *U. S. v. Kendall*, (E. D. La. 1920) 263 Fed. 126.

JUDICIAL OFFICERS

Vol. IV, p. 620, sec. 363. [First ed., vol. IV, p. 70.]

Verification of information.—An assistant district attorney has authority under this section to verify an information for a violation of the Selective Service Act (9 Fed. Stat. Ann. (2d ed.) 1136). *Brown v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 703, 168 C. C. A. 653.

Vol. IV, p. 657, sec. 828. [First ed., vol. IV, p. 95.]

XIV. RECEIVING, KEEPING AND PAYING OUT MONEY (p. 675)

Money held as security against liability on bail bond.—The clerk may properly deduct his poundage of one per cent, under this section, from the amount allowed to the surety on a forfeited bail bond out of the impounded funds of the principal in such clerk's hands, which are finally adjudged to have been held in trust primarily as security against liability on such bond. *Leary v. U. S.*, (1920) 253 U. S. 94, 40 S. Ct. 446, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 4th Cir. 1919) 257 Fed. 246, 168 C. C. A. 330.

Vol. IV, p. 699, sec. 833. [First ed., vol. IV, p. 120.]

Clerks.—Fees and emoluments collected by a clerk of a district court, and deposited by him in a bank at interest, were not public moneys of the United States, so as to entitle the United States to the interest as an increment of its ownership, even where such clerk was, by exceptional legislation, an

officer whose salary was specifically appropriated, it not being disputed that he was under obligation to meet the expenses of his office from the fees and emoluments thereof, and to pay over to the United States only the resulting surplus. *U. S. v. MacMillan*, (1920) 253 U. S. 195, 40 S. Ct. 540, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 7th Cir. 1917) 251 Fed. 55, 163 C. C. A. 305.

Interest on the sum of the fees and emoluments deposited by the clerk of a district court in a bank is not, in and of itself, an emolument for which he is liable to account to the United States. *U. S. v. MacMillan*, (1920) 253 U. S. 195, 40 S. Ct. 540, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 7th Cir. 1917) 251 Fed. 55, 163 C. C. A. 305.

Vol. IV, p. 763, sec. 798. [First ed., vol. IV, p. 158.]

"Vouchers thereof shall be filed."—Fees and emoluments coming into the hands of the clerk of the Circuit Court of Appeals are not "public money" or the "money or property of the United States," but are received primarily to pay compensation of the clerk and expenses of his office, and for any balance he is not a trustee, but a debtor to the U. S. He is entitled to receive and should carefully preserve all paid and canceled checks drawn upon his account in a bank as clerk of the court, he having deposited in such bank fees and emoluments received, such canceled checks being included in the term "vouchers" as employed in this section. The Treasury Department has no right to order the bank to retain such checks. *Petition of Clerk for Instructions, etc.*, (C. C. A. 7th Cir. 1919) 261 Fed. 164.

JUDICIARY

Vol. IV, p. 825, Jud. Code, sec. 12.

[First ed., 1912 Supp., p. 135.]

Order of adjournment to whom directed.—A written order by a district judge adjourning a regular term of the District Court is not invalid because not in terms directed to either the marshal or the clerk, since they are required to take cognizance of it and will be presumed to have performed their duty until the contrary appears. *Weichen v. U. S.*, (C. C. A. 7th Cir. 1920) 262 Fed. 941.

Vol. IV, p. 832, Jud. Code, sec. 21.

[First ed., 1912 Supp., p. 137.]

Sufficiency of affidavit—Allegations of facts showing prejudice.—An affidavit under this section is insufficient where it merely states that the judge is prejudiced in favor of the opposite party without setting forth any facts in support of such allegation. *U. S. v. Fricke*, (S. D. N. Y. 1919) 261 Fed. 541.

Judges who may be appointed.—Where a district judge is disqualified to sit, the circuit judge need not appoint another district judge from the same district but may appoint one from another district. *In re De Ran*, (C. C. A. 6th Cir. 1919) 260 Fed. 732, 171 C. C. A. 470, wherein it was said:

"We cannot accede to the proposition that Judge Tuttle was without jurisdiction to hear the instant proceedings from the fact that there are two district judges for the northern district of Ohio, and that Judge Westenhaver, the other district judge, is not shown to have been disqualified. We set to one side, as without the record, the assertion in petitioner's brief that Judge Westenhaver was in fact not disqualified, as well as respondent's assertion that Judge Tuttle was already under general designation to sit in the northern district of Ohio. As the record stands, we think there was no lack of jurisdiction in Judge Tuttle. The authority to designate another judge upon Judge Killits' certificate of disqualification is expressly conferred by section 21 of the Judicial Code, under the practice specified in sections 20 and 14. Assuming that Judge Westenhaver was not disqualified, the circuit judge was not bound to designate him; the statute gave the circuit judge the choice of methods. It will be presumed that the designation was made for reasons deemed sufficient. We find nothing in the statutes which limits the power of designation to a case where all the judges of the district are disqualified; and we cannot read such limitation into the statute."

Vol. IV, p. 842, Jud. Code, sec. 24, par. first.

[First ed., 1912 Supp., p. 139.]

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I. JURISDICTION IN GENERAL

3. *Limited Jurisdiction of Courts* (p. 847)
 "The United States District Court, being a court of limited jurisdiction, it is the duty of the court to search the record in each case to ascertain whether the jurisdictional facts exist." *Cleveland Cliffs Iron Co. v. Kinney*, (D. C. Minn. 1919) 262 Fed. 980.

8. *Effect of State Legislation* (p. 848)

Recovery of taxes paid to state under duress.—An action for money had and received will lie by a foreign corporation against the treasurer of a state to recover taxes paid by the plaintiff to the defendant under protest and alleged implied duress, pursuant to the provisions of state statutes held by the United States Supreme Court to be unconstitutional. Such an action may be maintained notwithstanding that it is not permitted by the statutes of the state. *International Paper Co. v. Burrill*, (D. C. Mass. 1919) 260 Fed. 664. The court said:

"Citizens of other states cannot be deprived by enactments of the commonwealth of Massachusetts of their right through the federal courts to enforce common-law remedies."

II. SUITS OF CIVIL NATURE AT COMMON LAW OR EQUITY.

4. *At Law and Equity*

c. "In Equity" (p. 853)

State legislation.—To same effect as original annotation, see *Kessler v. Necker*, (D. C. N. J. 1919) 258 Fed. 654, wherein it was said:

"The one inhibition against the enforcement in a federal court of new equitable rights, created by state statute, is that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution of the United States. When the necessary elements giving federal courts jurisdiction are present, the following rules are deducible from the cases relative to the jurisdiction and power of federal courts to enforce rights created and to administer remedies provided for enforcement and administration in state courts:

"1. Rights, created or provided by the statutes of the states to be pursued in the state

courts, may be enforced and administered in the federal courts, either at law or in equity, or in admiralty, as the nature of the new rights may require.

"2. An enlargement of equitable rights by the statutes of the states may be administered by the federal courts, as well as by the courts of the states.

"3. A party by going into a federal court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality."

Adequate remedy at law.—Where by reason of diverse citizenship plaintiffs are entitled to sue in the federal court, the remedy at law to negative equitable jurisdiction must be a remedy at law in the federal court. If such remedy is doubtful merely, equitable jurisdiction is properly exercised. *Cleveland Cliffs Iron Co. v. Kinney*, (D. C. Minn. 1919) 262 Fed. 980.

Suit to quiet title.—A federal court has jurisdiction of a suit in equity to quiet the title to land of which the plaintiff is in peaceable possession, where it appears that no suit is pending at law wherein the validity of his title and the claim of the defendant can be tested, and that he has no adequate remedy at law. *Nirdlinger v. Stevens*, (D. C. N. J. 1919) 262 Fed. 591.

Appointment of receiver.—A suit against a corporation for the appointment of a receiver, brought in the state in which it was incorporated by a stockholder residing in another state, is within the jurisdiction of a federal court in the former state. *Adler v. Campeche Laguna Corp.*, (D. C. Del. 1919) 257 Fed. 789.

6. *Administration or Probate* (p. 856)

Construction of will.—Where there is no law in the state in which a will has been probated authorizing anyone, by suit inter partes, to assail probate proceedings, a federal court has no jurisdiction of such a suit for a construction of the will. *Lee v. Minor*, (C. C. A. 9th Cir. 1919) 260 Fed. 700, 171 C. C. A. 438.

Setting aside will.—In *Creighton v. Creighton*, (C. C. A. 8th Cir. 1919) 261 Fed. 333, a suit in equity was brought in the federal District Court in Kansas to set aside the will of a Kansas testator on the ground of mental incapacity and undue influence. A decree for the complainant was reversed on the merits, the evidence being held insufficient to sustain the decree, but the jurisdiction to entertain the suit was not questioned nor even mentioned.

VII. AMOUNT IN CONTROVERSY

3. *Cases Requiring Jurisdictional Amount*

b. *Diverse Citizenship* (p. 864)

Conveyance to give jurisdictional amount.—The fact that real property has been conveyed to the plaintiff in order to bring the amount in controversy up to the sum required by this section, does not affect the

jurisdiction of the court provided the conveyance is a real transaction without any reservation in the grantor for a reconveyance of the property to him. *Livingston v. Monidah Trust*, (C. C. A. 9th Cir. 1919) 261 Fed. 966.

4. *Necessity of Matter in Dispute Having Pecuniary Value*
- b. *Deprivation of Political and Social Rights* (p. 865)

Bill to restrain governor from submitting proposed Eighteenth Amendment to state legislature.—In *Ohio v. Cox*, (S. D. Ohio 1919) 257 Fed. 334, an injunction was sought to restrain the governor of Ohio from submitting the Eighteenth Amendment (1919 Supp. Fed. Stat. Ann. 839) to the state legislature for ratification. Regarding the amount in controversy, it was said:

"The jurisdiction of this court is limited to actions involving \$3,000, not including interest and costs. The bill alleges that the jurisdictional amount is involved. Looking at the plaintiff, or those he represents, as taxpayers, there is no allegation that any particular sum to him, or to any one of them, is involved; and considering the plaintiff, and those he claims to represent, as citizens of the United States seeking to remedy a political wrong, there is no amount of money involved.

"It is alleged that the result of the Prohibition Amendment would be a loss to the government of many millions of dollars, which would have to be made up otherwise. That may be true temporarily, but it may also be that the results of prohibition will be such as to make a wealthier people, a people better able to bear the financial burdens of government, and that a temporary loss of revenue from this particular source would be more than counterbalanced by increased capacity to carry those burdens. It was said by Mr. Justice Grier in the *License Cases*, 5 How. 504, 631 (12 L. Ed. 256):

"If a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she would be the gainer a thousand fold in the health, wealth, and happiness of the people."

"In any event, it is manifest that the increased burden would come through indirect taxation, impossible of ascertainment, highly vague and conjectural, and not of the kind measurable by the law. Moreover, if it were ascertainable, it would have to be shown that the loss to at least one citizen would amount to the jurisdictional amount, because individual claims of unjust taxation cannot be aggravated for the purpose of making a sum within the jurisdiction of this court.

"Counsel for plaintiff expressly disclaim appearing for any one interested in the liquor traffic. Indeed, they say they have declined retainers from some so interested. They and their client take the high ground that their interest lies deeper than questions of property rights, and grows out of their love of

country and their desire to protect it, by insisting that all the safeguards of the Constitution be maintained inviolate. The court believes them.

"But, if they did represent such interests, it was settled by the Supreme Court long ago that no one has an inherent right to conduct that traffic, and if any one makes an investment in it, however large, he does it with the knowledge that such property rights as he would otherwise have in the business he has built up are necessarily overborne by the greater right of the public, through the exercise of police power, to enhance the public health, morals, and welfare. So no right of pecuniary value, or any value, is involved in this behalf."

e. *Miscellaneous* (p. 865)

Suit for damages for wrongful death.—In *Novitsky v. Rozner*, (W. D. Pa. 1915) 250 Fed. 913, it was held that a suit by a father to recover damages for the death of his minor child, three and one-half years of age, did "not really and substantially involve a dispute or controversy of three thousand dollars."

5. *Ascertainment of Value of Matter in Dispute* (p. 865)

Injunction—Generally.—"In a suit for an injunction the value of the matter in dispute is not tested by the mere immediate pecuniary damage resulting from the acts complained of, but by the value to the complainant of the business or property right for which protection is sought." *Prest-O-Lite Co. v. Bournonville*, (D. C. N. J. 1914) 260 Fed. 440.

Interference with pipe line.—In a suit to enjoin the interference with a pipe line used by a common carrier in the transportation of oil, the value of the entire system and the amount which the plaintiff would be compelled to expend if a portion of its line were removed, should be considered in determining the amount in controversy. *Lowe v. Pure Oil Co.*, (C. C. A. 4th Cir. 1919) 260 Fed. 704, 171 C. C. A. 442. Regarding this question, the court said:

"It is insisted by defendant that the court below was without jurisdiction, inasmuch as the amount involved in the controversy was not \$3,000 in excess of cost and interest. This is based upon the theory that the amount involved should represent only the actual cost of removing this line from the south side of the creek to the north side of the creek.

"As we have stated, it is alleged in the bill that the value of the entire system of gravity oil lines exceeds the sum of \$3,000, and that, owing to the occupancy of the south side of the creek by the railroad in constructing its line, it is in such condition that it would be impracticable to locate the pipe line on that side, and that it was for this reason plaintiff was compelled to change its line so as to operate it for the purpose for which it was intended.

"It is insisted by plaintiff that the removal of a part of this line would destroy the entire gravity system in the creek beds, among other things necessitating its removal from tanks at Pine Grove to Jacksonburg, the main connecting lines above Jacksonburg, also necessitating an alteration in a multitude of smaller lines connecting each well with the main line, at a great loss and expense, and thus either destroy the business or necessitate the construction of a pressure system on other lands, involving the purchase of new rights of way, for a distance of more than one mile, over a hill. It is extended that the construction of such line would cost \$2,500 for labor done, \$3,000 for pump station, and \$3,000 for additional pipe, costing in the aggregate from \$8,000 to \$10,000. This, we think, should be considered in estimating the amount involved in this controversy.

"In addition to this phase of the question, it is insisted by counsel for plaintiff that 'where a particular matter of itself less than jurisdictional amount or value involves a right or estate as the subject of dispute, which right or estate depends upon the determination of the controversy, the value of the right or estate will fix the jurisdiction.'

Illegal issuance of bonds.—In a suit by taxpayers to restrain public officers from an alleged unconstitutional use of public funds and issuance of bonds, the injury to the plaintiffs rather than the amount of the funds or the bonds is the measure of the "amount" in controversy. *Scott v. Frazier*, (D. C. N. D. 1919) 258 Fed. 669.

Suit on judgment.—In a suit on a judgment the amount in controversy is the amount of the judgment rather than the amount of the original debt as it stood prior to its being merged in the judgment. *Preston v. Durham*, (N. D. Ga. 1920) 262 Fed. 843.

6. Aggregate of Claims and Joinder (p. 872)

In general.—To same effect as fifth paragraph of original annotation, see *Smith-Webster Co. v. John*, (C. C. A. 3d Cir. 1919) 259 Fed. 549, 170 C. C. A. 511.

Taxpayers' suits.—The amount in controversy in a suit in a federal District Court by taxpayers to enjoin, on constitutional grounds, the payment of public funds out of the state treasury, and the issuing of state bonds, must equal the jurisdictional amount as to each complainant. *Scott v. Frazier*, (1920) 253 U. S. 243, 40 S. Ct. 503, 64 U. S. (L. ed.) — (reversing (D. C. N. D. 1919) 258 Fed. 669), wherein the court said: "The jurisdiction was invoked because of alleged violation of rights under the Fourteenth Amendment. The complainants were taxpayers of North Dakota, who alleged that suit was brought on behalf of themselves and all other taxpayers of the state. There was no diversity of citizenship and jurisdiction was rested solely upon the

alleged violation of constitutional rights. The District Court rendered a decree dismissing the bill on the merits; the judge stating that he was of opinion that there was no jurisdiction, and directing the dismissal on the merits to prevent delay, and to permit the suit being brought here by a single appeal.

"There is no allegation that the loss or injury to any complainant amounts to the sum of \$3,000. It is well settled that in such cases as this the amount in controversy must equal the jurisdictional sum as to each complainant. *Wheless v. St. Louis*, 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583; *Rogers v. Hennepin County*, 239 U. S. 621, 36 Sup. Ct. 217, 60 L. Ed. 469.

"The District Court was right in its conclusion that there was no jurisdiction. The decree is reversed, and the cause remanded to the District Court, with directions to dismiss the bill for want of jurisdiction."

Item not proved in former trial.—That one item of a claim made up of several items was not proved in a former trial and the residue do not aggregate the jurisdictional amount is not ground for an objection to the jurisdiction made prior to a retrial. *Eggers v. Sun Sales Corp.*, (C. C. A. 2d Cir. 1920) 263 Fed. 373.

8. Pleading Amount by Plaintiff

a. Necessity and Sufficiency (p. 877)

In general.—To same effect as original annotation, see *Cleveland Cliffs Iron Co. v. Kinney*, (D. C. Minn. 1919) 262 Fed. 980.

VIII. SUITS ARISING UNDER CONSTITUTION, LAWS OR TREATIES

1. In General

c. General Definition of Federal Question (p. 883)

Tests variously stated.—To same effect as third paragraph of original annotation, see *Ohio v. Cox*, (S. D. Ohio 1919) 257 Fed. 334.

f. Citizenship. Immaterial (p. 885)

Averments of a bill setting up alleged obligations of a contract between a claimant and the state, and the contention that they were impaired by subsequent legislation, presented a controversy under the Federal Constitution and conferred jurisdiction (a sufficient amount being involved) upon a federal District Court irrespective of the citizenship of the parties. *Hays v. Seattle*, (1920) 251 U. S. 233, 40 S. Ct. 125, 64 U. S. (L. ed.) —, *affirming* (W. D. Wash. 1915) 226 Fed. 287.

2. Pleading Federal Question

a. Plaintiff Required to Show (p. 888)

In general.—In any case alleged to come within the federal jurisdiction, it is not enough to allege that questions of a federal character arise in the case, but it must plainly appear that the averments attempt-

ing to bring the case within such jurisdiction are real and substantial. *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co.*, (1920) 252 U. S. 436, 40 S. Ct. 385, 64 U. S. (L. ed.) —.

5. Allegations Held Insufficient

a. In General (p. 899)

Impairment of contract obligation.—The contention that a hydro-electric company, incorporated under the general laws of a state, which has adopted a resolution designating certain parcels of land as appropriated and necessary to carry out the corporate purpose, had acquired rights before appropriation was completed, as provided by the state condemnation laws, of which it was unconstitutionally deprived by the use of the designated parcels by other public utility companies,—is too unsubstantial to serve as the basis of federal jurisdiction where, independently of the incorporation and resolution, the company had no rights or property to be taken, and there was no state legislative or other action against any charter rights which such corporation possessed. Whatever controversies or causes of action the corporation had were against other companies as rivals in eminent domain, or as owners of the land, over which a federal court has no jurisdiction, diversity of citizenship not existing. *Cuyahoga River Power Co. v. Northern Ohio Traction, etc., Co.*, (1920) 252 U. S. 388, 40 S. Ct. 404, 64 U. S. (L. ed.) —.

IX. SUITS ARISING UNDER CONSTITUTION

1. In General (p. 905)

Constitutionality of federal statute.—The District Court has jurisdiction to determine whether a federal statute is constitutional. *Griesedieck Bros. Brewing Co. v. Moore*, (E. D. Mo. 1919) 262 Fed. 582, wherein the court said:

"It is perfectly obvious this court has jurisdiction to hear and determine the question raised as to the constitutional validity of the provisions of the act of Congress challenged, for such issue is a judicial, and not a legislative, question, and on the decision of this one issue depend all others in this case; for if the act in so far as challenged be within the constitutional power of the Congress to enact into law, the complainants, and all others, including the defendants, must obey and enforce its terms. On the contrary, if the provisions of the act challenged by complainants are found and decreed as a matter of law to lie without and beyond the constitutional power of the Congress to enact into law, then the act is not a law. It has no office to perform, has no binding force or effect upon any citizen of the republic, and defendants in enforcing it, or in attempting or threatening to enforce its provision against complainants or their property and property rights, to their irreparable loss, injury and damage, are not officers of the law acting within the scope of their lawful authority, but are, when so

engaged, mere private individuals, volunteers, and intermeddlers, whose injurious acts ought to and in justice should be restrained."

2. Municipal Ordinances

c. Violation of Due Process Clause (p. 914)

A suit to enjoin the enforcement of an ordinance requiring a coal company to obtain the consent of adjacent property owners to the erection of a coal yard within the city limits, and imposing fines for violation of the ordinance, is within the jurisdiction of a federal court, where the ordinance is alleged to be invalid because in contravention of the Fourteenth Amendment to the Constitution. *Hammond v. Calumet Coal, etc., Co.*, (C. C. A. 7th Cir. 1920) 262 Fed. 938.

3. Impairment of Contract Obligation (p. 916)

In general.—A suit by a gas company to restrain a city from enforcing the rates for gas prescribed in a franchise from the city to the company on the ground that they are unreasonable and confiscatory, and operate to impair the obligation of the contract between the company and city, is one arising under the laws of the United States and properly cognizable by a federal court. *Hillsdale Gaslight Co. v. Hillsdale*, (E. D. Mich. 1919) 258 Fed. 485.

5. Violation of Due Process Clause (p. 918)

Confiscatory railroad rates.—To same effect as original annotation, see *Toledo v. Toledo Rys., etc., Co.*, (C. C. A. 6th Cir. 1919) 259 Fed. 450, 170 C. C. A. 426; *Michigan R. Co. v. Lansing*, (E. D. Mich. 1919) 260 Fed. 322.

Doing complete justice in injunction proceedings.—Jurisdiction of a district court of a suit to enjoin, on constitutional grounds, the enforcement of rate-fixing orders made by a state commission, should be retained for the purpose of making the equitable relief as full and complete as the circumstances of the case and the nature of the proofs may require, although, since the suit was commenced, the state legislature has provided a direct judicial review of such orders therefore only possible in contempt proceedings, and then only at the risk of severe penalties if unsuccessful, and such suits should therefore proceed for the purpose of determining whether the maximum rates fixed by the commission are, under the present conditions, confiscatory, and if found to be so, injunction should issue to restrain their enforcement; if found not to be confiscatory, injunction should issue to restrain the enforcement of penalties accrued pendente lite, provided that it also be found that plaintiff had reasonable ground to contest the rates as being confiscatory. *Oklahoma Operating Co. v. Love*, (1920) 252 U. S. 331, 40 S. Ct. 338, 64 U. S. (L. ed.) —.

11. Suit Relating to Federal Election (p. 922)

An action to recover damages from state election officers.—To same effect as original

annotation, see *Wayne v. Venable*, (C. C. A. 8th Cir. 1919) 260 Fed. 64, 171 C. C. A. 100, wherein it was said: "The right of qualified electors to vote for a member of Congress at a general state election, which is also an election at which a congressman is to be lawfully voted for and elected, is a right 'fundamentally based upon the Constitution [of the United States], which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors.' *Ex parte Yarbrough*, 110 U. S. 655, 664, 665, 4 Sup. Ct. 158, 28 L. Ed. 274.

"An action for damages in the proper federal court lies by a qualified elector for his wrongful deprivation of this right by a defendant or by an effective conspiracy of several defendants who deprive him thereof. *Wiley v. Sinkler* 179 U. S. 58, 62, 63, 64, 21 Sup. Ct. 17, 45 L. Ed. 84; *Swafford v. Templeton*, 185 U. S. 487, 491, 492, 22 Sup. Ct. 783, 46 L. Ed. 1005.

"In the eyes of the law this right is so valuable that damages are presumed from the wrongful deprivation of it without evidence of actual loss of money, property, or any other valuable thing, and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right. *Scott v. Donald*, 165 U. S. 89, 17 Sup. Ct. 265, 41 L. Ed. 632; *Wiley v. Sinkler*, 179 U. S. 58, 65, 21 Sup. Ct. 17, 45 L. Ed. 84."

X. SUITS ARISING UNDER LAWS OF UNITED STATES

1. General Rules

c. Federal Law Collaterally Involved (p. 923)

To same effect as original annotation, see *Rensselaer, etc., R. Co. v. Delaware, etc., Co.*, (C. C. A. 2d Cir. 1919) 257 Fed. 555, 168 C. C. A. 539.

28. Laws Relating to Commerce (p. 939)

Failure to comply with Interstate Commerce Commission's regulations.—In an action against a railroad company to recover damages for loss of goods by fire alleged to have been occasioned by the negligence of the defendant, the fact that the charge of negligence embraces, *inter alia*, a failure to comply with some of the Interstate Commerce Commission's regulations prescribed for the handling and storing of such goods, does not make the controversy one arising under the laws of the United States, so as to give a federal court exclusive jurisdiction thereof. *Isaac Kubie Co. v. Lehigh Valley R. Co.*, (D. C. N. J. 1919) 261 Fed. 806.

XII. DIVERSE CITIZENSHIP

4. Citizenship of Corporation (p. 945)

Doing business, etc., in another state.—To same effect as last paragraph of original annotation, see *Empire Fuel Co. v. Lyons*,

(C. C. A. 6th Cir. 1919) 257 Fed. 890, 169 C. C. A. 40, wherein it was held that under the evidence the defendant, a foreign corporation, was doing business in the state where the suit was brought.

10. Nature of Suit (p. 951)

Construction of Porto Rican statute in injunction suit.—In *Camunas v. New York, etc., Steamship Co.*, (C. C. A. 1st Cir. 1919) 260 Fed. 40, 171 C. C. A. 76, the treasurer of Porto Rico appealed from a final decree permanently enjoining him from compelling a steamship company to contribute to the workmen's compensation fund of Porto Rico. The court held that while it was manifestly undesirable that a Porto Rican statute should receive its first judicial construction in a federal court, yet it would not, on that ground alone, refuse the plaintiff relief, if otherwise clearly entitled thereto, and that where the requisite diversity of citizenship appeared so as to give the federal court jurisdiction, it would construe the statute and determine the rights of the parties thereunder.

11. Several Parties Plaintiff or Defendant (p. 952)

In general.—To same effect as original annotation, see *Compania Minera Y Compadora, etc. v. American Metal Co.*, (W. D. Tex. 1920) 262 Fed. 183.

12. Arrangement of Parties as to Adverse Interest (p. 954)

In general.—To same effect as original annotation, see *Iron Molders' Union v. Niles-Bement-Pond Co.*, (C. C. A. 6th Cir. 1918) 258 Fed. 408, 169 C. C. A. 424.

Suit by stockholder.—A suit by a stockholder against a corporation and certain of its officers and directors to enjoin the payment of an alleged illegal commission to the president of the corporation and for an accounting by the individual defendants to the corporation, is in reality a right of action of the corporation. Accordingly, since the real dispute is between the corporation and the individual defendants, a federal court has no jurisdiction where they are all citizens of the same state. *Laughner v. Schell*, (C. C. A. 3d Cir. 1919) 260 Fed. 396, 171 C. C. A. 262, wherein it was said:

"Indeed, when the gist of the bill is sensed, it will be seen that the real cause of action, if it exists, is a right of action of the *Minnetonka Oil Company*, and the bill is a stockholders' bill to enforce such corporate right. Such being the case, the real dispute is one between the *Oil Company*, on the one side, and the individual defendants on the other; in other words, it is a question between citizens of Pennsylvania, and as between citizens of Pennsylvania the District Court for the Western District of Pennsylvania had no jurisdiction. Such being the fact, the real parties to the dispute being citizens

of Pennsylvania, it is sought to base jurisdiction on the citizenship of the plaintiff, who is a citizen of California. But, as we have seen, the plaintiff neither had nor does he state any individual cause of action. On the contrary, the basis of his bill is 'the rights of your orator and of the other stockholders of the Minnetonka Oil Company,' and it prays the defendants 'be directed to account to the Minnetonka Oil Company.'"

But see authorities cited in original annotation.

15. *Indispensable Parties* (p. 960)

In general.—To same effect as second paragraph of original annotation, see *Iron Molders' Union v. Niles-Bement-Pond Co.*, (C. C. A. 6th Cir. 1918) 258 Fed. 408, 169 C. C. A. 424.

A suit for the appointment of a receiver may not be maintained in a federal court where the indispensable parties thereto are all citizens and residents of the same state. *Fryer v. Weakley*, (C. C. A. 8th Cir. 1919) 261 Fed. 509.

17. *Representative Parties* (p. 962)

Rule stated.—To same effect as original annotation, see *Simson v. Klipstein*, (D. C. N. J. 1920) 262 Fed. 823, wherein the court said:

"To put it in another way, representatives may stand upon their own citizenship in federal courts, irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law, prohibiting the creation of federal jurisdiction by assignments, intended to obviate, was the voluntary creation of federal jurisdiction by simulated assignments made for that sole purpose. But assignments or conveyances by operation of law creating legal representatives are neither within the mischief nor reason of the law. *New Orleans v. Gaines, Administrator*, 138 U. S. 595, 606, 11 Sup. Ct. 428, 34 L. Ed. 1102; *Mexican Central R. R. Co. v. Eckman*, 187 U. S. 429, 434, 23 Sup. Ct. 211, 47 L. Ed. 245. The plaintiffs are 'managing agents,' having the legal and equitable title to the property in question, and are proper parties to the record, and so come within the above exception."

18. *Interveners and Substituted Parties* (p. 963)

If jurisdiction has attached on account of diversity of citizenship when the action was brought no subsequent change of parties can affect that jurisdiction. *Sternberger v. Continental Mines, etc., Co.*, (D. C. Colo. 1919) 259 Fed. 293, wherein it was held that a sale by the plaintiff of his interest in the subject matter of the suit to one who was a citizen of the same state as the defendants, did not oust the jurisdiction of the court.

20. *Pleading Citizenship* (p. 964)

Directors of corporation.—Where a bill alleges the citizenship of a corporate defendant, this allegation carries the citizenship of its directors where they appear in the suit only as representatives of the corporation. *Gas Securities Co. v. Antero, etc., Reservoir Co.*, (C. C. A. 8th Cir. 1919) 259 Fed. 423, 170 C. C. A. 399.

XVI. SUITS BY ASSIGNEES

2. *Construction* (p. 974)

Effect of amendment by Judicial Code.—The change in the language of this paragraph on the enactment of the Judicial Code from a suit "to recover the contents of any promissory note," etc., to a suit "upon any promissory note," etc., did not change the law. The old construction is still applicable. *Harlan v. Houston*, (C. C. A. 8th Cir. 1919) 258 Fed. 611, 170 C. C. A. 65.

4. *"Chose in Action"* (p. 975)

Construction of term.—*Suit upon promissory note.*—A suit against an executor of the assignee of a note and mortgage for an accounting by him as a mortgagee in possession of a tract of land and for the enforcement of a right of redemption, is not a suit upon the note and mortgage within the meaning of this section. *Harlan v. Houston*, (C. C. A. 8th Cir. 1919) 258 Fed. 611, 170 C. C. A. 65. In passing upon this question, the court said: "The answer must be found in the nature of the suit and the relief sought by the plaintiff. The plaintiff is not here seeking to enforce the stipulations of the note and mortgage, but on the contrary is assailing their continued effectiveness. His main object is the clearance of his title to the land by annulling the foreclosure sale and sheriff's deed to defendant and accomplishing his right of redemption from defendant's mortgage lien. The suit is more like the common one to quiet title upon the doing of equity than one for the enforcement of a right of action founded on a contract containing within itself the contractual promise or obligation that is broken. A suit to redeem from a mortgage in the nature of a suit to quiet title has been held not within the statute. *Power & Irrigation Co. v. Ditch Co.*, 141 C. C. A. 390, 226 Fed. 634. There is also an analogy to a suit to recover possession of a specific thing mortgaged, likewise held not within the limitation."

XVII. SERVICE OF PROCESS (p. 988)

In general.—To same effect as original annotation, see *Pine Hill Coal Co. v. Gusicki*, (C. C. A. 2d Cir. 1919) 261 Fed. 974.

Service on foreign corporation.—The unrevoked designation by a foreign corporation, conformably to the New York statute, of an agent upon whom service may be made, does not give the corporation a constructive presence in the state, so as to render it

amenable to service of process there after it has ceased to do business within the state, in an action based upon contracts made and to be performed outside the state, there being no allegation of performance within the state, nor that the causes of action arose out of acts or transactions within the state, although it is asserted that at all of the times of the duration of the contracts sued on and their breaches the corporation was doing business in the state, and at any time had the right to transact business therein, and that the contracts contemplated that they might be performed within the state. *Chipman v. Thomas B. Jeffery Co.*, (1920) 251 U. S. 373, 40 S. Ct. 172, 64 U. S. (L. ed.) — (affirming (S. D. N. Y. 1919) 260 Fed. 856), wherein the court said: "*Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 482, 111 N. E. 1075, L. R. A. 1916F, 407, Ann. Cas. 1918A, 389, passed upon the effect of a cause of action arising out of the state, the corporation, however, doing business within the state, and having complied with the statute in regard to its place of business and the designation of an agent upon whom process could be served. But the court throughout the opinion, with conscious solicitude of the necessity of making the ground of its decision the fact that the corporation was doing business in the state, dwelt upon the fact and distinguished thereby *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345, and *Simon v. Southern Ry. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492, in both of which the causes of action were based on transactions done outside of the states in which the suits were brought.

"*Tauza v. Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915, is nearer in principle of decision than the case just commented upon. The question of the doing of business within the state by the coal company was in the case and was discussed. But the question was unconnected with a statutory designation of a place of business or of an agent to receive service of process. However, there was an implication of agency in the coal company's sales agent under other provisions of the Code of Civil Procedure of the state and it was considered that the principle of *Bagdon v. Phila. & Read. C. & I. Co.*, *supra*, applied. But the court went further and left no doubt of the ground of its decision. It said: 'Unless a foreign corporation is engaged in business within the state, it is not brought within the state by the presence of its agents'—citing and deferring to *St. Louis S. W. Ry. Co. v. Texas v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B 77. And further said: 'The essential thing is that the corporation shall have come into the state.'

"If prior cases have a different bent, they

must be considered as overruled, as was recognized in *Dollar Co. v. Canadian C. & F. Co.*, 220 N. Y. 270, 277, 115 N. E. 711.

"In resting the case on New York decisions, we do not wish to be understood that the validity of such service as here involved would not be of federal cognizance, whatever the decision of a state court, and refer to *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *St. Louis Southwestern Ry. Co. v. Alexander*, *supra*; *Philadelphia & Reading Ry. Co. v. McKibben*, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; *Meisukas v. Greenough Red Ash Coal Co.*, 244 U. S. 54, 37 Sup. Ct. 593, 61 L. Ed. 987; *People Tobacco Co. v. American Tobacco Co.*, 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 687, Ann. Cas. 1918C, 537."

Service on foreign corporation.—A foreign corporation must be regarded as doing business in a district so as to subject itself to service of process where its only business consists of buying and selling goods between certain foreign countries and the United States and it maintains a duly authorized agent in the district who has power to buy them there. *Hunau v. Northern Region Supply Corp.*, (S. D. N. Y. 1920) 262 Fed. 181.

XVIII. ANCILLARY PROCEEDINGS

3. Particular Proceedings and Matters

g. Judgments and Decrees (p. 994)

Enforcement of judgments.—A federal court has no ancillary jurisdiction of an action at law to enforce a judgment rendered in a federal court of another district in favor of a materialman against the surety on the bond of a public contractor, given pursuant to the provisions of the Act of Feb. 24, 1905, ch. 778 (8 Fed. Stat. Ann. (2d ed.) 375 note). *U. S. v. Pedarre*, (E. D. La. 1920) 262 Fed. 839. The court said:

"I do not think it was the intention of Congress to require the laborer or materialman, obtaining a judgment against the surety on a bond given under the act of 1905, to go elsewhere to enforce the judgment. There are cases holding that courts of the United States have ancillary jurisdiction in equity and bankruptcy in aid of another federal court; but the instant suit is at law, and has all the elements of an original proceeding. If it is necessary to sue upon the judgment obtained under the provisions of the act of 1905 at the domicile of the sureties, it seems to me that jurisdiction would be governed by the statute limiting the general jurisdiction of the District Courts."

Enjoining judgment.—It was held that where a money judgment was entered in the District Court, such court had ancillary jurisdiction in equity to restrain further action by the marshal under the writ of execution that had been levied upon real estate. *Benedict v. Setters*, (C. C. A. 8th Cir. 1919) 261 Fed. 492. Commenting on

the ancillary jurisdiction of federal courts generally, the court said:

"The ancillary jurisdiction of the court can be maintained where the parties to a former suit are before the court, or the facts are such as to make the case a continuation of the former suit, or where the court is called upon to enforce or vacate its judgment or decree or set aside its process, or give relief with reference to property in its possession or under its control, or to bring in outside parties having an interest in the litigation, or where the property involved is in the custody of the court or its officers and the rights of parties thereto could not be determined in any other court without a conflict of jurisdiction between the courts. Clearly, the form of proceeding must in every case be determined by the particular facts alleged in the bill, and we are of the opinion that in this case this proceeding is supplementary and ancillary, and under no rational construction can be considered a new and original proceeding, in the sense in which federal courts have sanctioned with reference to the line which divides the jurisdiction of federal courts from that of state courts."

j. Receivers (p. 997)

Waiver of objections to jurisdiction.—Where in a suit against a corporation for the appointment of a receiver, the corporation files an answer wherein it admits the allegations in the bill and joins in the prayer thereof in asking the court to take jurisdiction and appoint a receiver, it thereby waives any objections to the court's jurisdiction and the receiver cannot thereafter raise them. *Kessler v. Necker*, (D. C. N. J. 1919) 258 Fed. 654.

Vol. IV, p. 1005, Jud. Code, sec. 24, par. third. [First ed., 1912 Supp., p. 139.]

IV. Saving of common-law remedy.

VIII. Contracts within admiralty jurisdiction.

9. Accounting.

13. Affreightment and charter-parties.

XX. Torts.

5. Injuries to persons or structures on land.

6. Right of action for death.

IV. SAVING OF COMMON-LAW REMEDY
(p. 1008)

State workmen's compensation law.—By amendment to this paragraph in the Act of Oct. 6, 1917, ch. 97, 40 Stat. L. 395 (see 1918 Supp. p. 414) "rights and remedies under the workmen's compensation law of any state" are saved to claimants. This amendment has been held to be unconstitutional. *Knickerbocker Ice Co. v. Stewart*, (1920) 253 U. S. 149, 40 S. Ct. 438, 64 U. S.

(L. ed.) —, *reversing* (1919) 226 N. Y. 302, 123 N. E. 362.

VIII. CONTRACTS WITHIN ADMIRALTY JURISDICTION

9. Accounting (p. 1016)

To same effect as original annotation, see *Metropolitan Steamship Co. v. Pacific-Alaska Nav. Co.*, (D. C. Me. 1919) 260 Fed. 973.

13. Affreightment and Charter-parties (p. 1017)

Where the substance of an agreement has reference to a specific, determined, maritime service of two ships hired for the carriage of persons and property upon navigable waters, it is a charter-party and within the admiralty jurisdiction of the District Courts. *Metropolitan Steamship Co. v. Pacific-Alaska Nav. Co.* (D. C. Me. 1919) 260 Fed. 973.

XX. TORTS

5. Injuries to Persons or Structures on Land (p. 1029)

To same effect as original annotation, see *Smalls v. Atlantic Coast Shipping Co.*, (E. D. Va. 1919) 261 Fed. 928.

6. Right of Action for Death (p. 1031)

State statute.—The state statute and the decision of its highest court thereunder as to the measure of recovery for death of an infant child were followed in *Maryland v. Atlantic Transport Co.*, (D. C. Md. 1919) 261 Fed. 416.

Vol. IV, p. 1037, Jud. Code, sec. 24, par. seventh. [First ed., 1912 Supp., p. 139.]

I. SUITS ARISING UNDER PATENT LAWS (p. 1037)

Contract relating to patent.—A suit for the breach of contract for the allotment of territory for the use of a patented system is within the jurisdiction of a state court. *Southland Sweet Potato Curing, etc., Ass'n v. Beck*, (Tex. Civ. App. 1920) 221 S. W. 656.

Vol. IV, p. 1047, Jud. Code, sec. 24, par. eighth. [First ed., 1912 Supp., p. 139.]

Suits for unfair competition.—In order to give a federal court jurisdiction of a suit for unfair competition by imitating the plaintiff's trademark, the plaintiff must allege or prove not only that there is a diversity of citizenship between the parties to the action, but also that the amount in controversy exceeds \$3,000. *Ests. Co. v. Burke*, (E. D. Pa. 1919) 257 Fed. 743.

Vol. IV, p. 1054, Jud. Code, sec. 24, par. sixteenth. [First ed., 1912 Supp., p. 140.]

Injunction suit against Comptroller of Currency.—A suit by a national bank to enjoin the Comptroller of the Currency from doing certain things under color of his office, declared to be threatened, unlawful, arbitrary, and oppressive, is one brought under the National Banking Law, within the true intendment of this section and clause and section 49 (see vol. 5, p. 482) which restrict suits, brought by national banking associations to enjoin the Comptroller under such law, to the district in which the bank is located, and such restriction operates pro tanto to displace the general provisions of section 51 (see vol. 5, p. 486), respecting the proper district for suits, and authorizes service of process upon the Comptroller wherever found. *Canton First Nat. Bank v. Williams*, (1920) 252 U. S. 504, 40 S. Ct. 372, 64 U. S. (L. ed.) — (reversing *M. D. Pa.* 1919) 260 Fed. 674, wherein the court said:

"Appellant, whose place of business is within the Middle district of Pennsylvania, brought this suit in the United States District Court for that district, seeking an injunction to prevent John Skelton Williams, Comptroller of the Currency, from doing certain things under color of his office declared to be threatened, unlawful, arbitrary, and oppressive.

"The bill alleges that, in order to injure complainant's president, towards whom he entertained personal ill will, the Comptroller determined to destroy its business, and to that end he had maliciously persecuted and oppressed it for three years, in the following ways, among others: by often demanding special reports and information beyond the powers conferred upon him by law; by disclosing confidential and official information concerning it to banks, members of Congress, representatives of the press, and the public generally; by inciting litigation against it and its officers; by publishing and disseminating false statements, charging it with unlawful acts and improper conduct and reflecting upon its solvency; and by distributing to depositors, stockholders and others alarming statements intended to affect its credit, etc., etc.; and further, that, unless restrained, he would continue these and similar malicious and oppressive practices.

"Williams is a citizen of Virginia, officially stationed at Washington. He was not summoned while in the Middle district of Pennsylvania, but a subpoena was served upon him in Washington by the United States marshal. Having specially appeared, he successfully challenged the jurisdiction of the court; and the cause is here upon certificate to that effect.

"Generally, a District Court cannot acquire jurisdiction over an individual without service of process upon him while in the

district for which it is held. But here a national bank seeks to enjoin the Comptroller, and the claim is that by statutory direction the proceeding must be had in the district where the association is located, and not elsewhere. The court below took the contrary view. (260 Fed. 674.)

"Determination of the matter requires consideration of three sections of the Judicial Code. . . .

"If sections 24 and 49 properly construed restrict this proceeding to the district where the bank is located, they displace section 51 pro tanto and authorize service of process upon defendant wherever found. *United States v. Congress Construction Co.*, 222 U. S. 199, 203, 32 Sup. Ct. 44, 56 L. Ed. 163.

"It is said for appellee that both sections 24 and 49 relate to injunction proceedings brought under the National Banking Law, — such proceedings as are thereby expressly authorized, and no others. And further, that such law only authorizes suit by a bank to enjoin the Comptroller when he undertakes to act because of its alleged refusal to redeem circulating notes. *Rev. Stat. § 5237* [6 Fed. Stat. Ann. (2d ed.) 872].

"The Act of February 25, 1863, establishing national banks, chap. 58, 12 Stat. at L. 665, 681:

"Sec. 59. And be it further enacted, That suits, actions, and proceedings by and against any association under this act may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established."

"An 'Act to Provide a National Currency, Secured by a Pledge of United States Bonds,' approved June 3, 1864, chap. 106, 13 Stat. at L. 99, 116:

"Sec. 57. And be it further enacted, That suits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established; or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: Provided, however, That all proceedings to enjoin the Comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

"In *Kennedy v. Gibson* (1869) 8 Wall. 498, 506, 19 L. ed. 476, 479, this court ruled that § 57 should be construed as if it read: 'And be it further enacted, That suits, actions and proceedings by and against,' etc., the words 'by and' having been accidentally omitted. 'It is not to be supposed that Congress intended to exclude associations from suing in the courts where they can be sued.' 'Such suits may still be brought by the associations in the courts of the United States.' And it further held 'that receivers

also may be sued in the courts of the United States by virtue of the act, without reference to the locality of their personal citizenship.'

"The Revised Statutes:

"Sec. 629. The circuit courts shall have original jurisdiction as follows: . . .

"Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations.

"Eleventh. Of all suits brought by [or against] any banking association established in the district for which the court is held, under the provisions of title, "The National Banks," to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title.'

"Sec. 736. All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.'

"Parts of the foregoing subsections 10 and 11 were joined in subsection 16, § 24, and § 736 became § 49, Judicial Code.

"What constitutes a cause arising 'under' the laws of the United States has been often pointed out by this court. One does so arise where an appropriate statement by the plaintiff, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of an act of Congress. If the plaintiff thus asserts a right which will be sustained by one construction of the law, or defeated by another, the case is one arising under that law. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.*, 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434; *Devine v. Los Angeles*, 202 U. S. 313, 50 L. ed. 1046, 26 Sup. Ct. Rep. 652; *Taylor v. Anderson*, 234 U. S. 74, 59 L. ed. 1218, 34 Sup. Ct. Rep. 724; *Hopkins v. Walker*, 244 U. S. 486, 489, 61 L. ed. 1270, 1274, 37 Sup. Ct. Rep. 711. Clearly the plaintiff's bill discloses a case wherein his right to recover turns on the construction and application of the National Banking Law; and we think the proceeding is one to enjoin the Comptroller under provisions of that law, within the true intendment of the Judicial Code."

Vol. IV, p. 1059, Jud. Code, sec. 24, par. twentieth. [First ed., 1912 Supp., p. 140.]

An action against the Director General of Railroads is not within this section and the District Court has jurisdiction though the claim exceeds ten thousand dollars. *Westbrook v. Director General of Railroads*, (N. D. Ga. 1920) 263 Fed. 211.

Vol. V, p. 16, Jud. Code, sec. 28.

[First ed., 1912 Supp., p. 144.]

III. Right of removal, in general, 605.

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III. RIGHT OF REMOVAL, IN GENERAL.

1. Entirely Statutory (p. 31)

Dependent on Act of Congress.—To same effect as original annotation, see *Compania Minera Y Compradora, etc. v. American Metal Co.*, (W. D. Tex. 1920) 262 Fed. 183; *Isaac Kubie Co. v. Lehigh Valley R. Co.*, (D. C. N. J. 1919) 261 Fed. 806; *Fairview Fluorspar, etc., Co. v. Bethlehem Steel Co.*, (E. D. Pa. 1919) 258 Fed. 681.

IV. REMOVABLE "SUITS"

1. In General (p. 43)

The mere convenience of parties and the avoidance of expense and litigation are not grounds for removal of a suit from a state to a federal court. *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

2. "Suit" (p. 43)

An assessment for a road district improvement is not a "suit" which may be removed. *Missouri Pac. R. Co. v. Izard County Highway Imp. Dist. No. 1*, (Ark. 1920) 220 S. W. 452.

5. Condemnation Proceedings (p. 45)

Time for removal, see notes to Judicial Code, § 29, II, 2, *infra*, p. 615.

8. Settlement of Decedents' Estates (p. 49)

Bill for directions in disposition of property.—A bill filed pursuant to a state statute by the administrators of the estate of a decedent for directions in the disposition of the properties that have come into their hands, is not a removable suit. *Shehane v. Smith*, (N. D. Ga. 1919) 257 Fed. 823. In passing upon this question, the court said:

"Whatever may be true as to the cases previously decided, a recent decision by the Supreme Court, which has come to my attention since I have had this case under investigation (*Sutton v. English*, 246 U. S. 199, 38 Sup. Ct. 254, 62 L. Ed. 664), is, I think, determinative of the matter. In the opinion in this case, by Mr. Justice Pitney, the following occurs:

"By a series of decisions in this court it has been established that since it does not pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States; that where a state, by statute or custom, gives to parties interested the right to bring an action or suit inter partes, either at law or in equity, to annul a will or to set aside the probate, the courts of the United States, where diversity of citizenship and a sufficient amount in

controversy appear, can enforce the same remedy, but that this relates only to independent suits, and not to procedure merely incidental or ancillary to the probate; and, further, that questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy. *Broderick's Will*, 21 Wall. [U. S.] 503, 509, 512 [22 L. Ed. 599]; *Ellis v. Davis*, 109 U. S. 485, 494, et seq. [3 Sup. Ct. 327, 27 L. Ed. 1006]; *Farrell v. O'Brien*, 199 U. S. 89, 110 [25 Sup. Ct. 727, 50 L. Ed. 101]; *Waterman v. Canal-Louisiana Bank Co.*, 215 U. S. 33, 43 [30 Sup. Ct. 10, 54 L. Ed. 80]."

"The proceeding in the state court which is sought to be removed here certainly must be considered a suit supplemental or ancillary to the probate proceeding, and if it be such this authority is controlling on the question, without considering former decisions of the Supreme Court."

Suit to remove administrator.—A suit in a state court to remove an administrator, is not removable to a federal court. *White v. Keown*, (D. C. Mass. 1919) 261 Fed. 814. Regarding the removability of such a suit, the court said:

"Such a proceeding is plainly local, in the sense that it is one for the state court.

"According to *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, an administrator appointed by a state court is an officer of that court, and as such cannot be disturbed by process issued from a subordinate federal court, and reasoning upon the well-understood theory that the jurisdiction of federal courts of first instance is a limited jurisdiction, depending upon the existence of federal questions and statutes in respect to diverse citizenship, it is there said that, where these elements of jurisdiction are wanting, the federal courts cannot proceed, even with the consent of the parties.

"In *Ex parte Wisner*, 203 U. S. 499, 27 Sup. Ct. 150, 51 L. Ed. 264, after explaining that the jurisdiction of the Circuit Court, which is now the District Court, depends upon acts of Congress, and cannot be extended beyond what is conferred, and that the Supreme Court of the United States alone possesses the broader jurisdiction derived immediately from the Constitution, it is said, in effect, that the test as to the jurisdiction of the subordinate federal courts under the removal provisions of the statutes is whether suit could have been originally brought therein, and, if not, that the case cannot be removed from the state court. Apply such test to the present situation, and assuming that diverse citizenship exists, it is not a removable case on the ground of diverse citizenship, because the subject-matter involved in the proceeding in the state court, to remove the administrator,

is not subject-matter over which there is jurisdiction in the subordinate federal courts. The exceptional instances, in diverse citizenship situations, where suits have been sustained in federal courts of first instance against local administrators to compel the payment of debts, suits to establish lost wills, suits to recover a particular legacy, bills in equity to annul wills as muniments of title, suits to establish debts against estates, proceedings in equity to establish liens upon undivided shares of heirs at law (the *Ingersoll Case* [C. C.] 127 Fed. 418; *Id.* [C. C.] 132 Fed. 168; *Id.*, 133 Fed. 226, 66 C. C. A. 280; *Id.* [C. C.] 136 Fed. 689; *Id.*, 148 Fed. 169, 178, 78 C. C. A. 303; *Id.*, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208; *Id.* [C. C.] 174 Fed. 666; *Id.*, 176 Fed. 194, 99 C. C. A. 548), and the like, have no pertinent application to a proceeding in a state probate court to remove an administrator, a proceeding which, in a broad and peculiar sense, relates to original and exclusive jurisdiction of probate courts in respect to the administration and settlement of estates in which many and diversified interests are necessarily involved."

10. *Within Original "Jurisdiction by this Title"*

a. In General (p. 52)

To same effect as original annotation, see *Isaac Kubie Co. v. Lehigh Valley R. Co.*, (D. C. N. J. 1919) 261 Fed. 806; *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

g Suit Not Maintainable in Equity (p. 54)

In *Miller v. Williams*, (C. C. A. 4th Cir. 1919) 258 Fed. 216, 169 C. C. A. 284, a suit in equity was brought in a state court to subject certain real estate of the defendant to the payment of a judgment recovered against him in a federal court and to cancel a release of that judgment on the ground that it had been procured by fraud. The real estate in question was attached under the provisions of the state law at the time the suit was commenced. The defendant, because of nonresidence, removed the suit to a federal court, and moved to dismiss the suit for want of equity because the federal court had no jurisdiction to set aside the release and discharge entered of record in the state court. The motion was denied and the Circuit Court of Appeals, in affirming the judgment, said:

"It is also argued that the release could be canceled only by the court which rendered the judgment, and therefore the court below was without authority to decree its cancellation. The argument is not convincing. As above stated, the plaintiff filed a bill in equity in the state court and attached the real estate of the nonresident defendant, which was within the jurisdiction of that court, under the provisions of section 2964 of the Code of Virginia, which reads as follows:

"When a person has a claim, legal or

equitable, to any specific personal property, or a like claim to any debt, whether such debt be payable or not, . . . if such claim exceed the sum of twenty dollars, exclusive of interest, he may, on a bill in equity filed for the purpose, have an attachment to secure and enforce the claim," etc.

"Even on defendant's theory that there was no judgment against him when the suit was commenced, because plaintiff had released it, manifestly she had a claim against him for the amount of the judgment, and the Virginia statute in express terms gave her a right of action in equity to enforce that claim. The property of defendant was seized by attachment as the statute provides, and he was personally served with process in that state. It follows that the state court, sitting as a court of equity, had full jurisdiction to grant the relief sought by plaintiff, if the proofs sustained her contention, and to that end could set aside the release and order a sale of the attached real estate to satisfy the judgment. This was the right of plaintiff in the court in which her suit was brought, and the defendant should not be permitted to take away that right by removing the case to a federal court and there setting up the plea that the cause of action stated in the bill was not cognizable by a federal court of equity. It seems but reasonable to hold that on this ground the motion to dismiss was properly denied."

j. As to District of Residence of Parties (p. 57)

In general.—To same effect as original annotation, see *Sanders v. Western Union Tel. Co.*, (N. D. Ga. 1919) 261 Fed. 697.

V. REMOVAL FROM AND TO WHAT COURT

2. *To What Court* (p. 61)

"Proper district."—In *Lockport Glass Co. v. H. L. Dixon Co.*, (W. D. Pa. 1919) 262 Fed. 976, the court said:

"The words 'proper district' have given rise to a diversity of opinion. Some cases have held that they mean any district of the United States in which the action could have been brought originally, and that therefore a removal from a state court to a District Court situate in another state can be had, because the suit could have been brought in the latter. The unreasonableness of such a construction must appear in the light of the application of such construction to extreme cases. Suppose a citizen of New Jersey has been aggrieved by a citizen of California, and immediately thereafter brings his action of tort in the state court of New York, where the offense was committed, and parties and witnesses are there to be conveniently found. The defendant, under such a construction of the words 'proper district,' would be entitled to have the cause removed to the District Court of the United States for the Southern District of California, if he were a citizen of Los

Angeles. Again, if proceedings were instituted by a citizen of New Jersey in a state court of Pennsylvania, and immediately there was an attachment of personal property, the defendant and owner of the property, if he were a citizen of the Southern district of California, might remove the action to that district. Such cases, however, cannot arise if there is kept in mind the fact that the words 'proper district' are only in the provisions of the statute which determine the classes of cases which may be removed.

"When an examination of section 29 of the Judicial Code is made, we find the procedure for the removal of causes set forth in detail, and such procedure must be followed in every case of every class for the removal of which section 28 has provided, and those requirements show what is meant in the statute by the words 'proper district.' The petition must be presented by the defendant to the state court in the suit therein pending, within a time limited by the law governing such court for filing an answer or plea, and such petition must be, in the language of the act, 'for the removal of such suit into the District Court to be held in the district where such suit is pending.' In that language is found the expression of the legislative mind that the 'proper district' of section 28 is the district in which such suit is pending. A suit pending in the state court of New York, or a suit pending in the state court of Pennsylvania, cannot be held to be pending in the Southern district of California. The present action was pending in the state of New York at the time the petition for removal was filed. In no way can it be deemed to have been pending in the Western district of Pennsylvania."

In *Thomas v. Delta Land, etc., Co.*, (D. C. Nev. 1918) 258 Fed. 758, several citizens of California sued a Nevada corporation in a Utah state court. The defendant removed the suit to the District Court for the district of Nevada. In granting a motion to remand, the court said:

"Section 28 of the Judicial Code provides that controversies over which the District Courts of the United States are given original jurisdiction, brought 'in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district.' No attempt is made in section 28 to define the term 'proper district.' The Delta Company contends that it must be construed to be the district in which the plaintiff or defendant is a resident, and, as neither the Delta Company nor the plaintiffs are residents of Utah, the controversy between them cannot be removed to the United States District Court for that state; and if there can be no removal to California, the residence of the plaintiffs, nor to Nevada, the residence of the defendant, there can be no removal at all, notwithstanding the provision in section 28 for removal to the proper district.

"Section 51 of the Judicial Code declares that 'where the jurisdiction is

founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' In the same section it is also provided that 'no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant.'

"Plaintiffs could have instituted this suit against the Delta Company in the federal court for Nevada, but from this it does not necessarily follow that defendant has a reciprocal right of removal to Nevada. The provisions quoted from section 51 render it impossible to harass a defendant by bringing suits against him in a federal court of a distant state, simply because such distant state happens to be the residence of the plaintiff. This consideration for the defendant suggests similar safeguards for the plaintiff, and undoubtedly moved Congress, in formulating the procedure for removal of causes in section 29, to provide for removals only 'into the District Court to be held in the district where such suit is pending.'

"It might be a serious hardship, if not an absolute denial of justice, to permit a defendant by removal proceedings to transfer the trial of a cause to a federal court far distant from the state in which the cause of action arose, and from the district in which the plaintiff resides, with no other ground for such removal than the fact that defendant, possibly in anticipation of such litigation, may have taken the precaution to be organized and to be brought into existence in a state separated as far as possible from the locality in which it was proposed to do business. If the purpose in drafting section 28 was to confer an advantage on the defendant, the intention could have been clearly expressed in appropriate language."

To same effect see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

Where both plaintiff and defendant are nonresidents.—To same effect as original annotation, see *Pendar v. Empire Gas, etc., Co.*, (S. D. Tex. 1919) 260 Fed. 669, wherein it was said:

"The plaintiff is a citizen of the state of South Dakota. The defendant is a corporation incorporated under the laws of Maine, and therefore a citizen, and, for jurisdictional purposes, a resident, of the state of Maine. It is conceded by counsel for the respondent that, were this suit brought in this district by original process, this court could not [under section 51 of the Judicial Code], since neither of the parties reside here, entertain jurisdiction without consent of both parties to the proceeding. But he contends that the removal statute [section 28], authorizing the removal of a cause by a nonresident defendant into the District Court of the United States for the proper district, is not limited or qualified by section [51], but gives to a defendant the absolute right to remove any case into the federal district having jurisdiction over the place where

the suit is brought in the state court, provided only the defendant is a nonresident of that state and district.

"It is conceded further by counsel for defendant that the case of *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, is authority against this contention, and that, if that case is the law of this case, the motion to remand must be sustained. They point, however, to the fact that of the three propositions in effect decided in the *Wisner* Case—that a suit can only be removed into the district where it could have originally been brought, that mandamus will lie to correct the improper action of a district court in taking jurisdiction, and that jurisdiction cannot be conferred by consent where the parties are citizens of different states and neither is a citizen of the state where the suit is pending—the second and third have been overruled in *Ex parte Hardin*, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, and *Ex parte Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, respectively, and they declare that the first is so wanting in merit as that certain of the inferior federal courts have already refused to follow it. They call my attention to a lengthy opinion by Judge Cochran of the Eastern district of Kentucky, in the case of *L. & N. Railway Co. v. Western Union Telegraph Co.*, 218 Fed. 91, an opinion of Judge Ervin, of the Southern district of Alabama, while sitting in the Northern district of Texas, in the case of *James v. Amarillo City Light & Water Co.*, 251 Fed. 337, and a dissenting opinion by Judge Learned Hand of the district bench of the Second circuit, in the case of the *Guaranty Trust Co. v. McCabe*, 250 Fed. 704, 163 C. C. A. 31.

"I am not disposed to deny the force of much of the reasoning in the opinions of those judges, but it appears to me that their views are more cogent as arguments for an amendment of the law than as really declaring the law as it is written; besides, I derive little support from arguments ab inconvenienti. When a judge is able to say, 'Ita lex scripta,' he has completed his inquiry and established a firm basis for his judgment. The effect of those cases is to declare that, because it has been held that parties may waive the venue requirement of section [51], which lies at the threshold of actual jurisdiction in any particular case, the plaintiff by bringing a suit in a state court puts it entirely in the power of the defendant to bring the matter into the federal court of the district where the suit is brought without consulting or considering plaintiff's wishes in the premises. Judge Ervin even goes to the point of declaring that a plaintiff has no right at all to be consulted as to the district to which the cause may be removed, and this is the effect, if not the verbiage, of the views of Judge Cochran and Judge Hand.

"This view is directly in conflict, not only with the holding, but with the reasoning, of

the Supreme Court in *Ex parte Moore*, *supra*, where the removal was sustained upon the express ground that the plaintiff, after the case had been removed by the defendant, had appeared and pleaded thus affirmatively, consenting to the jurisdiction of that court. Mr. Justice Moody, in *Re Winn*, 213 U. S. 464, 29 Sup. Ct. 516, 53 L. Ed. 873, speaking for the court, says:

"It is well settled that no cause can be removed from the state court to the Circuit Court of the United States unless it could originally have been brought in the latter court."

"And again, construing *Ex parte Moore*, said on page 469 (29 Sup. Ct. 519 [53 L. Ed. 873]):

"That case simply held that where there was a diversity of citizenship, which gave jurisdiction to some Circuit Court, the objection that there was no jurisdiction in a particular district might be waived by appearing and pleading to the merits."

"I think both the disposition made by the Circuit Court of Appeals of *Guaranty Trust Co. of New York v. McCabe*, 250 Fed. 700, 163 C. C. A. 34, and the reasons which underlie it, are eminently correct. In that case it is said:

"It has long been settled that a defendant may insist upon or waive his objection to venue, . . . but it is also settled by *Ex parte Moore*, 209 U. S. 490, 506, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, that in a case where jurisdiction depends upon diversity of citizenship, . . . the plaintiff, in case of removal, also has the right to insist upon or waive his objection to the jurisdiction because the district is not the "proper district"—that is, either the residence of plaintiff or of defendant."

In *Pullman Co. v. Sutherland*, (Ga. App. 1919) 101 S. E. 314, the court said: "The petition in this case alleges the residence of the plaintiff to be in Alabama and that of the defendant to be in Illinois. In the petition for removal this is not denied, nor is there any other reason given upon which the petition for removal is based. 'A suit which, by reason of the nonresidence of both parties, could not have been brought in the federal court in the first instance, cannot be removed to that court from a state court. . . or the ground of diverse citizenship, at least where the plaintiff resists such removal, even if the consent of both parties could confer jurisdiction.' *Ex parte Wisner*, 203 U. S. 449, 27 S. Ct. 150, 51 U. S. (L. ed.) 264. While it is true that in some of the later cases there is a tendency to modify the ruling made in the *Wisner* Case, *supra*, this court is bound by that ruling until the United States Supreme Court expressly overrules it."

In *Fairview Fluorspar, etc., Co. v. Bethlehem Steel Co.*, (E. D. Pa. 1919) 258 Fed. 681, an action which was brought in the court of a state of which neither party was a citizen, was held to be not removable by the defendant on the ground of diverse citi-

zenship to the federal court for the district in which he resided. On this question, the court said:

"The argument supporting the jurisdiction of this district is that by the twenty-eighth section of the Judicial Code diversity of citizenship confers the right of removal upon the defendant, if he be a nonresident of the state in which he is sued, provided only the cause be removed to a court in which he might have been sued in the first instance. There is here such diversity of citizenship; this defendant has been sued in the state of Missouri, of which defendant is a nonresident, and the suit might have been here brought. Why, then, may not the cause be removed to this court? The only answer to be made is that section 29 provides that the cause, if removed, must be removed to the court of the Missouri district, and this is open to the retort that, as that court has no jurisdiction, to give this effect to the twenty-ninth section is to deny the right of removal given by the twenty-eighth. The soundness of the proposition involved in the retort must be conceded, and the result accepted. The acceptance of it has support in these (among other) considerations:

"1. There is no right of removal unless it is given by statute, and section 28 which gives, and section 29 which denies, may be read together as meaning in effect that there is no right of removal unless the plaintiff be a resident of the state in which the suit is brought.

"2. The denial is consistent with the withholding of the right, unless the defendant be a nonresident of the state in which suit is brought.

"3. It is consistent with the conformity statutes.

"4. The ab inconvenienti argument supports it.

"5. It has support in that such a finding is in accord with the conclusions reached in a number of cases ruled by other District Courts."

VII. SUITS UNDER CONSTITUTION, LAWS, OR TREATIES

4. Questions Involved Already Settled (p. 78)

To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

6. Mere Questions of Fact (p. 79)

To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

10. Federal Question Must Appear in Plaintiff's Pleading (p. 79)

The rule stated.—To same effect as original annotation, see *Monroe v. Detroit, etc., R. Co.*, (E. D. Mich. 1919) 257 Fed. 782.

In the case of *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614, it was said:

"It is well settled that a suit arises under

the Constitution and laws of the United States, within the meaning of the foregoing statute, only when the plaintiff's statement of his own cause of action shows that it is based on that Constitution or those laws. *Spencer v. Duplan Silk Co.*, 191 U. S. 526, 24 Sup. Ct. 174, 48 L. Ed. 287; *Austin v. Gagan* (C. C.) 39 Fed. 626, 5 L. R. A. 476.

"If it does not so appear, and the defendant has such a defense, he may ultimately bring it before the Supreme Court of the United States by setting it up in the state court; and if it be properly urged, and thereafter denied by the highest state court, it may then be brought to the attention of the Supreme Court of the United States on writ of error.

"The defendant cannot, by allegations in his answer or petition supplementing the complaint, show a federal question which will entitle him to removal. . . It must necessarily follow that one who has been sued in a state court cannot thereafter in such pending suit raise a federal question by filing a voluntary petition in bankruptcy which will entitle him to a removal."

11. Removable Cases

j. Miscellaneous Cases (p. 88)

An action against the Emergency Fleet Corporation is removable on the ground that a federal question is involved. *Commonwealth Finance Corp. v. Landis*, (E. D. Pa. 1919) 261 Fed. 440.

12. Nonremovable Cases

a. Action on Federal Judgment (p. 80)

To same effect as original annotation, see *U. S. v. Pedarre*, (E. D. La. 1920) 262 Fed. 839.

c. Suit for Royalties on Patent (p. 89)

To same effect as original annotation, see *International Fastener Co. v. Francis Mfg. Co.*, (W. D. N. Y. 1919) 259 Fed. 311, wherein it was said:

"The principal question presented for decision is whether the plaintiff, by its last amendment to the complaint, embodied a primary cause arising for the first time under the patent laws of the United States, of which this court has exclusive jurisdiction. Judicial Code, § 28.

"The original agreement conferring the right to manufacture the fasteners for a period of 30 years was later modified to permit defendant to manufacture, without royalties, other fasteners not included in the Page patent. The controversy, therefore, true enough, presents the question as to whether the sew-on fastener device, as distinguished from the cling fastener specified in the contract, was fairly included and described in the Page patent.

"Plaintiff does not assert a cause of action for infringement, nor seek to restrain the defendant company from manufacturing any of the fastener devices, or to have the claims of the Page patent construed, or to have it

declared invalid. On the contrary, the action is plainly to recover damages for breach of a subsisting contract under which manufacturing rights were obtained and to recover for unpaid royalties. The claim that sew-on fasteners for garments are fairly included in the term 'cling' fastener, or in the description in the patent specification, even though involving the construction and interpretation of the Page patent, would not necessarily remove the case from the jurisdiction of the state court. There is a clear distinction between cases arising under the patent laws and mere questions presented thereunder. *Pratt v. Paris Gaalight & Coke Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. Ed. 458; *Goodyear v. Union India Rubber Co.*, Fed. Cas. No. 5,586.

"In *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85, the Supreme Court of the United States decided that a case could not be removed from the state court into the federal court as one arising under the Constitution, laws, or treaties of the United States, unless the complaint showed that it did so arise, and the want of such showing could not be supplied by anything contained in the petition for removal. In *Pratt v. Paris Gaalight & Coke Co.*, *supra*, the Supreme Court said:

"We have repeatedly held that the federal courts have no right, irrespective of citizenship, to entertain suits for the amount of an agreed license, or royalty, or for the specific execution of a contract for the use of a patent, or of other suits where a subsisting contract is shown governing the rights of the party in the use of an invention, and that such suits not only may, but must, be brought in the state courts. *Hartell v. Tilghman*, 99 U. S. 547 [25 L. Ed. 357]; *Wilson v. Sandford*, 10 How. 99 [13 L. Ed. 344]. . . Although in an action for royalties, if the validity and infringement of the patent are controverted, the case is considered as one "touching patent rights," for the purposes of an appeal to this court under Rev. Stat. § 699."

"See, also, *Dale Tile Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756, 31 L. Ed. 683.

"The cases of *Atherton Machine Co. v. Atwood Co.*, 102 Fed. 965, 43 C. C. A. 72, and *Leslie v. Mann Co.* (C. C.) 157 Fed. 236, the latter a decision by this court, upon which reliance is placed by defendant, are not in point, for in the first-mentioned case the action was clearly brought for an infringement of the patent there in controversy, although the validity of a subsisting contract was also involved, while in the latter case the articles manufactured by the defendant were in fact claimed in the bill to be an infringement of the patent, and the defendant was avoiding payment of the stipulated royalties under a contract or license of assignment of patent on the ground of noninfringement.

"In my opinion this action is not one arising under the patent laws of the United

States, and, without deeming it necessary to pass upon any other questions argued, the case is remanded to the Supreme Court of the state of New York."

f. Miscellaneous Cases (p. 90)

Action by municipality against railroad for violation of franchise agreement.—In *Monroe v. Detroit, etc., R. Co.*, (E. D. Mich. 1919) 257 Fed. 782, it was held that a suit by a city against a railroad company, operating an electric railway between the plaintiff city and another city in the same state, charging the defendant with violating and having violated a franchise agreement with the plaintiff regarding rates of fare to be charged between the two cities, was not one arising under the Constitution or laws of the United States and was not entitled to removal.

Action for wrongful death against Director General of Railroads.—An action in a state court to recover damages for the wrongful death of the driver of an automobile truck in a collision with a train, operated by a railroad under federal control, is not removable in view of the provisions of section 10 of the Federal Control Act (1918 Supp. Fed. Stat. Ann. 763). *Loughnan v. Hines*, (W. D. Wash. 1919) 261 Fed. 218.

X. DIVERSE CITIZENSHIP, ALIENAGE, OR FOREIGN STATE AS GROUND FOR REMOVAL

1. Same as for Original Jurisdiction (p. 102)

Both plaintiff and defendant nonresidents. — See annotation under this section *supra*, p. 607.

4. Fraudulent Joinder of Defendants

b. Motive for Legal Joinder Immaterial (p. 114)

To same effect as original annotation, see *Atlantic Coast Line R. Co. v. Feaster*, (E. D. S. C. 1919) 260 Fed. 881; *Kelly v. Robinson*, (E. D. Mo. 1920) 262 Fed. 695.

c. Joinder of Master and Servant (p. 116)

Where an individual defendant, living in the same state and district as the plaintiff, is joined as a defendant with a corporation for which he was working, against which a suit for damages for injuries received is brought, and the joinder of the individual defendant is for the purpose of defeating the removal of the cause to the United States court, the case will be retained in the federal court and a motion to remand the case denied. *Plunkett v. Gulf Refining Co.*, (N. D. Ga. 1919) 259 Fed. 968.

Where a declaration set out a cause of action against master and servant as joint tortfeasors, and the petition for removal, which contained several excerpts from evidence adduced on another trial in another court, failed to show that the resident defendant was made a party fraudulently and in bad faith, the refusal of the trial judge to

pass an order removing the case to the federal court was not erroneous. *Postal Tel.-Cable Co. v. Puckett*, (Ga. App. 1919) 101 S. E. 397.

7. *Suits by and against Aliens* (p. 120)

Alien joined with citizen.—To same effect as original annotation, see *Compania Minera Y Compradora, etc., v. American Metal Co.*, (W. D. Tex. 1920) 262 Fed. 183, but holding that a case is not removable where the alien defendant does not join in the petition for removal.

A suit by an alien against an alien.—To same effect as original annotation, see *Compania Minera Y Compradora, etc. v. American Metal Co.*, (W. D. Tex. 1920) 262 Fed. 183.

A suit by an alien against a citizen and an alien is not a suit "between citizens of different states," and hence not removable on that ground. *Compania Minera Y Compradora, etc. v. American Metal Co.*, (W. D. Tex. 1920) 262 Fed. 183.

XI. SEPARABLE CONTROVERSY AS GROUND OF REMOVAL

2. *Citizenship and Diversity of Citizenship Essential*

b. *Alienage of Party* (p. 123)

A separable controversy to which an alien is a party cannot be removed, whether the alien is a plaintiff or defendant. *Compania Minera Y Compradora, etc. v. American Metal Co.*, (W. D. Tex. 1920) 262 Fed. 183.

3. *Tests of Separability*

a. *In General* (p. 123)

In order to justify such removal, on the ground of a separate controversy.—To the same effect as the original annotation see *Postal Tel.-Cable Co. v. Puckett*, (Ga. App. 1919) 101 S. E. 397; *Roberts v. Underwood Typewriter Co.*, (D. C. N. J. 1919) 257 Fed. 583.

5. *Proper or Indispensable Codefendant* (p. 130)

Indispensable party.—Where, in a suit against two corporations, incorporated in different states, neither of the corporations is a necessary or indispensable party to the full determination of the controversy between the plaintiff and the other corporation, or for enforcing any judgment which he might recover against either, and other jurisdictional facts necessary to give the federal court cognizance of the controversy between the plaintiff and one of the corporations are present, the controversy is properly removed to the federal court. *Roberts v. Underwood Typewriter Co.*, (D. C. N. J. 1919) 257 Fed. 583.

6. *Plaintiff's Motive in Joining Defendants* (p. 130)

See *supra*, this note X, 4, b, p. 610.

13. *Separate Causes of Action* (p. 137)

Failure to allege joint cause of action.—

"While it is true that a defendant has no right to say that an action shall be several which a plaintiff elects to make joint, yet if the complaint fails to allege facts showing a joint cause of action, or alleges facts showing separate causes, or fails to allege facts showing any cause of action against the resident defendant, then there is a separable controversy which entitles the nonresident defendant to remove." *Gulf, etc., R. Co. v. Gulf Refining Co.*, (S. D. Miss. 1919) 200 Fed. 262, holding that the complaint failed to show any cause of action against the resident defendants.

14. *Several Plaintiffs* (p. 138)

Action for negligence by owner and insurer.

—Where, in an action by a corporation and an insurance company against a railroad to recover damages for the loss of goods by fire alleged to have been occasioned by the negligence of the defendant, it appears that the insurance company has paid part of the loss to the corporation, and claims to be subrogated to the latter's rights under its policy, there is no separable controversy justifying removal. *Isaac Kubie Co. v. Lehigh Valley R. Co.*, (D. C. N. J. 1919) 261 Fed. 806.

16. *Separable Controversy, How Shown* (p. 138)

In plaintiff's pleading.—In *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614, it was contended that the suit was removable because of a separable controversy between one of the plaintiffs, who was a trustee in bankruptcy of one of the parties to the suit, and several of the defendants. The court said:

"The existence of a separable controversy between the trustee Pruett and the Basic Fund Company is not set up in the petition for removal, unless it be in the allegation that the trustee 'has proceeded in the above-entitled cause with utter disregard to the jurisdiction of the bankruptcy court and the rights of' executors of the estate of Samuel Vadner, deceased, Basic Fund Company, and Phebe Vadner, to have their claims to the property of the bankrupt tried and determined in the bankruptcy proceedings."

"Prior to the petition for removal these claimants had filed petitions in intervention, and consented to submit their claims for adjudication to this court."

"The trustee in bankruptcy by intervening raised no new issues as against defendants. He joined the plaintiff in her demands, but as against her he claimed, and still claims, the fruits of the litigation. Clearly, whatever rights defendants had to removal as against Agnes Vadner were lost by delay. The intervention of the trustee could not revive a right already lapsed. If there was a right of removal as against the trustee, it must have accrued out of some controversy between him and one or

more of the defendants. No such controversy is pointed out in either petition for removal, except those litigated with Agnes Vadner in the state court, and there decided before removal to this court was sought. If there be such a controversy, and it be true, as alleged in both petitions, that Charles S. Vadner, Phebe Vadner, Basic Fund Company, a corporation, Charles S. Vadner and Phebe Vadner, executors of the estate of Samuel Vadner, deceased, and W. E. Pruett, trustee in bankruptcy, all reside in the city of Reno, Washoe county, Nev., the requisite diversity of citizenship is lacking. If there is a controversy between the defendants on one side, the trustee and Mrs. Vadner on the other, then one plaintiff, Pruett, and two defendants, Vadner and Phebe Vadner, are residents of the same state.

"If the Basic Fund Company is a citizen and resident of Montana, no separable controversy exists between it and Pruett, 'which can be fully determined between them without the presence of any other defendant.' Ordinarily, to determine whether there is a separable controversy, the complaint is the only document to be considered.

"The only relief prayed for by Agnes Vadner or Pruett against the Basic Fund Company is that the conveyances of the Vadner Terrace and the interest in the Downing note and mortgage to that company be set aside as fraudulent.

"In an action to set aside a conveyance to which the grantor and grantee are defendants, there is no separable controversy between plaintiff and the grantee; the grantor is a necessary party. 34 Cyc. 1274; *Graves v. Corbin*, 132 U. S. 571, 588, 10 Sup. Ct. 196, 33 L. Ed. 462; *Moore v. North River Constr. Co. (C. C.)* 19 Fed. 803; *Reineman v. Ball (C. C.)* 33 Fed. 692; *German Sav. & L. Soc. v. Dormitzer*, 116 Fed. 471, 475, 53 C. C. A. 639; *Beswick v. Dorris (C. C.)* 174 Fed. 502, 508; *Darnold v. Simpson (C. C.)* 114 Fed. 368; *Huncke v. Dold*, 7 N. M. 5, 32 Pac. 45, 48.

"In *Gaylord v. Kelshaw*, 1 Wall. 81, 17 L. Ed. 612, where there was a bill to set aside a conveyance as made without consideration and in fraud of creditors, it was held that the alleged fraudulent grantor was a necessary defendant, and if his citizenship was not set forth the cause must be remanded or dismissed.

"Here, Pruett, the plaintiff, and Vadner, the grantor, a necessary party defendant, are citizens and residents of the same state.

"If there is a controversy between Agnes Vadner and the Basic Fund Company, Charles Vadner is a necessary party thereto. It is alleged in both petitions for removal that the Basic Fund Company resides in Reno, Nev. (paragraph 6); and also that it is a Montana corporation, and a citizen and resident of that state (paragraph 11). There is no allegation in either petition as to the residence and citizenship of Agnes Vadner. An examination of the record shows she

claims to be a resident and citizen of Utah. In the petition for removal in the equity case to the Utah court, Charles Vadner, December 31, 1917, swore 'that the plaintiff at the time of the commencement of said suit was, and ever since said date has been, and still is, a citizen and resident of the state of Utah, and that she has been a resident and citizen since the institution of this action of the state of Utah.' Four days later, in his own petition for removal of the divorce case to the Utah federal court, the said Vadner swore 'that the said plaintiff at the date of the commencement of said suit (November 11, 1917) was, and still is, a citizen of the state of Massachusetts.' These conflicting statements undoubtedly explain the reason why allegations as to Agnes Vadner's citizenship are omitted from the petitions for removal to this court."

34. *Miscellaneous Equity Suits* (p. 148)

No separable controversy.—In a suit to set aside a conveyance to which the grantor and grantee are defendants, there is no separable controversy between the plaintiff and the grantee. The grantor is a necessary party. *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

Where, in a suit by a state against a fertilizer company to abate it as a nuisance, a subpoena duces tecum is served on another company doing a similar business, and on its failure to answer a rule for contempt filed against it, and subsequently a petition for attachment for contempt is filed, wherein it is prayed that the second company be made a party to the original suit, there is no separable controversy justifying the removal of the case to a federal court. *Boykin v. Morris Fertilizer Co.*, (N. D. Ga. 1919) 257 Fed. 827. The court said: "The Armour Fertilizer Works got into this litigation in a peculiar way, as shown. They seem to have been served with a subpoena duces tecum, according to the pleadings, and, failing to answer that, were attached for contempt. Then, being engaged in the same character of business as the Morris Fertilizer Company, and, according to the record, about to be proceeded against as being guilty of the same character of nuisance as the Morris Fertilizer Company (that is, the emission from their works of noxious gases and odors claimed to constitute a nuisance), they executed this contract.

"Thus the way the Armour Fertilizer Works came to be a party to this proceeding, if at all, is certainly novel and peculiar. They were never served in the case, apparently, and there was never any order by the court, so far as I can see in the record, making them a party defendant in the case, and no pleadings against them until the present proceeding for contempt, and it seems to me to be at least exceedingly doubtful whether the Armour Fertilizer Works has ever become legally and effectually a party to this proceeding. If so, it appears to be

certain that they became a party by reason of voluntarily entering into the contract which they did, and which was filed as a part of the record in the case. Whether this contract had that effect or not I need not determine, as that should be decided by the state court.

"But, whatever may be true about that, the proceeding which is now pending, and was pending when this removal was had, after setting out what had transpired in the case against the Morris Fertilizer Company, alleges that, at the time the original petition was filed against the Morris Fertilizer Company, the Armour Fertilizer Works was engaged in the manufacture and sale of fertilizers, was operating a plant largely similar to that of the Morris Fertilizer Company and but a short distance therefrom; that the plant of the Armour Fertilizer Works was as great a nuisance, and was guilty of the same acts and character of acts, as the defendant Morris Fertilizer Company. The petition then sets out, as stated heretofore, that petitioners were preparing to start litigation of the same kind and character against the Armour Fertilizer Works, but that a conference was had, which resulted in the contract which is set out above. Then, after setting out that under the contract both plants were shut down for some time, the petition alleges that for several months both plants have been violating said contract and agreement. The petition prays that rule be issued calling on the Morris Fertilizer Company and the Armour Fertilizer Works, on a date named, to show cause why each of them should not be attached and punished for contempt for violation of the order of the court of February 11, 1918.

"This is undoubtedly a joint proceeding on the part of the petitioners against both the Morris Company and the Armour Works. It might, probably, have been a separate proceeding against each; but the petitioners have elected to make it a joint proceeding against the two companies, and, as I understand the case, they charge that each is doing the same thing and together they constitute a nuisance, although each might, by itself, be a nuisance.

"One of the main grounds of the motion to remand in this case is that there is no separable controversy here. Evidently the basis of the present proceeding is the contract, which was a joint contract between the two companies and the plaintiff and relators. This contract must be the basis and foundation of any proceeding had against them now, and, the petitioners having chosen to proceed against the two jointly, the fact that they have so elected precludes the existence of a separable controversy. This doctrine is tersely stated by Simkins in 'A Federal Equity Suit,' page 74, as follows:

"Where the liability of two or more is joint and several, and plaintiff elects to sue jointly, a separable interest of one of the defendants cannot be set up to obtain federal jurisdiction"—citing *Powers v. Chesapeake*

& Ohio Railway, 169 U. S. 97, 18 Sup. Ct. 264, 42 L. Ed. 673, and numerous other authorities.

"The contract, as above set out, provides in the third paragraph:

"Said plants shall not again be operated unless they can be operated without violating the restraining order of force in the above case, and if both of said plants, at the same time, or either separately, cannot be made so to operate, then such plants shall be immediately shut down and shall remain closed."

"It will be noticed that, if either or both of the plants cannot be operated in the manner provided, then both shall be shut down, and, as I have stated above, if the Armour Fertilizer Works is a legal party to this proceeding at all, it is a party because of this joint agreement that, if either shall do wrong, both shall be liable. This being a proceeding against them jointly for violation of this contract and of the order of the court, I do not think there is a separable controversy here, such as would justify its removal to this court.

"There is also grave doubt in my mind whether the character of the proceeding is such as can be removed. It is a proceeding for contempt for the violation of an order of a court, and while the argument is that the proceeding relates back through the entire case, and the controversy between the Armour Fertilizer Works and the petitioners is a separate and distinct controversy from that of the Morris Fertilizer Company, yet, after all, it is a proceeding for contempt for violation of an order of the court and the right to remove it, on that account, is questionable at least."

35. *Actions for Torts, in General* (p. 150)

Removal denied.—To same effect as original annotation, see *Morgan v. Hines*, (E. D. Okla. 1919) 260 Fed. 585.

36. *Action of Tort Against Master and Servant* (p. 153)

Question of joint or several liability as governed by state law.—Where, in an action for the wrongful death of the plaintiff's intestate, the complainant joins with the decedent's employer, coemployees by whose alleged negligence plaintiff was killed, and whose citizenship is the same as that of the plaintiff, the question of the joint or several liability of the defendants is governed by the decisions of the highest court of the state rather than by the decisions of the federal courts. *Kelly v. Robinson*, (E. D. Mo. 1920) 262 Fed. 695.

Removal denied.—In *Atlantic Coast Line R. Co. v. Feaster*, (E. D. S. C. 1919) 260 Fed. 881, a removal was denied where it appeared that, under the decisions of the highest court of the state in which the action was brought, a joint action in tort might be maintained against a master and servant, if the cause of action arose of one transaction, despite the fact that one of the defendants

was liable under a statute and the other at common law. The court said:

"The position of the Atlantic Coast Line Railroad Company is that the statute known as the Employers' Liability Act passed by the state of South Carolina, on the 14th day of April, 1916, supersedes all law relating to the relations of the employer and employee in a case such as this, where the employer is a common carrier by railroad, and the right of the employee to recover depends entirely upon the terms of that act; whereas, his right to recover as against the other defendant, R. S. Jones, depends entirely upon the common law, making both employer and employee liable to the party injured in a case of injury caused by joint negligence; for this court cannot in the same cause administer a different rule as to liability to different defendants, the one being the liability imposed by the common law and the other being the rule as to the liability imposed by the Employers' Liability Act.

"There are some aspects in which this position would appear to be logical and reasonable and there are decisions of respectable courts supporting it; but the Supreme Court of South Carolina, in the case of *Powell v. Southern Railway Co.*, 110 S. C. 70, 96 S. E. 292, decided on the 15th of April, 1918, has decided explicitly that, although a railway company may be liable as an employer under the act of Congress entitled 'Employers' Liability Act' (Act April 22, 1908, c. 149, 35 Stat. 65) the language of the South Carolina statute being the same, while the other defendant in that case may be liable under common law, yet that where the complaint alleged that the transaction was one and that both defendants had concurrent part in the transaction, it did not matter that the law cast upon each defendant a different duty thereabout; that that consideration does not separate them in the performance of the same act, and that the complainant had a right to allege the existence of a joint tort, and to recover upon the tort as a joint one, although a different measure of liability might be imposed by the court upon the separate defendants; that although a different rule of law would be applied as measuring the liability of the two separate defendants, that would not be sufficient to change the general character of the tort and convert the right against each defendant into a separable one.

"This being a matter of local law under the practice in the state courts, it would appear to this court that it should be more controlling in this court, as the rule to be followed, than the diametrically opposite conclusion arrived at by the Supreme Court of Georgia in the case of *Lee v. Central of Georgia Railroad Co.*, 21 Ga. App. 558, 94 S. E. 888. The conclusions of the Supreme Court of Georgia and the Supreme Court of South Carolina are absolutely irreconcilable.

"In view of what appears to be the tendency of the Supreme Court of the United

States to hold that, in these cases of liability for negligence, the local law of the place where the alleged tort was committed should control, it would be safer to follow the rule laid down by the Supreme Court of South Carolina."

Where, in an action by an employee to recover damages for personal injuries, a resident employee and the nonresident employer are joined as defendant, both being charged with negligence, there is no separable controversy. *Plunkett v. Gulf Refining Co.*, (N. D. Ga. 1919) 259 Fed. 974.

Where a joint suit is brought by a resident of this state against a foreign corporation doing business in this state, and against one of its employees who resides in this state, for an injury alleged to have resulted from negligent acts committed by both defendants, the suit is not recoverable by the corporation as a separable controversy. *Postal Tel.-Cable Co. v. Puckett*, (Ga. App. 1919) 101 S. E. 397.

Removal allowed.—To same effect as second paragraph of original annotation, see *Kelly v. Robinson*, (E. D. Mo. 1920) 262 Fed. 695, wherein the court said:

"The learned observations of Mr. Story in his valuable work on the Law of Agency (Story on Agency [9th Ed.] § 308) seem most accurately to set forth the law on this question. Upon this precise point Mr. Story said this:

"We come, in the next place; to the consideration of the liability of agents to third persons, in regard to torts or wrongs done by them in the course of their agency. . . . And here the distinction ordinarily taken is between acts of misfeasance or positive wrongs and nonfeasances or mere omissions of duty by private agents. . . . The master is always liable to third persons for the misfeasances and negligences and omissions of duty of his servant, in all cases within the scope of his employment. So the principal, in like manner, is liable to third persons for the like misfeasances, negligences, and omissions of duty of his agent, leaving him to his remedy over against the agent in all cases where the tort is of such a nature as that he is entitled to compensation. . . . The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not . . . liable to third persons for his own nonfeasances or omissions of duty, in the course of his employment. His liability, in these latter cases, is solely to his principal."

"The above excerpt was quoted with approval by Judge Sherwood in the case of *Steinhauser v. Spraul*, *supra* [127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441], which case is the latest utterance of the Supreme Court of Missouri which I have been able to find upon this subject. Substantially, however, what was said by Judge Sherwood in the Steinhauser Case only reiterated what had theretofore been said by the Supreme Court of Missouri in an early case. *Harriman v. Stowe*, 57 Mo. 93.

"Applying to the allegations of plaintiff's petition the test of misfeasance or nonfeasance connoted by the rule above quoted, it seems plain that defendants Robinson and Johnson were, as to plaintiff's decedent, guilty of a mere omission of duty. These defendants were authorized and required to employ a sufficient number of competent miners to inspect and keep safe the roof of the mine. Having thus pleaded the incumbent duties resting upon the individual defendants plaintiff thereupon avers that the defendants (which of course includes the individual defendants) 'negligently employed and provided an insufficient number of miners to inspect the roof of said mine,' so that the place where decedent was compelled to work became and remained 'an unsafe and dangerous place to work' and by this negligence it is averred decedent came to his death.

"In the light of these averments in the petition it is, I think, too plain for argument that the charge here against the individual defendants is merely a charge of a failure or omission to perform an incumbent duty; that is, a charge of nonfeasance of duty and not misfeasance or wrong performance of such duty. If this view of the fact be correct, then there is no liability in favor of the plaintiff as against the individual defendants. Therefore the case presented is one of a separable controversy, and since, as between plaintiff and the corporate defendant against which a cause of action is pleaded in the petition, diversity of citizenship exists, this court has jurisdiction."

"Where a resident employee is joined with a nonresident employer as a defendant in a suit for damages, and no cause of action is stated against the resident defendant, it will be treated by the court as a case only against the employer, the nonresident of the state, for the purpose of jurisdiction. Where nonfeasance only is charged against the resident employee, no case is stated against him, because an employee is not liable to a third party for mere nonfeasance in connection with some duty he owes to his employer." *Plunkett v. Gulf Refining Co.*, (N. D. Ga. 1919) 259 Fed. 968.

XII. REMOVAL FOR PREJUDICE OR LOCAL INFLUENCE

8. *Requisites of Application, in General* (p. 175)

Application to be made to the federal court.

—To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

Requirements of petition.—A petition for removal on the ground of prejudice and local influence should be accompanied by an affidavit setting out the facts from which the existence of such prejudice or local influence will be inferred. *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614, holding a petition for removal to be insufficient where it did not allege that the prejudice was of such character as to prevent the defendants from having a fair trial.

13. *Order of Removal*

a. *Necessity of Order* (p. 180)

To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1919) 259 Fed. 614.

Vol. V, p. 235, Jud. Code, sec. 29.

[First ed., 1912 Supp., p. 145.]

II. Time for filing petition and bond, 615.

2. *Necessity of compliance with statute*, 615.

7. Time to plead in various states, 616.

24. *Waiver of objection for delay*, 616.

III. Notice of petition and bond prior to filing, 616.

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V. Bond for removal, 617.

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3. *By filing certified copy of record*, 618.

a. *Time to file, in general*, 618.

b. *Failure to file or delay in filing*, 618.

4. *Injunction against further proceedings in state court*, 619.

a. *In general*, 619.

II. TIME FOR FILING PETITION AND BOND

2. *Necessity of Compliance with Statute* (p. 238)

To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

State statute providing for appeal from condemnation award within certain time.—Where a state statute provides that an owner of property, in order to prevent the appraisers' award in condemnation proceedings from becoming final against him, must appeal therefrom within ten days after the filing of the award, a petition for removal of the case must be made within that time. *Toccoa v. Marchbanks*, (N. D. Ga. 1919) 261 Fed. 684, wherein the court said:

"The fact that in this case the condemnee filed a pleading before the assessors may be

treated as immaterial. The statute required no such thing. If they had been the final tribunal, although no written appeal or answer were required, of course removal would have to be sought at the time the condemnnee was compelled to appear for trial and there plead orally; but I think it may be fairly said that 'the statute of the state (there being no rule of court involved) required nothing of the defendant until, the award being filed, it declared that he must, within ten days therefrom, in order to escape its becoming a final judgment against him, fixing the amount he might recover, 'make, in writing, his appeal therefrom.' This appeal is the only thing required by the condemnation statute, from beginning to end, for the condemnnee to do. The issue that is to be made up for trial by a jury the statute does not require to be made up by the defendant, but by the judge, and this cannot serve as the point of time at which removal is to be sought, as contended by Marchbanks. Practically it would be quite unreasonable to permit the condemnnee to wait, not only until the appraisers had heard the case, made their award, filed it, and appeal had been entered, but until the case was actually called for trial before a jury, with parties and witnesses present, to make his demand for removal. Promptness is certainly aimed at in the seeking of this remedy.

"Considering the filing of the appeal to be the only plea or answer required by the state statute of the condemnnee, I take the time fixed for that as the time at which removal must be sought, under Judicial Code, § 29, and that the right of removal expires with the ten days after the filing of the award. Whether it be possible to treat the Georgia procedure as judicial from its inception, and whether the removal may be sought at any time prior to the filing of the award, should the condemnnee consider it important to seek it at that time, need not be, and is not now, decided. But see *Kaw Valley v. Metropolitan Water Co.*, 186 Fed. 315, 108 C. C. A. 393; *Des Moines Water Co. v. City of Des Moines*, 206 Fed. 657, 124 C. C. A. 445. It is held, however, that the removal must be sought during the period allowed for the filing of the appeal. This being true, the removal in this case was sought too late, and the case should be remanded. Compare *Martin's Adm'r v. B. & O. R. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; *Heller v. Ilwaco Mill & Lumber Co.* (C. C.) 178 Fed. 111; *First Nat. Bank v. Appleyard & Co.* (C. C.) 138 Fed. 939; *Head v. Selleck* (C. C.) 110 Fed. 786."

7. Time to Plead in Various States (p. 241)

In Utah.—See *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

24. Waiver of Objection for Delay (p. 265)

To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614.

III. NOTICE OF PETITION AND BOND PRIOR TO FILING

2. Under Judicial Code

a. Notice Required (p. 269)

To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614, wherein it was said:

"In the motion to remand, plaintiff states that no notice of the filing of any petition for removal was served on her. No evidence is furnished, by the record or otherwise, of any such service. Section 29 provides that 'written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same.' This language is mandatory and imperative. Removal proceedings are purely statutory, and, unless they are had as directed in the statute, in the face of seasonable objections the state court does not lose, and the federal court does not acquire jurisdiction."

c. Sufficiency of Notice (p. 272)

Where a rule to show cause why the prayer of the defendant's petition for removal should not be granted, is served on the plaintiff's attorney, this constitutes sufficient notice to comply with the requirements of this section. *Lewis v. Erie R. Co.*, (M. D. Pa. 1919) 257 Fed. 868. In considering this question, the court said: "The usual petition, with the required bond, was presented to court in the presence of counsel for plaintiffs, and out of abundance of caution the court entered a rule to show cause why the prayer of the petition should not be allowed, returnable at a time subsequent. Counsel accepted service of the rule. Is this a sufficient compliance with the statute, providing for written notice prior to the filing of the petition and bond in the removal of causes from state to federal courts?"

"We think it is. The plaintiffs were advised in writing of defendants' endeavor. Their counsel was in court, and defendants' petition and bond were before him. Ample opportunity was afforded to be heard before the court accepted the petition and bond and directed the removal. The record shows that plaintiffs appeared to the rule, filed an answer and were heard. What more could they expect from a more literal compliance of the statute, if that were possible? They were afforded a hearing and careful consideration of their objections to the attempted removal. While the recited provision of the statute is imperative, it is not intended to operate as a hindrance or obstacle in the way of those seeking to avail themselves of the provisions of the statute. Its aim and purpose is to give the opposing party full and timely notice of the attempt to remove a suit brought, possibly to afford such an opportunity for hearing before the court accepts the petition and bond tendered. When this is done, all has been accomplished that was intended. Accordingly

it was held that notice is unnecessary, where the motion was made upon dismissal as to resident defendant while all parties were in court (*Byrne's Adm'r v. Chesapeake & O. R. Co.* [1913] 151 Ky. 553, 152 S. W. 538; where copy of the petition for removal was furnished counsel of record in the state court before the same was filed and notice was satisfactory to that court, the court to which the case was removed held it to be a sufficient compliance, *Chase v. Erhardt* [D. C.] 198 Fed. 305); and if, as stated in *Cropsey v. Sun Printing & Publishing Ass'n* [D. C.] 215 Fed. 132, 'the main, if not the only, purpose of the statutory requirement as to notice is that the plaintiff be seasonably advised of the defendant's intention to remove the cause,' this was accomplished by submitting to their attorney the petition and bond, recognized by him as shown in the acceptance of service of the rule to show cause thereon endorsed. The formal notice, consisting of the petition and bond, and the rule fixing the time when the same would be taken up for action by the court, furnished the most substantial form of written notice to plaintiffs of the defendants' intention to remove the cause and constitutes, both in letter and spirit, compliance with the provisions of the act."

IV. PETITION FOR REMOVAL

13. *Allegations of Fraudulent Joinder*

a. In General (p. 293)

The right of a nonresident defendant to remove the cause cannot be defeated by the fraudulent joinder of a resident defendant; but the defendant seeking removal must allege facts which compel the conclusion that the joinder is fraudulent; merely to apply the term "fraudulent" to the joinder is not sufficient to require the state court to surrender its jurisdiction. *Postal Tel.-Cable Co. v. Puckett*, (Ga. App. 1919) 101 S. E. 397.

V. BOND FOR REMOVAL

1. *Necessity of Bond* (p. 318)

To same effect as original annotation, see *Thomas v. Delta Land, etc., Co.*, (D. C. Nev. (1918) 258 Fed. 758, wherein it was said: "The filing of the bond, conditioned as provided, within the time fixed, is a condition precedent, and essential to the enjoyment of the right of removal.

"In preparing the petitions for removal and the bonds, defendant has ignored the provisions of section 29. This defect has not been waived. The only right of removal which defendant can claim is that conferred by the Judicial Code, and inasmuch as removal is purely a matter of grace, and the method by which defendant may avail itself thereof is provided by the statute, I am of the opinion that the method formulated in section 29 is exclusive, and that this court has no jurisdiction."

5. *Condition* (p. 319)

In *In re Vadner*, (D. C. Nev. 1918) 259 Fed. 614, the court said regarding the condition of a bond for removal: "The bond filed in the present case is conditioned, not to enter the record in the District Court to be held in the district where such suit is pending, but to enter it in the United States District Court for the District of Nevada. It also binds the petitioners to enter the record, not within 30 days after petition filed, but on the first day of the next session of this court. No condition of defendants' bond is broken by failure to enter the record within the time or in the court designated by statute.

"In *Missouri, K. & T. Ry. v. Chappell* (D. C.) 206 Fed. 688, 694, a bond similar to the one now under consideration, conditioned under the old law to file the record by the first day of the following term, was held insufficient to oust the jurisdiction of the state court. It was held that the suit as brought in the state court continued there, notwithstanding the attempted removal, because of the absence of a statutory bond; that in a proceeding to enter a default judgment the state court was acting within its powers, and that the federal court could not properly arrest by injunction the action of the parties in pursuing their remedies in the state court. The cause was remanded.

"In *Webb v. Southern Ry. Co.*, 248 Fed. 618, 160 C. C. A. 518, a removal bond conditioned to file the record, either in the District Court for the district where the action was pending or in the District Court for another district, was held to be insufficient by the Circuit Court of Appeals for the Fifth Circuit, and the judgment of the lower court holding to the contrary was reversed, with directions to remand the cause.

"I am aware there are a number of decisions which seem to establish a different rule. For example, *Chase v. Erhardt* (D. C.) 198 Fed. 305, and *State Imp. Dev. Co. v. Leininger* (D. C.) 226 Fed. 884. But in each of those cases the petition and a defective bond were presented to the state court. The bond was there approved, and an order of removal entered; but, inasmuch as the record had been filed in the proper federal court within the 30 days, the purpose of the undertaking had been accomplished before any objection was made, and as the moving party had asked permission to amend, or to file a new bond, jurisdiction was retained."

VII. PROCEEDINGS ON PETITION

7. *Determination of Questions of Fact*

b. Other Cases (p. 343)

Erroneous legal estimate of facts.—While the allegations in the petition to remove a cause from the state to the federal court are a part of the record and considered as

true upon the hearing of the motion in the state courts, and all controverted facts are to be determined in the jurisdiction of the federal court, this does not apply when the real facts are not controverted, and there is a controversy raised only by an allegation in the petition based upon the petitioners' erroneous legal estimate of facts appearing in other portions of the record. *Hill v. Director-General*, (1919) 178 N. C. 607, 101 S. E. 376.

VIII. STATE COURT'S LOSS OF JURISDICTION

1. *By Filing of Sufficient Petition and Bond* (p. 356)

If a case be a removable one.—To same effect as original annotation, see *Frazier v. Hines*, (E. D. S. C. 1919) 260 Fed. 874, wherein it was said:

"The first question suggested is that this court will not consider any motion in the cause until an application has been made to the state court for an order to remove it to this court. Such has been, in a general way, the practice of this court, in removal cases, for many years. The general rule of law, however, is undoubtedly that if the case be a removable one, the mere filing of the bond and petition in the state court removes the case. *Traction Co. v. Mining Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462; *Iowa Cent. Ry. v. Bacon*, 236 U. S. 310, 35 Sup. Ct. 357, 59 L. Ed. 591.

"It is the duty of the state court to thereupon accept the petition and bond, and proceed no more in the cause. Whether, however, the state court accepts the petition and bond, or whether it grants or denies an order for removal, does not affect the fact of removal. The cause is removed, if it be a removable cause, although the state court may refuse to grant an order of removal. *Donovan v. Wells Fargo & Co.*, 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250; *Chesapeake & Ohio Ry. v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 420, 53 L. Ed. 765.

"Under such rule, the requirement of the submission of the matter to the state court for an order of removal before any action is taken by this court is a mere matter of comity or courtesy, and not a matter of right; and if the case presented is one in which some action should be taken, and in the opinion of this court it has been properly removed, it is the duty of this court to take action upon the application, whether the state court has granted or refused an order of removal, or whether or not any application for such an order has actually been made to it.

"Further, it is to be observed that the practice requiring application to the state court, and the decisions made thereunder, are very much affected by the requirement of the Judicial Code of 1911, § 29, which prescribes that written notice of the petition and bond for removal shall be given

the adverse party or parties (not the state court) prior to filing the same. This written notice appears to have been given in the present cause, and under the terms of the statute it would not appear that any further notice or application to the state court is required, either as a matter of law or comity, but any proper action in the cause should be taken by this court, without regard to any action of the state court. *Hansford v. Stone-Ordean-Wells Co.* (D. C.) 201 Fed. 185; *Cropsey v. Sun Printing & Publishing Ass'n* (D. C.) 215 Fed. 132."

5. *Validity of Further Proceedings*

a. In General (p. 358)

To same effect as original annotation, see *Frazier v. Hines*, (E. D. S. C. 1919) 260 Fed. 874.

IX. JURISDICTION ACQUIRED BY FEDERAL COURT

3. *By Filing Certified Copy of Record*

a. Time to File, in General (p. 366)

In *Lewis v. Erie R. Co.*, (M. D. Pa. 1919) 257 Fed. 868, regarding the time within which a certified copy of the record must be filed, it was said: "Plaintiffs' contention that certified copy of the record in this suit was not filed within 30 days from the date of the filing of the petitions in compliance with the requirements of the provisions of the act must also be denied. It is true that such certified record was not filed within 30 days from the filing of the petitions; however, the provisions requiring that certified copy of the record be filed within 30 days from the date of the filing of the petitions imply, no doubt, acceptance of such petitions and action thereon by the court, otherwise the clerk would be without authority to certify the record, if demanded by the removing parties. Petitions in this case, though filed early in December, were not accepted by the court ordering the removal until January 27th. The record having been filed in the United States court February 15th, following, was easily within the 30 days provided for filing."

b. Failure to File or Delay in Filing (p. 366)

Upon inexcusable laches.—To same effect as original annotation, see *In re Vadner*, (D. C. Nev. 1919) 259 Fed. 614, wherein the court said:

"Under section 29 of the Judicial Code, the record on removal should have been filed in this court on or before June 9, 1918. A portion of the record was filed here June 7th, but no bond on removal was filed in the state court until May 17th, seven days after the petitions were filed, and the bond then filed did not appear in this court until July 3d, 52 days after petitions filed. The final installment of the record was not forwarded to this court until September 20, 1918.

"If a proper bond and petition are filed in the state court within the time to answer, the jurisdiction of the lower court is divested; but in the event of delay beyond the 30 days in entering the record in the federal court, it is not improper to remand the cause, if no satisfactory explanation is presented. In this instance no excuse for the delay is offered."

4. Injunction Against Further Proceedings in State Court

a. In General (p. 372)

To same effect as original annotation, see *Frazier v. Hines*, (E. D. S. C. 1919) 260 Fed. 874; *Atlantic Coast Line R. Co. v. Feaster*, (E. D. S. C. 1919) 260 Fed. 881.

Vol. V, p. 376, Jud. Code, sec. 31.

[First ed., 1912 Supp., p. 147.]

I. IN GENERAL (p. 377)

Application generally.—In *White v. Keown*, (D. C. Mass. 1919) 261 Fed. 814, it was held that the provisions of this section have reference to a system of laws which impose restraint upon civil rights and equal protection, and that alleged discriminations and illegal acts, or even corrupt acts, not authorized by a state's system of laws, do not make a given case removable to federal courts of first instance, and that the remedy for wrongs of that character is to prosecute the case to the highest court of the state, with the right ultimately of prosecution by writ of error in the Supreme Court of the United States, a court of broader constitutional power.

Vol. V, p. 380, Jud. Code, sec. 33.

[First ed., 1912 Supp., p. 148.]

II. Construction.

2. "Revenue law."

IV. Procedure for removal.

1. Time for filing petition.

5. Certiorari.

II. CONSTRUCTION

2. "Revenue Law" (p. 382)

Application for release on habeas corpus.—In *Ex p. Beach*, (S. D. Cal. 1919) 259 Fed. 956, it was held that this section was not decisive on a petition for habeas corpus to discharge a deputy collector of customs from custody under a warrant issued by a state court, charging him with felonious assault in the performance of his duty.

IV. PROCEDURE FOR REMOVAL

1. Time for Filing Petition (p. 384)

A petition for removal under this section is not too late if filed after the decision of the lower state court has been vacated by appeal and the entire controversy removed

to the superior state court for retrial. In *re Duane*, (D. C. Mass. 1919) 261 Fed. 242, wherein it was said: "It is not controverted that the petitioner was an 'officer of the courts of the United States,' within the meaning of the Act. It has been several times decided, under language like this section, that a petition for removal was not too late if filed after a disagreement of the jury, or after a judgment had been rendered in the trial court, which had been vacated on appeal, and the case sent back for retrial. That is substantially the situation of the present controversy. There is at present no judgment or sentence outstanding against the petitioner. I therefore rule that the petition for certiorari is seasonably filed."

5. Certiorari (p. 385)

Procedure.—In *re Duane*, (D. C. Mass. 1919) 261 Fed. 242, the court, in discussing the procedure after the issuance of a writ of certiorari by the District Court to a state court, said:

"It seems to me that the best practice will be for this court, upon the filing of such a petition as is here presented, to the granting of which objection is seasonably made by the state authorities, to proceed to hear and determine the jurisdictional facts as far as necessary for the purpose of determining whether the case probably ought to be removed from the state court, unless the emergency appears so great that, in order to protect the petitioner's rights, the writ should issue at once. Which course should be pursued in a given case is, I think, a matter for the discretion of the court to which the application for certiorari is made."

"In the present case the petitioner is not in confinement and is suffering no hardship from delay. I will therefore hear the issues of fact presented by the answer of the state authorities, for the purpose of determining in a preliminary way whether the petitioner probably has a good case for removal. If that question be determined in his favor, the writ will thereupon issue, and the trial will take place in this court; if otherwise, the petition will be denied although without prejudice to the right to bring another, and the case left in the state court for trial."

Vol. V, p. 398, Jud. Code, sec. 37.

[First ed., 1912 Supp., p. 150.]

I. Dismissal of suit, 620.

3. Parties improperly or collusively made or joined, 620.

a. In general, 620.

II. Grounds for remand, 620.

2. Suit not within original federal jurisdiction in the particular district, 620.

4. Collusive joinder or colorable assignments, 622.

5. Where jurisdiction is doubtful, 622.

7. Delay in filing transcript, 622.

III. Waiver or amendment of defects, 622.

3. Amendment of petition for removal, 622.

a. In general, 622.

V. Procedure for remand, 623.

7. Sufficiency of motion, 623.

16. Costs on remand, 624.

I. DISMISSAL OF SUIT

3. Parties Improperly or Collusively Made or Joined

a. In General (p. 401)

The fact that the plaintiff, a partnership, has a controlling interest in one of the defendants, a corporation, does not justify a federal court in dismissing a suit on the ground of collusion. *Toledo v. Toledo Rys., etc., Co.*, (C. C. A. 6th Cir. 1919) 259 Fed. 450, 170 C. C. A. 426. The court said:

"If this constituted that collusion which is fatal to jurisdiction on the ground of citizenship, the court should not have entertained this bill nor any ancillary proceeding solely dependent thereon; but while it does indicate 'collusion,' in the vague sense in which that word is sometimes used, we think the law is clear that, unless there is something more, a District Court of the United States should entertain a case so presented.

"It is settled for this court (and we do not mean to intimate any doubt elsewhere), by our decision in *City of Holland v. Holland Gas Co.*, Feb. 13, 1919, 257 Fed. 679, 168 C. C. A. 629, that there is, in such a case, no such merger of identity between the controlling stockholder and the controlled corporation as prevents the former from pursuing in good faith as a stranger could, any ordinary legal remedy against the latter; and so the question of collusion here becomes—save as to degree of proof and as to mere color—the same as if between strangers carrying out their common understanding. It is necessarily to be deduced from, if not expressly ruled in, *Blair v. Chicago*, 201 U. S. 400, 448, 26 Sup. Ct. 427, 50 L. Ed. 801; *Chicago v. Mills*, 204 U. S. 321, 330, 27 Sup. Ct. 286, 51 L. Ed. 504; *Re Metropolitan Receivership*, 208 U. S. 90, 110, 28 Sup. Ct. 219, 52 L. Ed. 403, and see opinion of Judge Lacombe (*Pennsylvania Steel Co. et al. v. New York City Ry. Co.* [C. C.] 157 Fed. 440, 444); and *Wheeler v. Denver*, 229 U. S. 342, 350, 33 Sup. Ct. 842, 57 L. Ed. 1219—that a nonresident plaintiff has an absolute right to pursue, in a federal court, all his remedies against a resident defendant, and it makes no difference what his motive may be in electing the federal remedy. He may do so expressly because he wishes to keep the litigation out of the state courts; that is his constitutional right. See also *Cowles v. Mercer Co.*, 74 U. S. (7 Wall.) 118, 122, 19 L. Ed. 86. So, it is wholly immaterial whether the defendant, in acquiescing in the plans for a federal forum, is inspired by the

same motives. If the consent of the defendant were important to the jurisdiction, that would be another question; but where the plaintiff's right to choose that forum is absolute and defendant's opposition cannot impair it, no more can defendant's consent do any harm."

II. GROUNDS FOR REMAND

2. Suit Not Within Original Federal Jurisdiction in the Particular District (p. 408)

Both plaintiff and defendant nonresidents.

—A suit commenced in a state court in which neither the plaintiff nor the defendant resides is not removable by the defendant to the District Court for the district in which he resides on the ground of diverse citizenship, and where, after such removal, objection to the jurisdiction of such District Court is made, the suit must be remanded to the state court. *Fairview Fluorspar, etc., Co. v. Bethlehem Steel Co.*, (E. D. Pa. 1919) 258 Fed. 681, wherein it was said:

"The argument supporting the jurisdiction of this district is that by the twenty-eighth section of the Judicial Code diversity of citizenship confers the right of removal upon the defendant, if he be a nonresident of the state in which he is sued, provided only the cause be removed to a court in which he might have been sued in the first instance. There is here such diversity of citizenship; this defendant has been sued in the state of Missouri, of which defendant is a nonresident, and the suit might have been here brought. Why, then, may not the cause be removed to this court? The only answer to be made is that section 29 provides that the cause, if removed, must be removed to the court of the Missouri district, and this is open to the retort that as that court has no jurisdiction to give this effect to the twenty-ninth section is to deny the right of removal given by the twenty-eighth. The soundness of the proposition involved in the retort must be conceded and the result accepted. The acceptance of it has support in these (among other) considerations:

"1. There is no right of removal unless it is given by statute, and section 28 which gives, and section 29 which denies, may be read together as meaning in effect that there is no right of removal, unless the plaintiff be a resident of the state in which the suit is brought.

"2. The denial is consistent with the withholding of the right, unless the defendant be a nonresident of the state in which suit is brought.

"3. It is consistent with the conformity statutes.

"4. The *ab inconvenienti* argument supports it.

"5. It has support in that such a finding is in accord with the conclusions reached in a number of cases ruled by other District Courts."

A suit by an Idaho corporation against a

railroad company, a Utah corporation, brought in an Idaho state court on claims growing out of an alleged violation of the Interstate Commerce Act (4 Fed. Stat. Ann. (2d ed.) 396), is not removable to the District Court for the district of Idaho, since under section 51 of the Judicial Code (5 Fed. Stat. Ann. (2d ed.) 486), the suit was not within the original jurisdiction of such court. *Boise Commercial Club v. Oregon Short Line R. Co.*, (C. C. A. 9th Cir. (1919) 260 Fed. 769, 171 C. C. A. 495. In discussing the removability of such a suit, the court said:

"It is unnecessary to cite the numerous and conflicting decisions bearing upon the question of jurisdiction where the remand of an action like this is prayed for. In the later cases, such as *Western Union Telegraph Co. v. Louisville & Nashville R. R. Co.* (D. C.) 201 Fed. 932; *Hohenberg & Co. v. Mobile Liners* (D. C.) 245 Fed. 169, and *James v. Amarillo Light & Power Co.* (D. C.) 251 Fed. 337, the more important decisions are referred to and the differing views argued with special ability. In the two latter opinions Judge Ervin held that, where jurisdiction of the court is founded on the fact that the action is between citizens of different states and suit is brought in a state court of a state in which defendant is not a resident, there is a right of removal to the federal court of that district, which right cannot be contested by plaintiff on the ground that he could not have brought the suit in that federal court over the objection of plaintiff. The reasoning of the learned judge in *James v. Amarillo Light & Power Co.*, *supra*, was that in *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, the Supreme Court intended to hold that the District Court had no jurisdiction to try an action where neither party resided in the state of such court, and expressed the opinion that the provisions of section 51, limiting the bringing of the suit in the first instance, are limitations to bind the plaintiff, but are not binding upon the defendant. The court said:

"The provisions of section 51 expressly so state, and do not in any manner undertake to regulate or control or limit the right given by section 28 to defendant. If plaintiff, being a resident of one state, and defendant of another, bring his suit in a federal court of a third state, defendant can, by appearing generally, waive the objection as to venue, and such court has jurisdiction to try such suit. If therefore plaintiff brings his suit in a state court, defendant is given by section 28 the right to remove it to this same court, and it has just as much jurisdiction to try such case as if plaintiff had originally brought it there."

"Such was the view taken by the court in *Rubber & Celluloid Harness Trimming Co. v. Whiting Adams Co.* 210 Fed. 393, and *Louisville & Nashville R. R. Co. v. Western Union Telegraph Co.* (D. C.) 218 Fed. 91.

"There is much force in the view and we should be inclined to take a similar position were it not for the action of the Supreme Court (247 U. S. 505, 38 Sup. Ct. 427, 62 L. Ed. 1240) in denying certiorari applied for in *Guaranty & Trust Company of New York v. McCabe et al.*, 250 Fed. 699, 168 C. C. A. 31. There the plaintiff was a New York corporation, with its principal place of business in the Southern district of New York, and the defendants were inhabitants of Charleston, in the Eastern district of South Carolina. The court considered the citizenship and residence of the members of the firm of Pell & Co., the assignors, and after stating that the plaintiff could have brought its action against the defendants in the United States District Court for the Eastern District of South Carolina, ruled that at no time could it have brought the action in the United States District Court for the Southern District of New York, because all the members of Pell & Co. were not residents of the Southern district of New York. *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, and *Interior Construction Co. v. Gibney*, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401, were cited in support of that proposition. The court quoted from *Ex parte Wisner*, *supra*, to the effect that, in order to make a suit removable under section 2 of the act of 1887-1888, it must be one which the plaintiff could have brought originally in the United States court to which it would be removed by original process, and regarded it as settled by the case of *Ex parte Moore*, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, that in a case where jurisdiction depends upon diversity of citizenship the plaintiff, in case of removal, also has the right to insist upon or waive his objection to the jurisdiction because the district is not the proper district; that is, either the residence of plaintiff or of defendant. To the argument that *Ex parte Moore*, *supra*, had been overruled, the court replied by citing *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, as holding that the Supreme Court had disapproved of *Ex parte Wisner* only so far as that case had held that mandamus was a proper remedy, and argued that, if the Supreme Court had intended to go further, it would have said so. The court cited the classifications of section 51 of the Judicial Code and said:

"Where the parties are citizens of different states and the action is founded only on that fact, the statute clearly authorizes the bringing of the suit in one of two places, i. e., the residence of the plaintiff or the defendant, and, as held in *Ex parte Moore*, *supra*, when the suit is brought elsewhere, either plaintiff or defendant has the right to object to removal on the ground that such removal takes the cause to a district other than the residence of the plaintiff or defendant."

"Judge Learned Hand, in a dissenting opinion, took a contrary view; but, as already said, upon application for certiorari the Supreme Court denied the writ.

"We assume that ordinarily the denial of the writ of certiorari by the Supreme Court may not indicate the expression of an opinion in affirmance of the law of the case as applied by the Circuit Court of Appeals; but where there is a single question involved, and that question is entirely one of jurisdiction and there have been radically diverse decisions by the lower federal courts, the denial of the writ would fairly imply that the court was satisfied that the jurisdictional point had been rightly decided.

"Under the circumstances, therefore, it is proper that our decision should be against the view that there is jurisdiction in the present case."

A plaintiff, by bringing a suit in a state court in a district in which neither he nor the defendant resides, does not thereby waive his right to object to the removal of the case by the defendant to the District Court for such district, on the ground that the suit was not within the original jurisdiction of the federal court in that particular district. *Isaac Kubie Co. v. Lehigh Valley R. Co.*, (D. C. N. J. 1919) 261 Fed. 806, wherein the court said regarding such a waiver:

"A plaintiff, in the first instance, has the right of choice between a state and a United States court to try a controversy of this character, but the defendant's right to remove is not a matter of choice. Having exercised their choice, and selected a state court, the plaintiffs in the instant case can be deprived or prevented from prosecuting the suit in the state court only if they have expressly or impliedly consented to this court taking jurisdiction. The defendant contends that the plaintiffs have impliedly consented; that is, that they have waived their right to object to the jurisdiction of this court. No general appearance has been entered by either of the plaintiffs, and no step taken by them here, except to move to remand the case to the state court, for which they appear specially. The sole contention of the defendant in this behalf is that by instituting a suit in the state court, over which some United States District Court could have taken cognizance if its jurisdiction had been invoked in the first instance, the plaintiffs have subjected themselves to the removal of the suit at the will of the defendant.

"Generally stated, one does not waive his right to object until he is confronted with the duty of objecting. In the case of waiving objections to a court's assuming jurisdiction over his person, he is not called upon to object until such jurisdiction is exercised. In removal proceedings the duty of objecting arises only after the proceedings have been taken. It is what he does after the proceedings have been removed that is pertinent upon the question whether he has waived his right to object, not what he did before. If

the defendant's contention as to waiver were sound, many, perhaps the greater number, of the suits remanded should have been retained.

"The only case cited by defendant in support of its contention that the plaintiff waived its right to object to removal proceedings when it instituted the suit in the state court, is *Barlow v. Chicago & N. W. Ry. Co.* (C. C.) 164 Fed. 765, which so held. It is to be observed that in that case the court was dealing with a sole plaintiff, who was a nonresident alien, a situation which it considered sufficient to distinguish it from *In re Wisner*, *supra*, where all the parties were citizens. The doctrine enunciated in the *Barlow* Case has not met with general acceptance by the federal courts. The contrary has been expressly held in *Mahopoulus v. Chicago, R. I. & P. Ry. Co.* (C. C.) 167 Fed. 165; *Sagara v. Chicago, R. I. & P. Ry. Co.* (C. C.) 189 Fed. 220; *Hall v. Great Northern Ry. Co.* (D. C.) 197 Fed. 488; *Ivanoff v. Mechanical Rubber Co.* (D. C.) 232 Fed. 173; *Jackson v. Wm. Keneflick Co.* (D. C.) 233 Fed. 130."

See further on this subject annotations under sec. 28 (v, 2), *supra*, p. 606.

4. Collusive Joinder or Colorable Assignments (p. 411)

Joinder made in good faith.—"If plaintiff upon reasonable grounds in good faith believes that defendants are jointly liable to him, and properly makes it so appear on motion to remand, his joinder of defendants is not fraudulent, however the truth turns out to be, and remand will be granted." *Zigich v. Tuolumne Copper Min. Co.*, (D. C. Mont. 1919) 260 Fed. 1014, holding, however, that the evidence did not show such a bona fide joinder.

5. Where Jurisdiction Is Doubtful (p. 411)

To same effect as original annotation, see *Thomas v. Delta Land, etc., Co.*, (D. C. Nev. 1918) 258 Fed. 758; *Boykin v. Morris Fertilizer Co.*, (N. D. Ga. 1919) 257 Fed. 827.

7. Delay in Filing Transcript (p. 413)

As to this ground for remand, see notes to sec. 29 (IX, 3, b), *supra*, p. 618.

III. WAIVER OR AMENDMENT OF DEFECTS

3. Amendment of Petition for Removal

a. In General (p. 417)

In *Frazier v. Hines*, (E. D. S. C. 1919) 260 Fed. 874, the plaintiff brought action under the Employers' Liability Act (8 Fed. Stat. Ann. (2d ed.) 1208) against the Director General of Railroads to recover damages for an alleged personal injury committed by the negligence of the employees of the defendant. The defendant filed his petition for removal of the action to the federal court on the ground of diversity of citizenship, and thereafter moved to amend the petition by inserting therein an allegation that the plain-

tiff was not an employee of the defendant at the time of the injury. In denying the motion the court said:

"The next question is whether an application of the character now made to amend the petition for removal should be granted. An inspection of the record shows that the amendment sought to the petition is a very substantial one. The theory of the amendment proposed is that the complaint in the state court is brought to obtain a recovery under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65), and to obtain the benefit of that act; and the amendment now sought is one to introduce a new allegation of fact in the petition for removal filed in the state court to the effect that the party plaintiff was not an employee of the defendant and therefore not an employee within the terms of the federal statute, and as such not entitled to the benefit of that statute, and the cause of action being between citizens of different states, the action is not within the inhibition of that statute, which forbids the removal from the state court of actions brought under that statute.

"This would be an amendment of a substantial character, as interposing an allegation of fact denying an allegation in the complaint, which on the face it is apprehended will defeat a removal. The original petition for removal placed the ground for removal upon the sole fact that the plaintiff and defendant were citizens of different states. This amendment proposes to introduce an allegation of fact which is matter of defense on the merits, to wit, that the plaintiff was not an employee of the defendant, and therefore not entitled to claim the benefit of the federal Employers' Liability Act, and not being entitled to sue in that capacity, the cause could be removed.

"The rule as to amendments to petitions for removal is that these amendments may be permitted in this court to a petition filed for removal in the state court, where the amendment is one to cure technical defects or to amplify the allegations of the petition for removal; that is to say, where the amendment does not more than set forth in proper form what has been before imperfectly stated in the petition. *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; *Kinney v. Columbia Savings & Loan Ass'n*, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103. The rule may be said to be summed up in the case of *Southern Pacific Co. v. Stewart*, 245 U. S. 359, 38 Sup. Ct. 130, 62 L. Ed. 345, that amendments have been permitted so as to make allegations of the removal petition more accurate and certain, when the amendment is intended to set forth in proper form the ground of removal already imperfectly stated. . . . But the issue of fact the proposed amendment seeks to import goes to the merits of the defense as well as to the right of removal. It would amount

in effect to this court determining in advance of the trial on the merits before a jury that the plaintiff was not an employee of the defendant, and not entitled to the benefits of the federal Employers' Liability Act.

"The very question came up in the case of *Southern Railway v. Lloyd*, 239 U. S. 496, 36 L. Ed. 210, 60 L. Ed. 402. There the complaint was brought for a recovery under the federal Employers' Liability Act. The defendant sought to remove on the ground of diversity of citizenship, and to avoid the inhibition of the act against a removal alleged that the plaintiff was not engaged in interstate commerce at the time of the injury. The Supreme Court held the petition insufficient, for—

"In no case can the right of removal be established by a petition to remove, which amounts simply to a traverse of the facts alleged in the plaintiff's petition, and in that way undertaking to try the merits of a cause of action good upon its face.' *Chesapeake & Ohio Ry. v. Cockrell*, 232 U. S. 146, 34 Sup. Ct. 278, 56 L. Ed. 544.

"The doctrine here laid down has been approved again in the case of *Great Northern Ry. Co. v. Alexander*, 246 U. S. 276, 38 Sup. Ct. 237, 62 L. Ed. 713, where it is held that it is settled:

"That a case arising under the laws of the United States, nonremovable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of court upon any issue tried upon the merits, but that such conversion can only be accomplished by the voluntary amendment of his pleadings by the plaintiff, or, where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or of parties 'defendant.'

"With the exception mentioned in all these cases, that where there is a fraudulent purpose to defeat a removal, then upon proper allegations of fact showing that fraudulent purpose duly set forth in the petition, this court can entertain the decision of the issues involved on the question of a fraudulent purpose to defeat removal, and hold the cause removed, if such fraudulent purpose be established. No allegation is made in the petition for removal herein that there was any fraudulent purpose in any of the allegations of the complaint to defeat a removal to this court, and it follows that the application to amend the petition for removal should be and is hereby refused."

V. PROCEDURE FOR REMAND

7. Sufficiency of Motion (p. 433)

Affidavits submitted by a plaintiff in support of a motion to remand must set out facts showing the grounds of the motion, and not state mere conclusions. *Zigich v. Tuolumne Copper Min. Co.*, (D. C. Mont, 1919) 260 Fed. 1014.

16. *Costs on Remand* (p. 436)

In *Jones v. Delta Land, etc., Co.*, (D. C. Nev. 1918) 258 Fed. 761, it appeared that thirteen different plaintiffs instituted separate suits against a corporation of another state. The defendant removed the suits to a federal court. On motion to remand, it was held that each of the plaintiffs was entitled to costs. In passing upon the question, the court said:

"True, there has been but one argument covering all 13 cases; but there were 13 different plaintiffs, each of whom was put to expense and inconvenience, and each, under section 37 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1098), is entitled to his costs. It is provided in that section that on remanding the cause the court shall make such order as to costs as shall be just. Here each plaintiff was represented by an attorney, who prepared and presented a motion to remand, and arranged to submit each motion to the court, and must attend to the re-entry of the cause in the state court. I am satisfied that the docket fee of \$10 for such service is neither unreasonable nor unjust."

Vol. V, p. 446, Jud. Code, sec. 38.

[First ed., 1912 Supp., p. 150.]

III. PROCEDURE AFTER REMOVAL

1. *Status of Proceedings Had in State Court* (p. 462)

Lack of precision in allegations.—Any lack of precision in some of the allegations of a complaint which fully meets the requirement of the local code is waived by failure to make timely objection after the case has been removed from a state to a federal court. *Cole v. Ralph*, 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, reversing (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

Vol. V, p. 467, Jud. Code, sec. 40.

[First ed., 1912 Supp., p. 151.]

Discretion of court.—This section does not confer upon a defendant an absolute right to a trial in the county where the offense was committed, but only a qualified right in cases where such a trial may be had "without great inconvenience." The District Court is vested with discretion in making this determination, and where the trial judge, after a hearing, determines that a trial cannot be had in the county where the offense was committed without great inconvenience, and no abuse of discretion is apparent, his finding will not be disturbed. *Brown v. U. S.*, (C. C. A. 5th Cir. 1919) 257 Fed. 46, 168 C. C. A. 258.

Transfer of cause to another court.—This section does not contemplate a transfer of the cause to another court, but only a trial by the same court in the county where the

offense was committed. Accordingly, an indictment for murder brought in the county where the offense was committed, may be dismissed and the defendant tried under an indictment brought in another county. *Brown v. U. S.*, (C. C. A. 5th Cir. 1919) 257 Fed. 46, 168 C. C. A. 258.

Vol. V, p. 470, Jud. Code, sec. 42.

[First ed., 1912 Supp., p. 151.]

II. PARTICULAR OFFENSES (p. 471)

False claim against United States.—Where a false claim for a reward for the apprehension of a deserter under the Selective Service Act (9 Fed. Stat. Ann. (2d ed.) 1136), is made in one district and transmitted to an officer in another district, the District Court in the former district has jurisdiction of the offense under this section. *U. S. v. Downey*, (D. C. R. I. 1919) 257 Fed. 366.

Vol. V, p. 478, Jud. Code, sec. 48.

[First ed., 1912 Supp., p. 153.]

I. CONSTRUCTION AND SCOPE OF PROVISION

4. "*Regular and Established Place of Business*" (p. 478)

Factory and offices in different states.—A company which maintains in a certain state a large factory at which it employs some three thousand men and manufactures some of the product that it puts upon the market, has a "regular and established place of business" in such state within the meaning of this section, although its executive offices are situated in another state. *McKinnon Chain Co. v. American Chain Co.*, (M. D. Pa. 1919) 259 Fed. 873.

Vol. V, p. 486, Jud. Code, sec. 51.

[First ed., 1912 Supp., p. 153.]

II. Construction.

V. Applicability.

1. Generally.

4. Corporations.

b. Effect of doing business in state.

5. Action or proceeding and subject-matter.

II. CONSTRUCTION (p. 497)

Generally.—To same effect as fourth paragraph of original annotation, see *Fairview Fluorspar, etc., Co. v. Bethlehem Steel Co.*, (E. D. Pa. 1919) 258 Fed. 681.

Venue of suit based on diversity of citizenship.—A civil suit, in which jurisdiction of the federal court is founded on diversity of citizenship of the parties, may be brought in the district in which the plaintiff resides only when the defendant is found there. *Gutschalk v. Peck* (N. D. Ohio 1919) 261 Fed. 212. Regarding the proviso of this section,

concerning the venue of suits between citizens of different states, the court said:

"We hold that the language depended upon from section 51 of the Judicial Code is not in fact an attempt to enlarge, from previous legislation, the court's jurisdiction over the person of a nonresident defendant, but it is a limitation thereof. Previous to 1888, when section 51 became the law, jurisdiction of an individual was given to a federal court of first instance in this language (Act March 3, 1875, c. 137, § 1, 18 Stat. 470):

"No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided."

"Comparing this language with that above quoted from the act of 1888 (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [section 51, Judicial Code]), it will appear that the broad provision that a person might be proceeded against in a civil action in any district in which he might be found was repealed in the provision, in the new legislation, that 'no civil suit shall be brought in any District Court against any person by any original process of proceeding in any other district than that whereof he is an inhabitant;'. . . In writing this into section 51, Congress undoubtedly was protecting the individual against process wherever he might be. This language just quoted ends with a semicolon. The statute proceeds thereupon to a limitation of its effect to operate under certain circumstances, and so the statute says:

"But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of the plaintiff or the defendant."

"When we bear in mind that Congress is amending a statute which provided that the defendant might be sued in any district in which he is found, the meaning of this provision, it seems to us, is clear. By the old statute the plaintiff could begin an action in the district where he found the defendant, commanding for that purpose the power of the court to cause its own officers to summon the defendant, but this law, of course, compelled the plaintiff to go into the district in which he found his adversary to commence the action. The limitation in section 51 we are considering must, we think, be considered to be, pro tanto, a preservation, under the circumstance provided for, of the right accorded in the Act of 1875, and it should not be construed to give this court a kind of jurisdiction which was not provided for by the act of 1875.

"We are therefore of the opinion that the language in question means this, and nothing more than this: That a party may go into his adversary's district to sue him, or if he

catches his adversary in plaintiff's own district, he may sue him there. To say that this language means that a party may go into the court of his own district, and command process to run out of that court, in an action of this general character, to a far-distant district where the adversary may be, is to plead for an innovation in the law which we cannot see that the language of the statute requires, and for one which is of so far-reaching a character, and so fraught with disadvantage to and possible invasion of the rights of a defendant, that it is inconceivable that Congress intended such a result. If such is the true meaning of this statute, then it follows that the processes of the court of the district of Maine are available in an action for money only to bring a sole defendant from the district of Alaska or Hawaii and force him to a defense under unconscionable conditions. Congress certainly meant to do no such thing."

V. APPLICABILITY

1. Generally (p. 497)

An injunction suit against the Comptroller of the Currency is not controlled by this section but by sections 24, cl. 16 (see vol. IV, p. 1054) and 49 (see vol. V, p. 482). *Canton First Nat. Bank v. Williams*, (1920) 252 U. S. 504, 40 S. Ct. 372, 64 U. S. (L. ed.) —, reversing (M. D. Pa. 1919) 260 Fed.

4. Corporations

b. Effect of Doing Business in State (p. 502)

To same effect as original annotation, see *McNeely v. E. I. DuPont De Nemours Powder Co.*, (D. C. Del. 1920) 263 Fed. 252.

5. Action or Proceeding and Subject Matter (p. 506)

Admiralty suits.—Where there is concurrent jurisdiction between districts the plaintiff may select the district in which he can obtain security. *Shamrock Towing Co. v. Manufacturers', etc., Lighterage Co.*, (E. D. N. Y. 1918) 262 Fed. 844. To same effect, see *Cavanaugh v. Starbuck Towing Corp.*, (E. D. N. Y. 1919) 261 Fed. 656.

Vol. V, p. 520, Jud. Code, sec. 53.

[First ed., 1912 Supp., p. 154.]

I. PURPOSE AND SCOPE (p. 521)

"Prosecution."—The term "prosecution" as used in this section means the proceedings which follow the finding and return of the indictment, and does not embrace the inquiry of the grand jury and the finding of the indictment. *Biggerstaff v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 926, wherein it was said:

"While the inquisition of a grand jury is essential, it is preliminary, and not a part of the definite prosecution of any particular individual. It is in this restricted sense that the term is used in the statute, though

in other relations it may have a broader meaning. As confirmatory of this it will be observed that the same section also authorizes the court or judge, upon the application of the defendant, to 'order the cause to be transferred for prosecution to another division of the district.' Doubtless the same meaning was intended in both connections. It is the cause which follows the indictment that is prosecuted."

Necessity of judge being within district when allowing appeal.—This section does not require a district judge in allowing an appeal or writ of error to be at the time of such allowance within the territory comprising the division of the court in which the decree or judgment to be reviewed was rendered. *Wheeler v. Taft*, (C. C. A. 5th Cir. 1920) 261 Fed. 978. Regarding this section, the court said:

"The defendant moved that the writ of error be dismissed. What is relied on to support that motion is the circumstance that, at the time of his allowance of the writ, the judge was not within the division of his district to which the case was removed from the state court. Attention is called to the provision of section 53 . . . that a removal of a suit from a state court shall be to the United States District Court in the division in which the county is situated from which the removal is made. It is contended that an effect of that requirement is to confine the action of the court in a suit at law to the territorial division in which the suit belongs."

"We do not think that anything in the provision referred to indicates a purpose to make the validity of the action of a district judge in allowing an appeal or writ of error dependent upon his being at the time of such allowance within the territory comprising the division of the court in which the decree or judgment to be reviewed was rendered. When the order is one which may be made at the chambers of the judge, it is not necessary that it be made within the territorial limits of the division in which the order is to be effective, if it is made where the judge at the time is performing the duties of his office, as the judge's chambers are considered to be where he is, and is authorized to be, engaged in performing his judicial duties. *Ex parte Holtor Parker*, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123; *Apgar v. United States*, 255 Fed. 16, 166 C. C. A. 344.

"Even if the writ of error had been subject to be dismissed, as an appeal was sued out within the time allowed, the case would be in this court for review as a consequence of the provision of the Act of Congress of September 6, 1916, that:

"No court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard

the same and take the action which would be appropriate if the proper appellate procedure had been followed."

Vol. V, p. 525, Jud. Code, sec. 57.

[First ed., 1912 Supp., p. 154.]

III. DIVERSITY OF CITIZENSHIP (p. 538)

Necessity of residence in district.—To the same effect as original annotation, see *Howard v. Leete*, (C. C. A. 6th Cir. 1919) 257 Fed. 918, 169 C. C. A. 68, wherein the plaintiff, in a suit involving the right to rescind a purchase of real estate, denied jurisdiction of the District Court to render judgment against him upon a counterclaim on the ground that such court, sitting in the state where the property was situated, had no jurisdiction over him, since he was a citizen of another state and the defendants were citizens of a third state. Answering this contention, the court said:

"That the court had jurisdiction over the parties is equally plain. It is a mistake to say that this jurisdiction was acquired merely because the original action was local. Embracing, as it did, the right to rescind a purchase of real estate, the action was, even under the supplemental bill, a local action in a proper enough sense whether or not the second bill was rightly labeled 'supplemental.' But there was all the time diversity of citizenship of the parties, and appellant could not be allowed to question a jurisdiction he had himself invoked. His inability to get the counterclaim to the original bill of interpleader dismissed did not alter the situation. The difficulty was that by that time he wished other and wholly inconsistent relief. The fact that he was not a resident of Kentucky, thus making suit at law against him in that state difficult, if not impracticable, would have furnished additional reason for the exercise of complete jurisdiction in the equity suit. *Cafilisch v. Humble* (C. C. A. 6) 251 Fed. 1, 5, 163 C. C. A. 251. And see *Springfield Co. v. Barnard Co.*, *supra*, 81 Fed. at pages 264 and 265, 26 C. C. A. 389."

Vol. V, p. 541, Jud. Code, sec. 66.

[First ed., 1912 Supp., p. 159.]

II. JURISDICTION AND POWERS OF FEDERAL AND STATE COURTS

2. State Courts (p. 543)

Purchaser at receiver's sale is not entitled to intervene in a receivership proceeding for the trial of a claim against the property growing out of its management by the receiver, he having assumed such claims. The matter is within the jurisdiction of a state court. *American Brake Shoe, etc., Co. v. Pere Marquette R. Co.*, (E. D. Mich. 1920) 263 Fed. 237. The court said:

"Petitioner, of course, under the circumstances of the present case, is liable or other-

wise interested in this matter only because it has succeeded to the rights and obligations of the receivers heretofore appointed by this court, and now occupies their former position with respect to liabilities arising out of their acts in carrying on the business connected with their duties as such receivers; and the terms of the statute just quoted are now as fully applicable to said petitioner as they would have been to the receivers whom they have succeeded, if the latter had not been discharged, and they, instead of petitioner, had been sued in respect of the alleged negligence of their servants in the suit which is the subject of this controversy. This suit was properly brought in the state court, and the latter has full jurisdiction to determine all of the issues involved therein without interference by this court."

Vol. V, p. 607, Jud. Code, sec. 128.
[First ed., 1912 Supp., p. 195.]

III. "Final decisions."

1. Necessity.
2. Definition and nature.
10. Injunction.
11. Intervention and interpleader.
17. Receivership proceedings.
18. Miscellaneous.

III. "FINAL DECISIONS"

1. Necessity (p. 611)

Where the record in a case does not show a judgment on the verdict in the court below, a writ of error will not lie to the Circuit Court of Appeals. *U. S. v. Long Branch Distilling Co.*, (C. C. A. 5th Cir. 1920) 262 Fed. 768.

2. Definition and Nature (p. 611)

Generally.—To same effect as original annotation, see *National Brake, etc., Co. v. Christensen*, (C. C. A. 7th Cir. 1919) 258 Fed. 880, 169 C. C. A. 600.

10. Injunction (p. 614)

On an appeal from an interlocutory injunctive order the Circuit Court of Appeals has the right to dismiss the suit upon a proper showing. *Bell, etc., Co. v. Bliss*, (C. C. A. 7th Cir. 1919) 262 Fed. 131.

11. Intervention and Interpleader (p. 615)

An order of a federal District Court denying the application of a municipality to intervene in a suit by a gas company against the attorney general, the district attorney, and the state Public Service Commission, to enjoin the enforcement of state legislation fixing gas rates, is not of that final character which furnishes the basis for an appeal. *New York v. Consolidated Gas Co.*, (1920) 253 U. S. 219, 40 S. Ct. 511, 64 U. S. (L. ed.) —, reversing (C. C. A. 2d Cir. 1919) 260 Fed. 1022, 171 C. C. A. 669.

17. Receivership Proceedings (p. 616)

An order of a federal District Court which denied the application of a receiver of an insolvent corporation, appointed by a state chancery court, for an order turning over to him the assets of the corporation in the possession of a receiver previously appointed by the federal court, is a final decision within the meaning of the Judicial Code, § 128, governing the appellate review in the Circuit Court of Appeals of final decisions of the District Court. *Ex p. Tiffany*, (1920) 252 U. S. 32, 40 St. Ct. 239, 64 U. S. (L. ed.) —, wherein the court said:

"By the Judicial Code, § 128, the circuit court of appeals is given appellate jurisdiction to review, by appeal or writ of error, final decisions in the district courts, with certain exceptions not necessary to be considered. It is clear that the order made in the district court, refusing to turn over the property to the chancery receiver, was a final decision within the meaning of the section of the Judicial Code to which we have referred, and from which the chancery receiver had the right to appeal to the circuit court of appeals. By the order the right of the state receiver to possess and administer the property of the corporation was finally denied. The words, 'final decision in the district court,' mean the same thing as 'final judgments and decrees,' as used in former acts regulating appellate jurisdiction. *Loveland, Appellate Jurisdiction of Federal Courts*, § 39. This conclusion is amply sustained by the decisions of this court. *Savannah v. Jesup*, 106 U. S. 563, 27 L. ed. 276, 1 Sup. Ct. Rep. 512; *Gumbel v. Pitkin*, 113 U. S. 545, 28 L. ed. 1128, 5 Sup. Ct. Rep. 616; *Krippendorf v. Hyde*, 110 U. S. 276, 287, 28 L. ed. 145, 149, 4 Sup. Ct. Rep. 27. See also a well-considered case in the circuit court of appeals, ninth circuit, *Dexter Horton Nat. Bank v. Hawkins*, 111 C. C. A. 514, 190 Fed. 924."

18. Miscellaneous (p. 616)

Order setting aside verdict.—The Circuit Court of Appeals has no jurisdiction to review an order of a district judge setting aside a verdict, since such an order is not final. *Dry Dock, etc., R. Co. v. Petkunas*, (C. C. A. 2d Cir. 1919) 261 Fed. 988.

Order denying petition for return of seized books and papers.—An order of a District Court denying the petition of a company, which is a defendant in a criminal prosecution, for a return of its books, papers and memoranda impounded by an ex parte order of the District Court, so that they might be used by the government in the trial of indictments pending against the company, is interlocutory and not reviewable on a writ of error by the Circuit Court of Appeals. *Coastwise Lumber, etc., Co. v. U. S.*, (C. C. A. 2d Cir. 1919) 259 Fed. 847, 170 C. C. A. 647. The court said: "In the case of *Wise v. Mills*, 220 U. S. 549, 31 Sup. Ct. 597, 55

L. Ed. 579, the District Court entered an order committing the United States attorney for contempt, because of his refusal to obey its order to return books and papers of the defendant in a criminal action seized without a warrant. Upon his writ of error the Supreme Court held that the order committing for contempt was final as to the United States attorney because, he not being a party to the criminal action, nothing more remained to be done as far as he was concerned, while it held the order to return the defendant's books and papers was interlocutory.

"When one not a party to the action has been committed for contempt, the order is final and appealable as to him (Nelson v. United States, 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673; Alexander v. United States, 201 U. S. 117, 26 Sup. Ct. 356, 50 L. Ed. 686); and when there is no action pending a demand for a return of books and papers seized is of course an independent special proceeding (Perlman v. United States, 247 U. S. 12, 38 Sup. Ct. 417, 62 L. Ed. 950; Veeder v. United States, 252 Fed. 414, 164 C. C. A. 338).

"Because it is not before us, we express no opinion upon the question whether this wholesale seizure of the Coastwise Company's books and papers was an infringement of its rights under the Fourth and Fifth Amendments of the Constitution of the United States, but, because the order before us is interlocutory, the writ of error is dismissed without prejudice."

Denial of motion to vacate order of commitment for contempt.—An order denying a motion to vacate an order of commitment for contempt is not final, and hence not subject to review under this section. Gill v. U. S., (C. C. A. 2d Cir. 1919) 262 Fed. 502, wherein the court said:

"Judicial Code, § 128 gives appellate jurisdiction only when decisions of the district courts are final; and the only final decision in this matter was the original order of commitment. The decision of the court denying the motion to vacate is one which may be renewed at any time, and is not final. Therefore it is not subject to review upon writ of error."

Vol. V, p. 629, Jud. Code, sec. 129.

[First ed., 1912 Supp., p. 195.]

V. Injunction.

4. "Refusing, dissolving, or refusing to dissolve."

XII. Scope of review.

V. INJUNCTION

4. "Refusing, dissolving, or refusing to dissolve" (p. 634)

Refusing to dissolve.—To same effect as original annotation, see *Mississippi Valley Trust Co. v. Railway Steel Spring Co.*, (C. C. A. 8th Cir. 1919) 259 Fed. 346, 169 C. C. A. 362.

XII. SCOPE OF REVIEW (p. 639)

Appeal from an order granting, etc., injunction.—A Circuit Court of Appeals, on appeal from an order of a District Court which had granted a preliminary injunction in entire reliance upon a decree of another District Court, properly takes notice of and considers the changed circumstances arising out of the subsequent reversal of such decree. *Meccano v. Wanamaker*, (1920) 253 U. S. 136, 40 S. Ct. 463, 64 U. S. (L. ed. —, affirming (C. C. A. 2d Cir. 1918) 250 Fed. 450, 162 C. C. A. 520, which reversed (S. D. N. Y. 1917) 241 Fed. 133.

Whether a preliminary injunction shall be awarded rests in the sound discretion of the trial court, and on appeal an order granting or denying such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. *Meccano v. Wanamaker*, (1920) 253 U. S. 136, 40 S. Ct. 463, 64 U. S. (L. ed.) —, affirming (C. C. A. 2d Cir. 1918) 250 Fed. 450, 162 C. C. A. 520, which reversed (S. D. N. Y. 1917) 241 Fed. 133.

Dismissal of bill for injunction.—The power of Circuit Courts of Appeals under this section to review preliminary orders granting injunctions, is not limited to the mere consideration of, and action upon, the order appealed from, but, if insuperable objection to maintaining the bill clearly appears, it may be dismissed and the litigation terminated. *Meccano v. Wanamaker*, (1920) 253 U. S. 136, 40 S. Ct. 463, 64 U. S. (L. ed.) —, affirming (C. C. A. 2d Cir. 1918) 250 Fed. 450, 162 C. C. A. 520, which reversed (S. D. N. Y. 1917) 241 Fed. 133) which held however that a final decree upon the merits may not be entered by a Circuit Court of Appeals on grounds of estoppel by judgment upon an appeal from an order granting a preliminary injunction.

"This appellate court, on an appeal from an order granting or denying an injunction, may decide the case upon the merits, and direct a dismissal of the suit, if it is of the opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810. This court is not confined in its review of the injunction order to the justice of the denial of the temporary injunction, but it may consider the sufficiency of the defense interposed. *Linde Air Products Co. v. Morse Dry Dock Co.*, 246 Fed. 834, 159 C. C. A. 136." *Victor Talking Mach. Co. v. Starr Piano Co.*, (C. C. A. 2d Cir. 1920) 263 Fed. 82.

Disclaimer as to patent in suit for infringement of patent and copyright, and for unfair competition.—Petitioner in a suit for infringement of a patent, for unfair competition, and for the infringement of a copyright, may not file a disclaimer as to the patent upon certiorari to a Circuit Court of Appeals to review a decree which reversed

an order of the trial court granting a preliminary injunction. *Meccano v. Wanamaker*, (1920) 253 U. S. 136, 40 S. Ct. 463, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 2d Cir. 1918) 250 Fed. 450, 162 C. C. A. 520, which *reversed* (S. D. N. Y. 1917) 241 Fed. 133.

Vol. V, p. 650, Jud. Code, sec. 145, par. first. [First ed., 1912 Supp., p. 200.]

II. JURISDICTION

7. Claims Sounding in Tort (p. 657)

A suit to recover from the United States the losses incurred by a public contractor because of the misrepresentations by the government as to the character of the materials to be encountered cannot be said to be one sounding in tort, and hence not tenable against the United States, where there is no intimation of bad faith against the officers of the government, and the Court of Claims regarded the representation as in the nature of a warranty, and there was nothing punitive in its judgment, it being simply compensatory of the cost of the work of which the government received the benefit. *U. S. v. Atlantic Dredging Co.*, 253 U. S. 1, 40 S. Ct. 423, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 490.

Vol. V, p. 667, Jud. Code, sec. 153. [First ed., 1912 Supp., p. 203.]

Subsidies in Spanish concession for operation of cables in Philippine Islands.—No contract, express or implied, on the part of the United States, justiciable in the Court of Claims, to pay the annual subsidies provided for in a Spanish concession for the construction and operation of submarine cables in the Philippine Islands, can be deducted from the use of such cables by the United States government at the reduced rate prescribed in such concession for official despatches, where this was the full rate demanded by the cable company, nor from the acceptance by subordinate officials of the Philippine government of the tax on receipts from messages computed as required by such concession, nor from a statement of account showing a balance favorable to the United States which was paid to and accepted by the treasurer of the Philippine government, which statement was prepared without suggestion of demand from the government of the United States, or even from the Philippine government, and in which, in order to give it the form of an account, the company was obliged to treat as unpaid, charges for tolls over the Hong-kong-Manila cable, all of which had been paid by the United States government and accepted by the company. *Eastern Extension, etc., Co. v. U. S.*, (1920) 251 U. S. 355, 40 S. Ct. 168, 64 U. S. (L. ed.) —.

Vol. V, p. 668, Jud. Code, sec. 156. [First ed., 1912 Supp., p. 204.]

IV. COMPUTATION OF TIME (p. 670)

Taking property for army post.—The taking of a placer mining claim as part of a site for an army post must, for the purpose of applying the statute of limitations to a suit against the government for compensation, be deemed to have been on the date of the approval or ratification by the Secretary of War of the unauthorized action of a military commander in taking possession, and not on the date of the latter's action, in view of the fact that the Secretary of War alone possessed the requisite authorization from Congress to determine whether the army post should be established and what land should be taken therefor, and the Secretary's action was none the less a taking of the mining claim because the President, when reserving the tract from sale and setting it aside for military purposes, had done so "subject to any legal rights which may exist to any land within its limits." *U. S. v. North American Transp., etc., Co.*, (1920) 253 U. S. 330, 40 S. Ct. 518, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 424.

Vol. V, p. 673, Jud. Code, sec. 162. [First ed., 1912 Supp., p. 205.]

Inquiry into ownership.—In determining the jurisdictional question of ownership, in cases brought under the provisions of this section, the validity of a sale of cotton to the Confederate states by the tutor of infant owners residing in Louisiana, may be inquired into by this court, even though the property at time of seizure by the federal government were in the possession of the purchaser. *Walker v. U. S.*, (1919) 54 Ct. Cl. 48.

Vol. V, p. 680, Jud. Code, sec. 177. [First ed., 1912 Supp., p. 208.]

Condemnation proceedings.—The compensation recoverable in the Court of Claims for the taking by the government of private property in Alaska for a public use is the value of the property as of the date of the taking. It cannot include any amount for use and occupation between the time of the taking and the entry of judgment, where, except for an allegation in the petition that the United States is indebted in a specified amount for use and occupation, there was no request in the Court of Claims of any kind in respect to such allowance, and that court did not mention the subject in its opinion, and it is not referred to in the application for an appeal, since, if it is interest that the owner seeks, its allowance is forbidden by this section, and, if it is not interest, the facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest. *U. S. v. North American Transp., etc., Co.*, (1920)

253 U. S. 330, 40 S. Ct. 518, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 424.

In *U. S. v. Rogers*, (C. C. A. 8th Cir. 1919) 257 Fed. 397, 168 C. C. A. 437, it was held that interest might be awarded against the United States in a condemnation proceeding from the date of the taking. The court said:

"In the rule of immunity of the government from liability for interest, the term 'interest' is generally used as meaning compensation for the use or forbearance of money, or damages for its detention. But the position of the government in the case at bar is not like that which it occupies when a claim or demand on contract is asserted against it. True, it is said that, when the government takes possession of private property for public use in advance of formal proceedings in eminent domain, the right of the acquiescing owner arises *ex contractu* (*United States v. Great Falls Mfg. Co.*, 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846); but that is by way of implication that compensation is intended by the government, instead of a trespass for which the landowner has no enforceable remedy. The duty and obligation to make just compensation in such a case is fundamental, and whatever is an essential element in that compensation cannot be excluded, even by legislative enactment. The question of compensation is a judicial one."

Indian claims.—The provision of this section against the allowance of interest upon any claim against the United States up to the time of the rendition of judgment thereon by the Court of Claims unless upon a contract expressly stipulating for the payment of interest, is applicable to the unpaid consideration due to Indians under a treaty which made a present cession of their lands to the United States for a consideration to be paid thereafter, with no mention made of interest. *U. S. v. Omaha Tribe of Indians*, (1920) 253 U. S. 275, 40 S. Ct. 522, 64 U. S. (L. ed.) —, *affirming* in part and *reversing* in part (1918) 53 Ct. Cl. 549.

Interest was allowed in *U. S. v. Rogers*, (C. C. A. 8th Cir. 1919) 257 Fed. 397, 168 C. C. A. 437; *U. S. v. Highamith*, (C. C. A. 8th Cir. 1919) 257 Fed. 401, 168 C. C. A. 441.

Vol. V, p. 689, Jud. Code, sec. 195.

[First ed., 1912 Supp., p. 213.]

A writ of certiorari to the Court of Customs Appeals was granted in *U. S. v. Aetna Explosives Co.*, (1920) 253 U. S. 481, 40 S. Ct. 483, 64 U. S. (L. ed.) —.

Vol. V, p. 691, Jud. Code, sec. 198.

[First ed., 1912 Supp., p. 214.]

Assignments of error.—An appellee in Court of Customs Appeals must confine himself to supporting the decision of the Board of United States General Appraisers. *U. S.*

v. Coroners Bros., (1919) 9 U. S. Cust. App. 220.

Burden of proof.—A protestant must show not only the incorrectness of the classification protested against but also the correctness of the one claimed. Where the merchandise is dutiable neither as classified nor claimed, the protestant has not sustained this burden of proof, and must fail. *U. S. v. Sears, Roebuck & Co.*, (1918) 9 U. S. Cust. App. 33.

A finding by the appraiser and collector that the value of a carton is part of the value of a handkerchief contained in it and not a packing charge, puts upon one claiming the contrary the burden of proof. *U. S. v. Rappolt*, (1918) 9 U. S. Cust. App. 21.

Conclusiveness of findings.—The finding of the Board of United States General Appraisers upon a question of fact is entitled to controlling weight in the absence of satisfactory evidence to the contrary. *U. S. v. Mutual China Co.*, (1919) 9 U. S. Cust. App. 232.

And with the testimony in conflict, the Board of General Appraisers' finding of fact should control. *Seward v. U. S.*, (1918) 9 U. S. Cust. App. 4.

Vol. V, p. 708, Jud. Code, sec. 233.

[First ed., 1912 Supp., p. 229.]

I. Scope and construction.

II. State a party.

4. State against state.

8. Citizen against state.

I. SCOPE AND CONSTRUCTION (p. 709)

Citizen against United States officers.—The Supreme Court may not entertain original jurisdiction of a suit brought by a citizen of a state against officers of the United States. *Duhne v. New Jersey*, (1920) 251 U. S. 311, 40 St. Ct. 154, 64 U. S. (L. ed.) —.

II. STATE A PARTY

4. State Against State (p. 710)

Consolidation of controversies between states.—In *Pennsylvania v. West Virginia*, (1920) 252 U. S. 563, 40 S. Ct. 357, 64 U. S. (L. ed.) —, controversies between states were consolidated and a commissioner appointed, with the power of a master in chancery, to take and return the testimony.

Intervention by United States.—In a suit between states the motion of the United States for leave to intervene therein for an injunction and the appointment of a receiver was granted. *Oklahoma v. Texas*, (1920) 252 U. S. 372, 40 S. Ct. 353, 64 U. S. (L. ed.) —.

8. Citizen Against State (p. 715)

The judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by

a citizen against his own state, without its consent. *Duhne v. New Jersey*, (1920) 251 U. S. 311, 40 S. Ct. 154, 64 U. S. (L. ed.) —.

Vol. V, p. 717, Jud. Code, sec. 234.

[First ed., 1912 Supp., p. 230.]

Error in order for appointment of auditor as ground for issuance of mandamus or prohibition.—Error in providing, in an order for the appointment of an auditor in an action at law, that the expense be paid by one or both of the parties, in accordance with the discretion of the trial court, does not require that the extraordinary remedies of mandamus or prohibition be granted, but, if petitioner deems himself prejudiced by the error, he may seek redress through application to the District Court for a modification of the order, or, after final judgment, by writ of error from the Circuit Court of Appeals. *Ex p. Peterson*, (1920) 253 U. S. 300, 40 S. Ct. 543, 64 U. S. (L. ed.) —.

Mandamus or prohibition to District Court judge where constitutional right to trial by jury involved.—The Supreme Court has jurisdiction of a petition for writs of mandamus or prohibition directed to a District Court judge, by which relief is sought against the appointment of an auditor to make a preliminary investigation as to the facts, hear the evidence, and report his findings, with a view to simplifying the issues for the jury, where the petitioner asserts that, by the appointment of such auditor and proceedings thereunder, his constitutional right to trial by jury would be violated. *Ex p. Peterson*, (1920) 253 U. S. 300, 40 S. Ct. 543, 64 U. S. (L. ed.) —.

Vol. V, p. 723, Jud. Code, sec. 237.

[First ed., 1912 Supp., p. 230.]

II. General considerations affecting review of judgments of state courts.

1. Statutory limitation on authority to review.

V. "Highest court of a state."

VI. Questions reviewable by Supreme Court.

1. Federal questions.

a. Necessity.

3. Local and general law.

8. Presumptions.

IX. Validity of statute of, or authority exercised under, state "drawn in question."

1. "Statute of state."

X. "Repugnant to constitution, treaties or laws of United States."

2. Validity of state constitution or laws drawn in question.

3. Proper construction of state law drawn in question.

5. Impairment of or giving effect to contract.

XVII. Record.

1. In general.

XIX. Review on writ of certiorari.

II. GENERAL CONSIDERATIONS AFFECTING REVIEW OF JUDGMENTS OF STATE COURTS

1. Statutory Limitation on Authority to Review (p. 725)

Assignments of error which involve no federal question cannot be reviewed by the Supreme Court of the United States. *Kinzell v. Chicago, etc., R. Co.*, (Idaho, 1920) 190 Pac. 255.

V. "HIGHEST COURT OF A STATE (p. 730)

"Highest" court—*In general.*—A judgment of a Missouri Court of Appeals which reversed the judgment below after the state Supreme Court had, on certiorari, quashed a prior judgment of affirmance in the Court of Appeals, and had remanded the cause to that court for decision, is a judgment of the highest state court for purposes of a writ of error from the federal Supreme Court. *Mergenthaler Linotype Co. v. Davis*, (1920) 251 U. S. 256, 40 S. Ct. 133, 64 U. S. (L. ed.) —, *dismissing writ of error to review State v. Robertson*, (1917) 271 Mo. 475, 196 S. W. 1132.

A judgment of a California District Court of Appeal refusing certiorari to an inferior court is the judgment of the state court of last resort having power to consider the case so far as the appellate jurisdiction of the federal Supreme Court is concerned, where such appellate court assumed jurisdiction of the cause, and the Supreme Court of the state refused, for want of jurisdiction, to review the judgment, although the District Court of Appeal may have erred in assuming jurisdiction, since this is purely a question of state law. *Pacific Gas, etc., Co. v. Police Ct.*, (1919) 251 U. S. 22, 40 S. Ct. 79, 64 U. S. (L. ed.) —, *affirming on other grounds* (1915) 28 Cal. App. 412, 152 Pac. 928.

Jurisdiction of a writ of error from the federal Supreme Court to the Pennsylvania Superior Court to review a judgment which sustained, on the supposed authority of a decision of the state Supreme Court, an order of the state Public Service Commission challenged as repugnant to the Federal Constitution, is not excluded on the theory that the refusal of the state Supreme Court to permit an appeal must have been upon the ground that the commission was a purely administrative body; that it had no judicial power to declare the statute under which it acted unconstitutional; and that therefore no question of the constitutionality of the statute was before the Superior Court, inasmuch as an appeal to the state Supreme Court was a matter of right if the case had involved such a question, since whatever powers a state may deny to its commissions, it may not give them power to do what the laws of the United States forbid, whether they call their action administrative or judicial, and the Superior Court treated the question as open. The state Supreme Court must be regarded as having merely denied an appeal upon a point that possibly was thought to

have been decided already by that court. *Pennsylvania R. Co. v. Public Service Commission*, (1919) 250 U. S. 566, 40 S. Ct. 36, 64 U. S. (L. ed.) —, *reversing* (1917) 67 Pa. Super. Ct. 575.

VI. QUESTIONS REVIEWABLE BY SUPREME COURT

1. Federal Questions

a. Necessity (p. 733)

The general rule.—Non-federal grounds put forward by the highest state court as the basis for its decision, but which are plainly untenable, cannot serve to bring the case within the rule that the federal Supreme Court will not review the judgment of a state court where the latter has decided the case upon an independent ground not within the federal objections taken, and that ground is sufficient to sustain the judgment. *Ward v. Love County*, (1920) 253 U. S. 17, 40 St. Ct. 419, 64 U. S. (L. ed.) —, *reversing* (1918) 68 Okla. —, 173 Pac. 1050, *followed in* *Broadwell v. Carter County*, (1920) 253 U. S. 25, 40 S. Ct. 422, 64 U. S. (L. ed.) —, *reversing* (1918) 71 Okla. —, 175 Pac. 828.

3. Local and General Law (p. 742)

Assessments.—A judgment of the highest court of a state which, by affirming, without more, a judgment of the trial court directing a reassessment against the property itself instead of against a street railway company of the share of the expense of a pavement properly apportioned to a central strip in a highway owned in fee by the street railway company, leaves in serious doubt the right of the company to a new and adequate hearing in respect of the assessment, will be so modified and corrected by the federal Supreme Court on writ of error as definitely to preserve such right. *Oklahoma R. Co. v. Severns Pav. Co.*, (1919) 251 U. S. 104, 40 S. Ct. 73, 64 U. S. (L. ed.) —, *modifying and affirming* (Okla. 1918) 170 Pac. 216.

8. Presumptions (p. 750)

Taxing power of state in question.—When the constituted authority of the state undertakes to exert the taxing power, and the validity of its action is brought before the federal Supreme Court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. *Green v. Frazier*, (1920) 253 U. S. 233, 40 S. Ct. 499, 64 U. S. (L. ed.) —, *(affirming)* (N. D. 1920) 176 N. W. 11), wherein it was held that judicial interference with state tax legislation, the purpose of which has been declared by the people of the state, the legislature, and the highest state court to be of a public nature and within the taxing power of the state, cannot be justified unless it is clear beyond reasonable controversy that rights secured by the Federal Constitution have been violated.

IX. VALIDITY OF STATUTE OF, OR AUTHORITY EXERCISED UNDER, STATE "DRAWN IN QUESTION"

1. "Statute of State" (p. 752)

Following construction of state statute.—The federal Supreme Court, when dealing with the constitutionality of state statutes challenged under U. S. Const., 14th Amend., accepts the meaning of such statutes as construed by the highest court of the state. *Farncomb v. Denver*, (1920) 252 U. S. 7, 40 S. Ct. 271, 64 U. S. (L. ed.) —, *affirming* (1918) 64 Colo. 13, 171 Pac. 66.

X. "REPUGNANT TO CONSTITUTION, TREATIES OR LAWS OF UNITED STATES"

2. Validity of State Constitution or Laws Drawn in Question (p. 753)

To the same effect as the original annotation see *Green v. Frazier*, (1920) 253 U. S. 233, 40 S. Ct. 499, 64 U. S. (L. ed.) —.

3. Proper Construction of State Law Drawn in Question (p. 753)

Whether a state statute did or did not validate a contract theretofore unenforceable is a question for the state courts to decide, and their decision is not subject to review in the federal Supreme Court. *Munday v. Wisconsin Trust Co.*, (1920) 252 U. S. 499, 40 S. Ct. 365, 64 U. S. (L. ed.) —, *affirming* (1918) 168 Wis. 31, 168 N. W. 393, 169 N. W. 612.

5. Impairment of or Giving Effect to Contract (p. 756)

Questions determined by court.—"When this court is called upon to decide whether state legislation impairs the obligation of a contract, it must determine for itself whether there is a contract, and what its obligation is, as well as whether the obligation has been impaired. *Detroit United Railway v. Detroit*, 242 U. S. 238, 249, 37 Sup. Ct. 87, 61 L. Ed. 268. But, as stated in *Southern Wisconsin Railway v. Madison*, 240 U. S. 457, 461, 36 Sup. Ct. 400, 401 (60 L. Ed. 739):

"The mere fact that without the state decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point." *Milwaukee Electric R., etc., Co. v. Milwaukee*, (1920) 252 U. S. 100, 40 S. Ct. 306, 64 U. S. (L. ed.) —, *affirming* on other grounds (1917) 166 Wis. 163, 164 N. W. 844.

XVII. RECORD

1. In General (p. 790)

The claim in the state trial court that a ruling was contrary to U. S. Const., 14th Amend., affords no basis for a writ of error from the federal Supreme Court, where no such contention was made in the assignment of errors in the highest court of the state, nor was it, so far as appears by the record, otherwise presented to or passed upon by

that court. *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, (1920) 252 U. S. 341, 40 S. Ct. 330, 64 U. S. (L. ed.) —, (dismissing writ of error to review (1918) 175 N. C. 668, 96 S. E. 99) wherein the court said:

"If a general statement that the ruling of the state court was against the 14th Amendment were a sufficient specification of the claim of a right under the Constitution to give this court jurisdiction (see *Clarke v. McDade*, 165 U. S. 168, 172, 41 L. ed. 673, 674, 17 Sup. Ct. Rep. 284; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248, 46 L. ed. 171, 176, 22 Sup. Ct. Rep. 120; *Marvin v. Trout* 199 U. S. 212, 217, 224, 50 L. ed. 157, 159, 161, 26 Sup. Ct. Rep. 31), still the basis for a review by this court is wholly lacking here. For the 14th Amendment was mentioned only in the trial court. In the supreme court of the state no mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here. But obviously that was too late. *Chicago, I. & L. R. Co. v. McGuire*, 196 U. S. 128, 132, 49 L. ed. 413, 417, 25 Sup. Ct. Rep. 200. The omission to set it up properly in the supreme court of the state was not cured by the allowance of the writ of error by its chief justice. *Appleby v. Buffalo*, 221 U. S. 524, 529, 55 L. ed. 838, 840, 31 Sup. Ct. Rep. 699; *Hulbert v. Chicago*, 202 U. S. 275, 280, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617; *Marvin v. Trout*, 199 U. S. 212, 223, 50 L. ed. 157, 161, 26 Sup. Ct. Rep. 31.

"We have no occasion, therefore, to consider whether the claim of denial of rights under the 14th Amendment was substantial in character which is required to support a writ of error. *Equitable Life Assur. Soc. v. Brown*, 187 U. S. 308, 311, 47 L. ed. 190, 192, 23 Sup. Ct. Rep. 123. Compare *Hendersonville Light & P. Co. v. Blue Ridge Interurban R. Co.*, 243 U. S. 563, 61 L. ed. 900, 37 Sup. Ct. Rep. 440."

XIX. REVIEW ON WRIT OF CERTIORARI (p. 794)

See notes to 1918 Supp., p. 411, sec. 2 (Act Sept. 6, 1916), *infra*, this Supplement, p. 657.

Scope of review.—"When a writ of certiorari is issued to the highest court of a state, the Supreme Court of the United States is not concerned with, nor does it have jurisdiction to dispose of, the merits, except in so far as they relate to the federal question upon which its jurisdiction depends." *Kinzell v. Chicago, etc. R. Co.*, (Idaho 1920) 190 Pac. 255, distinguishing review under this section from review on certiorari directed to the Circuit Court of Appeals under Judicial Code section 240, 6 Fed. Stat. Ann. (2d ed.) 854.

Vol. V. n. 794, Jud. Code, sec. 238. [First ed., 1912 Supp., p. 231.]

I. Scope of statute and general matters.

1. In general.

8. Frivolous grounds and moot questions.

III. Final judgments.

IV. "Jurisdiction of court in issue."

1. In general.

2. Separate appeals and right of election between Supreme Court and Circuit Court of Appeals.

a. General consideration of subject.

b. Jurisdiction sole question in issue.

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VI. Constitutional questions in issue.

3. "Constitution or law of state claimed to be in contravention of Constitution of United States."

e. Illustrations.

4. Exclusiveness of jurisdiction of Supreme Court.

I. SCOPE OF STATUTE AND GENERAL MATTERS

1. In General (p. 797)

Jurisdiction of a direct writ of error from the federal Supreme Court to a District Court once having attached because of the presence of constitutional questions continues, although such questions have since been decided in other cases to be without merit, for the purpose of disposing of other questions raised in the record. *Pierre v. U. S.*, (1920) 252 U. S. 239, 40 S. Ct. 205, 64 U. S. (L. ed.) —.

8. Frivolous Grounds and Moot Questions (p. 799)

The contention, by the owner of a non-exclusive franchise to use the streets of a town for the distribution of electric current, that competition in business likely to result from a similar grant to another corporation would be a violation of its own contract, or a taking of its property in violation of the Federal Constitution, is too plainly frivolous to serve as the basis of an appeal to the Supreme Court from a decree of a District Court dismissing a suit for injunctive relief. *Piedmont Power, etc., Co. v. Graham*, (1920) 253 U. S. 193, 40 S. Ct. 453, 64 U. S. (L. ed.) —.

III. FINAL JUDGMENTS (p. 800)

Admiralty suit.—A decree of a federal District Court dismissing for lack of jurisdiction the petition of the defendant vessel owner in an admiralty suit to bring in as a party defendant a corporation which it is asserted would be liable as an indemnitor if the liability of the vessel should be established lacks the finality essential to support an appeal. *Oneida Nav. Corp. v. Job*,

(1920) 252 U. S. 521, 40 S. Ct. 357, 64 U. S. (L. ed.) —.

Judgment on habeas corpus based on three separate affidavits.—A single judgment upon a petition for a writ of habeas corpus setting forth a detention of the relator in extradition proceedings on three separate affidavits is not reviewable on appeal, where such judgment, though directing that the writ be denied as to the commitment on one of these affidavits, also declared that the writs of habeas corpus are granted as to the commitments on the other two affidavits, and ordered that the case be remanded for further hearing, since only one branch of the case having been finally disposed of below, none of it is reviewable. *Collins v. Miller*, (1920) 252 U. S. 364, 40 S. Ct. 347, 64 U. S. (L. ed.) —.

Effect of failure of either party to raise question of finality of judgment.—The fundamental question whether the judgment appealed from is a final one must be answered, although not raised by either party. *Collins v. Miller*, (1920) 252 U. S. 364, 40 S. Ct. 347, 64 U. S. (L. ed.) —.

IV. "JURISDICTION OF COURT IN ISSUE"

1. In General (p. 801)

To same effect as original annotation, see *Shapley v. Cohoon*, (C. C. A. 1st Cir. 1920) 263 Fed. 993.

Appeals which must go directly to the Supreme Court are those wherein the jurisdiction of the District Court as a federal court is involved. An objection to the jurisdiction of a bankruptcy court over certain property is not within the act. *In re Amy*, (C. C. A. 2d Cir. 1920) 263 Fed. 8.

Decision of other questions.—That other questions which were incidentally involved in the main question of jurisdiction were also decided does not permit an appeal to the Circuit Court of Appeals. *Nickels v. Pullman Co.*, (C. C. A. 4th Cir. 1919) 263 Fed. 551.

2. Separate Appeals and Right of Election Between Supreme Court and Circuit Court of Appeals

a. General Consideration of Subject (p. 801)

A case may properly be appealed to the Circuit Court of Appeals where there are other questions in the case beside that of jurisdiction. *Stebbins v. Selig*, (C. C. A. 8th Cir. 1919) 257 Fed. 230, 168 C. C. A. 314.

b. Jurisdiction Sole Question in Issue (p. 905)

To same effect as original annotation, see *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co.*, (C. C. A. 7th Cir. 1919) 258 Fed. 927, 170 C. C. A. 123.

5. When Jurisdiction is in Issue (p. 806)

Other illustrations.—*Chipman v. Thomas B. Jeffrey Co.*, (1920) 251 U. S. 373, 40 S. Ct. 172, 64 U. S. (L. ed.) —, holding

service of summons insufficient to give jurisdiction over foreign corporation. *Canton First Nat. Bank v. Williams*, (1920) 252 U. S. 504, 40 S. Ct. 372, 64 U. S. (L. ed.) —, holding that a suit by a national bank to restrain the Comptroller of the Currency can be brought only in the district where such bank is located and may there be maintained upon service made upon the defendant wherever found.

VI. CONSTITUTIONAL QUESTIONS IN ISSUE

3. Constitution or Law of State Claimed to be in Contravention of Constitution

e. Illustrations (p. 832)

Impairment of obligation of contract.—The question whether the obligations of a contract with a state were impaired by subsequent state legislation is one which will warrant a direct writ of error from the federal Supreme Court to a District Court. *Hays v. Seattle*, (1920) 251 U. S. 233, 40 S. Ct. 125, 64 U. S. (L. ed.) —, *affirming* (W. D. Wash. 1915) 226 Fed. 287.

A decision of the highest court of a state is not reviewable in the federal Supreme Court as presenting the question whether contract obligations were impaired by the effect given to a municipal ordinance repealing a street lighting and power franchise, where this contention was first made in the intermediate state appellate court, and no effect whatever was given to such ordinance, either by that court or by the state court of last resort, each court reaching the conclusion under review independently of and without reference to such ordinance. *Hardin-Wyandot Co. v. Upper Sandusky*, (1919) 251 U. S. 173, 40 S. Ct. 104, 64 U. S. (L. ed.) —, *affirming* (1916) 93 Ohio St. 428, 113 N. E. 402.

4. Exclusiveness of Jurisdiction of Supreme Court (p. 834)

To same effect as original annotation, see *Chamberlin v. Q., etc., Co.*, (C. C. A. 7th Cir. 1919) 260 Fed. 933, 171 C. C. A. 575.

Vol. V, p. 838, Jud. Code, sec. 239.

[First ed., 1912 Supp., p. 231.]

III. TABLE OF CASES WHERE QUESTIONS WERE CERTIFIED (p. 848)

Porto Rico Ry., etc. Co. v. Mor, (1920) 253 U. S. 346, 40 S. Ct. 516, 64 U. S. (L. ed.) —, question certified by the Circuit Court of Appeals for the first circuit as to the jurisdiction of the United States District Court for Porto Rico.

Vol. V, p. 854, Jud. Code, sec. 240.

[First ed., 1912 Supp., p. 232.]

I. Power to review by certiorari, in general.

1. Confined to cases not reviewable on appeal or writ of error.
2. Comprehensive power of review.

- II. Discretion in exercise of power.
 2. Power sparingly exercised.
 3. Before final decree in Circuit Court of Appeals.
 4. Illustrations of exercise of power.
- III. Procedure for obtaining writ.
 6. Petition for certiorari united with appeal or writ of error.
 7. On motion to dismiss appeal or writ of error.
- V. Hearing and examination, determination, and remand.
- VI. Table of certiorari cases.
 2. Cases or questions of importance.
 3. Division of opinion in Circuit Court of Appeals.
 5. Other federal courts in conflict.
 8. Patent cases.
 12. Miscellaneous cases.
 - c. Other cases.

I. POWER TO REVIEW BY CERTIORARI, IN GENERAL

1. Confined to Cases Not Reviewable on Appeal or Writ of Error (p. 855)

The Supreme Court may, under this section, bring up by certiorari directed to a Circuit Court of Appeals a cause in which the decree of the latter court is made final by § 128, and may treat the cause as if on appeal. *Meccano v. Wanamaker*, (1920) 253 U. S. 136, 40 S. Ct. 463, 64 U. S. (L. ed.) —, *affirming* on other grounds (C. C. A. 2d Cir. 1918) 250 Fed. 450, 162 C. C. A. 520, which *reversed* (S. D. N. Y. 1917) 241 Fed. 133.

2. Comprehensive Power of Review (p. 856)

In general.—The federal Supreme Court, on certiorari to review a judgment of a Circuit Court of Appeals which reversed a judgment below in favor of plaintiffs and ordered a new trial, may deal only with the matter considered by the Circuit Court of Appeals, and remand the cause for any needed action upon other questions, or it may proceed itself to a complete decision, where defendant does not rely entirely upon the ground of decision advanced by the Circuit Court of Appeals, but urges that if it be not well taken, the record discloses other grounds not considered by that court for reversing the judgment and ordering a new trial, and that if its decision be right, it is not sufficiently comprehensive to serve as a guide to the court and the parties upon another trial, plaintiffs insisting that the judgments in the District Court were right and should be affirmed. *Cole v. Ralph*, (1920) 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, *reversing* on other grounds (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

The Supreme Court will not undertake, on certiorari sued out to review a decree of a Circuit Court of Appeals which reversed a decree of a District Court, granting a preliminary injunction, to decide which one of two conflicting views expressed by two Cir-

cuit Courts of Appeals is the correct one, nor to decide the several issues involved upon the merits. *Meccano v. Wanamaker*, (1920) 253 U. S. 136, 40 S. Ct. 463, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 2d Cir. 1918) 250 Fed. 450, 162 C. C. A. 520, which *reversed* (S. D. N. Y. 1917) 241 Fed. 133.

II. DISCRETION IN EXERCISE OF POWER

2. Power Sparingly Exercised (p. 856)

A decree of a Circuit Court of Appeals which, upon a view of all relevant circumstances, reversed an order of the trial court granting a preliminary injunction, will not be disturbed by the Supreme Court on certiorari except for strong reasons. *Meccano v. Wanamaker*, (1920) 253 U. S. 136, 40 S. Ct. 463, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 2d Cir. 1918) 250 Fed. 450, 162 C. C. A. 520, which *reversed* (S. D. N. Y. 1917) 241 Fed. 133.

3. Before Final Decree in Circuit Court of Appeals (p. 857)

In *Spiller v. Atchison, etc., R. Co.*, (1920) 253 U. S. 117, 40 S. Ct. 466, 64 U. S. (L. ed.) —, judgments not final were reviewed on certiorari, the court saying: "Upon consideration of the particular circumstances of the case, we have concluded that a writ of certiorari ought to be allowed, without further protracting the litigation to the extent that would be necessary in order to reach final judgments."

4. Illustrations of Exercise of Power (p. 858)

Recovery of amounts awarded in reparation order of Interstate Commerce Commission.—Decrees of a Circuit Court of Appeals which reversed decrees below for the recovery of the amounts awarded in a reparation order made by the Interstate Commerce Commission, and remanded the cause for a new trial, are reviewable in the Supreme Court by certiorari under this section, in the case of those which are made final by the combined effect of sections 128 and 241, because the requisite jurisdictional amount is not involved, and in the case of the other decrees by virtue of section 262, in aid of the ultimate jurisdiction of the Supreme Court to review such decrees by writ of error. *Spiller v. Atchison, etc., R. Co.*, (1920) 253 U. S. 117, 40 S. Ct. 466, 64 U. S. (L. ed.) —, *reversing* on other grounds (C. C. A. 8th Cir. 1917) 246 Fed. 1, 158 C. C. A. 227; (C. C. A. 8th Cir. 1918) 249 Fed. 677, 161 C. C. A. 587.

III. PROCEDURE FOR OBTAINING WRIT

6. Petition for Certiorari United with Appeal or Writ of Error (p. 860)

Pell v. McCabe, (1919) 250 U. S. 573, 40 S. Ct. 43, 63 U. S. (L. ed.) 1147, was a case of an appeal and a certiorari, the former being dismissed.

In *Spiller v. Atchison, etc., R. Co.*, (1920) 253 U. S. 117, 40 S. Ct. 466, 64 U. S. (L. ed.) —, there was a writ of error and a petition for a writ of certiorari, the former being dismissed and a hearing had on the latter.

7. On Motion to Dismiss Appeal or Writ of Error (p. 861)

After dismissal of a writ of error by the Supreme Court for want of jurisdiction, a writ of certiorari was awarded, a petition therefor having been filed in due season, in *Spiller v. Atchison, etc., R. Co.*, (1920) 253 U. S. 117, 40 S. Ct. 466, 64 U. S. (L. ed.) —.

V. HEARING AND EXAMINATION, DETERMINATION, AND REMAND (p. 862)

Concurrent findings of fact by two courts below.—The concurrent judgment of the two courts below that a railway carrier was not negligent in failing to give warning to a brakeman concerning the use of freight cars with handholds only at two diagonal corners will not be disturbed by the Supreme Court. *Boehmer v. Pennsylvania R. Co.*, (1920) 252 U. S. 496, 40 S. Ct. 409, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 2d Cir. 1918) 252 Fed. 553, 165 C. C. A. 3.

VI. TABLE OF CERTIORARI CASES

2. Cases or Questions of Importance (p. 866)

Schall v. Camors, (1920) 251 U. S. 239, 40 S. Ct. 135, 64 U. S. (L. ed.) —, "its general importance in the administration of the Bankruptcy Act warranted a review of the case by certiorari" to determine the question "whether a claim for unliquidated damages, arising out of a pure tort which neither constitutes a breach of an express contract nor results in any unjust enrichment of the tortfeasor that may form the basis of an implied contract, is provable in bankruptcy."

Birge-Forbes Co. v. Heye, (1920) 251 U. S. 317, 40 S. Ct. 160, 64 U. S. (L. ed.) —, question as to proper form of judgment in favor of a plaintiff who became an alien enemy pending suit: "it seemed proper that" the question "should be set at rest."

Cole v. Ralph, (1920) 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, the court saying: "The cases are here upon writs of error which were granted because the ground upon which the Circuit Court of Appeals put its decision—the construction and application of some of the mineral land laws—was deemed of general interest in the region where those laws are operative."

3. Division of Opinion in Circuit Court of Appeals (p. 867)

U. S. v. Poland, (1920) 251 U. S. 221, 40 S. Ct. 127, 64 U. S. (L. ed.) —, suit in District Court for Alaska to cancel land patent.

Cole v. Ralph, (1920) 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —; *Erie R.*

Co. v. Collins, (1920) 253 U. S. 77, 40 S. Ct. 450, 64 U. S. (L. ed.) —; *Erie R. Co. v. Szary*, (1920) 253 U. S. 86, 40 S. Ct. 454, 64 U. S. (L. ed.) —; *Meccano v. Wanamaker*, (1920) 253 U. S. 136, 40 S. Ct. 463, 64 U. S. (L. ed.) —.

5. Other Federal Courts in Conflict (p. 869)

Erie R. Co. v. Collins, (1920) 253 U. S. 77, 40 S. Ct. 450, 64 U. S. (L. ed.) —, an action on the federal Employers' Liability Act, the question being whether the plaintiff was employed in interstate commerce where the courts below "seemed to have been constrained to that conclusion by the same cases, and a review of them, therefore, is immediately indicated to see whether in their discord or harmony, whichever exists, a solution can be found for the present controversy." See also as a case "not distinguishable" from the foregoing, *Erie R. Co. v. Szary*, (1920) 253 U. S. 86, 40 S. Ct. 454, 64 U. S. (L. ed.) —.

8. Patent Cases (p. 870)

Bone v. Marion County, (1919) 251 U. S. 134, 40 S. Ct. 96, 64 U. S. (L. ed.) —, no novelty and no infringement.

12. Miscellaneous Cases.

c. Other Cases (p. 872)

Liverpool, etc., Steam Nav. Co. v. Brooklyn Eastern Dist. Terminal, (1919) 251 U. S. 48, 40 S. Ct. 66, 64 U. S. (L. ed.) —, as to limitation of vessel owner's liability in case of collision.

Worth Bros. Co. v. Lederer, (1920) 251 U. S. 507, 40 S. Ct. 282, 64 U. S. (L. ed.) —; *Carbon Steel Co. v. Lewellyn*, (1920) 251 U. S. 501, 40 S. Ct. 283, 64 U. S. (L. ed.) —, and *Forged Steel Wheel Co. v. Lewellyn*, (1920) 251 U. S. 511, 40 S. Ct. 285, 64 U. S. (L. ed.) —, as to construction of the *Munitions Tax Act* of Sept. 8, 1916, ch. 463, § 301, 39 Stat. L. 780, 1918 Supp. Fed. Stat. Ann. 351, two justices dissenting.

The South Coast, (1920) 251 U. S. 519, 40 S. Ct. 233, 64 U. S. (L. ed.) —, holding that a charter party gave the master power to create a lien for supplies, three justices dissenting.

The Atlanten, (1920) 252 U. S. 313, 40 S. Ct. 332, 64 U. S. (L. ed.) —, libel in admiralty, construction of charter party.

Manners v. Morosco, (1920) 252 U. S. 317, 40 S. Ct. 335, 64 U. S. (L. ed.) —, construing an exclusive license to produce a copyrighted play as including a license to produce it in moving pictures.

Strathearn Steamship Co. v. Dillon, (1920) 252 U. S. 348, 40 S. Ct. 350, 64 U. S. (L. ed.) —, and *Thompson v. Lucas*, (1920), 252 U. S. 358, 40 S. Ct. 353, 64 U. S. (L. ed.) —, presenting questions arising under the *Seamen's Act* of March 4, 1915, ch. 153, 38 Stat. L. 1164, 9 Fed. Stat. Ann. (2d ed.) 159.

Penn Mut. L. Ins. Co. v. Lederer, (1920) 252 U. S. 523, 40 S. Ct. 397, 64 U. S. (L. ed.) —, a case where "whether the plaintiff is entitled to recover depends wholly upon the construction to be given certain provisions in section II, G, (b) of the Revenue Act of October 3, 1913, c. 16, 38 Stat. L. 114, 172, 173," 4 Fed. Stat. Ann. (2d ed.) 246.

Boehmer v. Pennsylvania R. Co., (1920) 252 U. S. 496, 40 S. Ct. 409, 64 U. S. (L. ed.) —, an action under the federal Employers' Liability Act, involving construction of sec. 4 of the Safety Appliance Act of 1893, 27 Stat. L. 531, 8 Fed. Stat. Ann. (2d ed.) 1174.

White v. Chin Fong, (1920) 253 U. S. 90, 40 S. Ct. 449, 64 U. S. (L. ed.) —, to review a judgment discharging respondent from the custody of the Commissioner of Immigration, he holding respondent for deportation as a Chinese person not entitled to be in the United States.

Western Union Tel. Co. v. Brown, (1920) 253 U. S. 101, 40 S. Ct. 460, 64 U. S. (L. ed.) —, action for failure to deliver a message involving question of measure of damages.

Fidelity Title, etc., Co., v. Du Bois Electric Co., (1920) 253 U. S. 212, 40 S. Ct. 514, 64 U. S. (L. ed.) —, action for personal injuries by negligence, involving various questions.

Chicago, etc., R. Co. v. McCasell-Dinsmore Co., (1920) 253 U. S. 97, 40 S. Ct. 504, 64 U. S. (L. ed.) —, as to validity of provision in a bill of lading under the Cummins Amendment, Act of March 4, 1915, c. 176, 38 Stat. L. 1196, 4 Fed. Stat. Ann. (2d ed.) 506.

Kwock Jan Fat v. White, (1920) 253 U. S. 454, 40 S. Ct. 566, 64 U. S. (L. ed.) —, reviewing a judgment which affirmed a judgment sustaining a demurrer to a petition for habeas corpus on behalf of a Chinese person who had been denied entry to this country.

Vol. V, p. 877, Jud. Code, sec. 241.

[First ed., 1912 Supp., p. 232.]

II. MODE AND SCOPE OF REVIEW (p. 878)

Only final judgments.—Decrees of a Circuit Court of Appeals which reversed decrees below for the recovery of amounts awarded in a reparation order made by the Interstate Commerce Commission, and remanded the cause for a new trial, are not final for the purpose of a writ of error. *Spiller v. Atchison, etc., R. Co.*, (1920) 253 U. S. 117, 40 S. Ct. 466, 64 U. S. (L. ed.) —, reversing on other grounds (C. C. A. 8th Cir. 1917) 246 Fed. 1, 158 C. C. A. 227, (C. C. A. 8th Cir. 1918) 249 Fed. 677, 161 C. C. A. 587.

Refusal of District Court to direct verdict.—The refusal of the trial court to direct a verdict for defendant will not be disturbed by the Supreme Court where that court is of the opinion that the evidence presented sev-

eral disputable questions of fact which it was the province of the jury to determine, and this was the view, not only of the judge who presided at the trial, but of another judge who overruled a motion for a new trial. *Cole v. Ralph*, 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, reversing (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

Jurisdiction of Circuit Court of Appeals in issue.—An appeal having been taken to a Circuit Court of Appeals in a case in which jurisdiction below was based upon constitutional grounds, and hence was not appealable to that court, and a final order having been made by the Circuit Court of Appeals, the Supreme Court has jurisdiction under this section to review the question of the jurisdiction of the Circuit Court of Appeals. *New York v. Consolidated Gas Co.*, (1920) 253 U. S. 219, 40 S. Ct. 511, 64 U. S. (L. ed.) —, reversing (C. C. A. 2d Cir. 1919) 260 Fed. 1022, 171 C. C. A. 669) which further held that the proper course for the Supreme Court on an appeal from a decree of affirmance made by a Circuit Court of Appeals in a case wrongfully appealed to that court, was to reverse the judgment of the Circuit Court of Appeals and remand the case to that court, with directions to dismiss the appeal.

Consideration of trial court's jurisdiction.—After final judgment entered by a federal District Court and affirmed by a Circuit Court of Appeals, the trial court's jurisdiction will not ordinarily be denied on the theory that the requisite jurisdictional amount was not involved, where the action was in tort, the alleged damages exceeded the prescribed amount, the declaration discloses nothing rendering such a recovery impossible, and no bad faith appears. *Chesbrough v. Northern Trust Co.*, (1920) 252 U. S. 83, 40 S. Ct. 237, 64 U. S. (L. ed.) —, affirming (C. C. A. 6th Cir. 1918) 251 Fed. 881, 164 C. C. A. 97.

Vol. V, p. 890, Jud. Code, sec. 243.

[First ed., 1912 Supp., p. 232.]

Time within which to appeal.—A motion for new trial, seasonably made, suspends the running of the time within which to file an application for appeal, but in the absence of any such motion or of some proceeding of which the court has jurisdiction, and seasonably filed, the court is powerless, after the period within which an appeal can be applied for, to extend the time fixed by section 243 of the Judicial Code for appeal. *Chicago, etc., R. Co. v. U. S.*, (1919) 64 Ct. Cl. 116.

Findings of fact.—A finding of the Court of Claims that an infirmity building constructed by the government for Indians was not used and was not such a building as was contemplated by treaties with such Indians means not that a building of this general character was not contemplated, but that the particular building was not what it ought to have been, and not suitable for the use of the Indians, and, so construed, it is either

a finding upon a mere question of fact, or, at most, is a finding of mixed fact and law, where the question of law is inseparable, and in either case the finding is not reviewable by the federal Supreme Court on appeal. *U. S. v. Omaha Tribe of Indians*, (1920) 253 U. S. 275, 40 S. Ct. 522, 64 U. S. (L. ed.) —, *affirming* in part and *reversing* in part (1918) 53 Ct. Cl. 549.

The failure of the Court of Claims to find certain facts in accordance with claimant's contention may not be assigned as error on appeal to the federal Supreme Court, since the review by the latter court is based upon the findings as made. *U. S. v. Omaha Tribe of Indians*, (1920) 253 U. S. 275, 40 S. Ct. 522, 64 U. S. (L. ed.) —, *affirming* in part and *reversing* in part (1918) 53 Ct. Cl. 549.

A case in which the Court of Claims filed a written opinion decreeing dismissal of a suit for want of jurisdiction, but made no finding of facts, will not be remanded for such finding where all the relevant facts were admitted by that court. *Cartas v. U. S.*, (1919) 250 U. S. 545, 40 S. Ct. 42, 64 U. S. (L. ed.) —.

Vol. V, p. 907, Jud. Code, sec. 248.

[First ed., 1912 Supp., p. 234.]

See *infra*, this title, notes to 1918 Supp. p. 422, sec. 5, on p. 660.

Vol. V, p. 917, Jud. Code, sec. 251.

[First ed., 1912 Supp., p. 236.]

Table of certiorari cases—Other cases.—A petition for a writ of certiorari to the District of Columbia Court of Appeals (for opinion below see (App. Cas. D. C. 1919) 258 Fed. 160) was granted in *American Steel Foundries v. Newton*, (1919) 250 U. S. 655, 40 S. Ct. 10, 63 U. S. (L. ed.) 1192; denied in *Chesapeake, etc., Telephone Co. v. Summerville*, (1919) 250 U. S. 661, 40 S. Ct. 10, 63 U. S. (L. ed.) 1195 (for opinion below see (App. Cas. D. C. 1919) 258 Fed. 147).

In *Beckwith v. Commissioner of Patents*, (1920) 252 U. S. 538, 40 S. Ct. 414, 64 U. S. (L. ed.) —, decision of Commissioner of Patents granting registration of a trademark on conditions, a hearing was had on certiorari.

In *District of Columbia v. R. P. Andrews Paper Co.*, (1920) 253 U. S. 479, 40 S. Ct. 481, 64 U. S. (L. ed.) —, a writ of certiorari was granted to review the judgment of the District of Columbia Court of Appeals reported in (App. Cas. D. C. 1920) 263 Fed. 1017; also in *District of Columbia v. Saks*, (1920) 253 U. S. 479, 40 S. Ct. 482, 64 U. S. (L. ed.) —, to review a judgment of the District of Columbia Court of Appeals reported in (App. Cas. D. C. 1920) 263 Fed. 1020; and in *District of Columbia v. Lisner*, (1920) 253 U. S. 479, 40 S. Ct. 482, 64 U. S. (L. ed.) —, to review a judgment of the

District of Columbia Court of Appeals reported in (App. Cas. D. C. 1920) 263 Fed. 1020.

Vol. V, p. 923, Jud. Code, sec. 256, par. third. [First ed., 1912 Supp., p. 239.]

State workmen's compensation law.—By amendment to this paragraph in the Act of Oct. 6, 1917 (see 1918 Supp. p. 414) "rights and remedies under the workmen's compensation law of any state" are saved to claimants. The amendment has been held to be unconstitutional. *Knickerbocker Ice Co. v. Stewart*, (1920) 253 U. S. 149, 40 S. Ct. 438, 64 U. S. (L. ed.) —, *reversing* (1919) 226 N. Y. 302, 123 N. E. 382.

In *Gibson v. Gernat*, (1920) 253 U. S. 487, 40 S. Ct. 483, 64 U. S. (L. ed.) —, a writ of certiorari to the District of Columbia Court of Appeals was denied.

Vol. V, p. 928, Jud. Code, sec. 262.

[First ed., 1912 Supp., p. 241.]

II. "All writs not specifically provided for by statute."

9. Mandamus.

c. Not as substitute for appeal or writ of error.

13. Subpoena duces tecum.

II. "ALL WRITS NOT SPECIFICALLY PROVIDED FOR BY STATUTE"

9. *Mandamus*

c. Not as Substitute for Appeal or Writ of Error (p. 942)

Generally.—Resort may not be had to the extraordinary writ of mandamus or prohibition where the petitioner has the right to a writ of error or appeal. *Ex p. Tiffany*, (1920) 252 U. S. 32, 40 S. Ct. 239, 64 U. S. (L. ed.) —.

13. *Subpoena Duces Tecum* (p. 949)

Subpoenas duces tecum.—To same effect as original annotation, see *United Mine Workers v. Coronado Coal Co.*, (C. C. A. 8th Cir. 1919) 258 Fed. 829, 169 C. C. A. 549.

Vol. V, p. 959, Jud. Code, sec. 265.

[First ed., 1912 Supp., p. 242.]

II. Jurisdiction.

1. Generally.

2. Court first acquiring jurisdiction retains it.

V. Other particular matters and proceedings.

II. JURISDICTION

1. *Generally* (p. 962)

To same effect as original annotation, see *Detroit, etc., R. Co. v. Monroe*, (E. D. Mich. 1919) 262 Fed. 177, holding that a federal

court had no jurisdiction to enjoin proceedings in a state court in a case which it has previously remanded to such court.

2. Court First Acquiring Jurisdiction Retains It (p. 982)

Appointment of receiver.—Where a District Court and a state court have concurrent jurisdiction of suits against a corporation for the appointment of a receiver, the court first appointing a receiver acquires control over the corporation's property and has jurisdiction to the exclusion of the other court. *Wheeler v. Badenhausen Co.*, (E. D. Pa.) 1919) 260 Fed. 991, wherein the court said:

"Where two courts have concurrent jurisdiction, it is the policy of the law that the jurisdiction of both shall not be concurrently invoked and exercised, and, as between two courts having concurrent jurisdiction of the subject-matter of an action, the court which first obtains jurisdiction has the right to proceed to its final determination without interference from the other."

V. OTHER PARTICULAR MATTERS AND PROCEEDINGS (p. 976)

Bankruptcy proceedings.—To same effect as original annotation, see *In re Levy*, (E. D. Pa. 1919) 259 Fed. 314.

A bankruptcy court is powerless to enjoin a state court from punishing a bankrupt for refusing to obey the order of the latter court to pay alimony, or to relieve him from his obligation to pay installments of alimony. *In re Pyatt*, (D. C. Nev. 1918) 257 Fed. 362.

Vol. V, p. 983, Jud. Code, sec. 266. [First ed., 1912 Supp., p. 242.]

II. Power of court and single judge. V. Appeal and effect of appeal.

II. POWER OF COURT AND SINGLE JUDGE (p. 985)

Violation of state constitution.—Three judges proceeding under this section may consider also whether the statute in question contravenes the constitution of the state. *Wofford Oil Co. v. Smith*, (M. D. Ala. 1920) 263 Fed. 396.

V. APPEAL AND EFFECT OF APPEAL (p. 988)

Appeal direct to Supreme Court.—An appeal to the Supreme Court, taken under the Judicial Code, § 266, from the denial by a District Court of an interlocutory application for an injunction to restrain the enforcement of a state statute on constitutional grounds, must be dismissed where the decree as entered not only disposed of the application, but dismissed the action, and another appeal was later taken from the same decree under section 238, this being the proper practice, since the denial of the applica-

tion was merged in the final decree. *Shaffer v. Carter*, (1920) 252 U. S. 37, 40 S. Ct. 221, 64 U. S. (L. ed.) —.

Vol. V, p. 989, Jud. Code, sec. 267. [First ed., 1912 Supp., p. 243.]

II. Jurisdictional matters generally.

IV. Remedy at law.

1. Adequate remedy at law bars relief in equity.

VI. Application of rules in particular matters and proceedings.

8. Cloud on title.

13. Fraud generally.

22. Taxes.

II. JURISDICTIONAL MATTERS GENERALLY (p. 990)

Disposition of all questions raised by bill.—Equitable jurisdiction of a suit which presents one ground for equitable relief, with no adequate remedy at law, extends to the disposition of all the questions raised by the bill, since a court of equity does not do justice by halves, and will prevent, if possible, a multiplicity of suits. *Shaffer v. Carter*, (1920) 252 U. S. 37, 40 S. Ct. 221, 64 U. S. (L. ed.) —.

Suit against Treasury officials to establish equitable lien upon fund in Treasury.—A court of equity may grant relief against Treasury officials by way of mandatory injunction or a receivership to one who has an equitable right in a fund appropriated by Congress to pay a specified person, conformably to a finding of the Court of Claims, where such person is made a party so as to bind her, and so that a decree may afford a proper acquittance to the government. *Houston v. Ormes*, (1920) 252 U. S. 469, 40 S. Ct. 369, 64 U. S. (L. ed.) —, *affirming* (1918) 47 App. Cas. (D. C.) 364.

IV. REMEDY AT LAW

1. Adequate Remedy at Law Bars Relief in Equity (p. 996)

To same effect as original annotation, see *Canadian Car, etc., Co. v. American Can Co.*, (C. C. A. 2d Cir. 1919) 258 Fed. 363, 169 C. C. A. 379, 6 A. L. R. 1182, *modifying* (S. D. N. Y. 1918) 253 Fed. 162.

VI. APPLICATION OF RULES IN PARTICULAR MATTERS AND PROCEEDINGS

8. Cloud on Title (p. 1003)

Statutes which may furnish an adequate legal remedy against taxes assessed under an unconstitutional law do not bar resort to equity by a taxpayer who avers that the tax lien asserted by virtue of the levy and tax warrant, itself attacked on constitutional grounds, creates a cloud on title, where there appears to be no legal remedy for the removal of a cloud on title cast by an invalid lien imposed for a tax valid in itself. *Shaffer*

r. Carter, (1920) 252 U. S. 37, 40 S. Ct. 221, 64 U. S. (L. ed.) —, wherein the court said: "For removal of a cloud upon title caused by an invalid lien imposed for a tax valid in itself, there appears to be no legal remedy. Hence, on this ground, at least, resort was properly had to equity for relief; and since a court of equity does not 'do justice by halves,' and will prevent, if possible, a multiplicity of suits, the jurisdiction extends to the disposition of all questions raised by the bill. *Camp v. Boyd*, 229 U. S. 530, 551, 552, 57 L. ed. 1317, 1326, 1327, 33 Sup. Ct. Rep. 785; *McGowan v. Parish*, 237 U. S. 285, 296, 59 L. ed. 955, 963, 35 Sup. Ct. Rep. 543."

13. *Fraud Generally* (p. 1005)

Fraudulent representations inducing sale.—

A suit in equity for the rescission of the sale of the notes of a corporation may not be maintained by purchasers of the notes against a bank because of alleged false representations regarding the value of the security for the notes, made by it to a firm of brokers who superintended the sale of the bonds, where the bank was neither the vendor nor indorser of the notes. In such case only the vendors or indorsers could be compelled by equitable process to rescind, and moreover the purchasers have an adequate remedy at law against the bank by an action for fraud and deceit. *Passaic Nat. Bank v. Commercial Nat. Bank*, (App. Cas. D. C. 1919) 262 Fed. 234.

22. *Taxes* (p. 1007)

Equity has jurisdiction, there being no adequate remedy at law, of a suit to enjoin state officials from enforcing an alleged unlawful tax upon foreign railway companies where such tax is made a first lien upon all the property of the railways in the state, thus putting a cloud upon their titles, and where delay in payment is visited with considerable penalties. *Wallace v. Hines*, (1920) 253 U. S. 66, 40 S. Ct. 435, 64 U. S. (L. ed.) —, wherein the court said: "This is an appeal from an order of three judges restraining the defendants, the appellants, from taking steps to enforce taxes imposed by an act of North Dakota, approved March 7, 1919 (chap. 222), until the further order of the court. The plaintiff railroads are corporations of other states, with lines extending into North Dakota. The defendants are the state tax commissioner, the state treasurer, the state auditor, the attorney-general, and the secretary of state for North Dakota. As the tax is made a first lien upon all the property of the plaintiff railroads in the state, and thus puts a cloud upon their title, and as delay in payment is visited with considerable penalties, there is jurisdiction in equity unless there is an adequate remedy at law against the state to which the tax is to be paid. *Schaffer v. Carter*, 252 U. S. 37; *Gaar, Scott & Co. v.*

Shannon, 223 U. S. 468, 472, 56 L. ed. 510, 512, 32 Sup. Ct. Rep. 236. The only ground for supposing that there is such a remedy is a provision that 'an action respecting the title to property, or arising upon contract, may be brought in the District Court against the state the same as against a private person.' N. D. Comp. Laws 1913, § 8175. This case does not arise upon contract except in the purely artificial sense that some claims for money alleged to have been obtained wrongfully might have been enforced at common law by an action of assumpsit. Nothing could be more remote from an actual contract than the wrongful extortion of money by threats, and we ought not to leave the plaintiffs to a speculation upon what the state court might say if an action at law were brought. *Union P. R. Co. v. Weld County*, 247 U. S. 282, 62 L. ed. 1110, 38 Sup. Ct. Rep. 510."

Vol. V, p. 1009, Jud. Code, sec. 268.

[First ed., 1912 Supp., p. 243.]

IV. PARTICULAR ACTS OR CONDUCT AS CONTEMPTS

4. *Court Officers' Acts* (p. 1020)

Attorney.—In *U. S. v. Markewich*, (S. D. N. Y. 1919) 261 Fed. 537, it appeared that an attorney made a speech at a public meeting in which he falsely represented the District Court was influenced by certain interests in granting orders in a specified case. It was held that, as an officer of the court, his conduct should be severely censured and that the record of the contempt proceeding should be transmitted to his state bar association.

Vol. V, p. 1047, Jud. Code, sec. 269.

[First ed., 1912 Supp., p. 243.]

II. POWER OF COURT (p. 1048)

Duty of Circuit Court of Appeals to order new trial on reversing judgment below.—A Circuit Court of Appeals may not reverse the judgment below, entered on a verdict for plaintiff in a personal injury action, without ordering a new trial. *Fidelity Title, etc., Co. v. Du Bois Electric Co.*, (1920) 253 U. S. 212, 40 S. Ct. 514, 64 U. S. (L. ed.) —, reversing (C. C. A. 3d Cir. 1918) 253 Fed. 987, 165 C. C. A. 668.

Discretion of court.—Where there is substantial evidence to support the verdict the exercise of discretion by the trial court in refusing a new trial is not subject to review on a writ of error. *Bristol Gas, etc., Co. v. Boy*, (C. C. A. 8th Cir. 1919) 261 Fed. 297.

Vol. V, p. 1059, Jud. Code, sec. 274a.

[First ed., 1916 Supp., p. 137.]

Scope of section.—This section "permits one who is entitled to a remedy to retain it

in the suit he has brought by a transfer of the case to the proper docket, although his suit may have been brought at law when it should have been brought in equity, or vice versa; but it does not restore a remedy to one who is not entitled thereto, when he has abandoned and waived it in favor of an inconsistent remedy." *Issenhuth v. Kirkpatrick*, (C. C. A. 8th Cir. 1919) 258 Fed. 293, 169 C. C. A. 309, wherein it was held that the action of the court in permitting a transfer under this section to the equity docket of a properly instituted action at law for deceit was a reversible error.

Amendments permissible.—Where a trustee in bankruptcy brings suit on the equity side of the court to set aside a sale of certain goods made, within four months prior to the filing of the petition in bankruptcy, by the bankrupts to one of their creditors, on the ground that such sale was made with intention to hinder, delay, and defraud creditors of the bankrupts, the petition in the case may be amended under this section so as to show that at the time of the alleged sale the bankrupts were insolvent, that the creditor then knew of such insolvency, that the transfer or sale alleged operated as a preference, and that the creditor at that time had reasonable cause to believe that such transfer or the enforcement of it would operate to effect a preference in his favor, and a surrender of the goods may also be prayed. *Hicks Co. v. Moore*, (C. C. A. 5th Cir. 1919) 261 Fed. 773.

Application to District of Columbia courts.—This section applies to the courts of the United States generally, including those of the District of Columbia. *Tuckerman v. Mearns*, (App. Cas. D. C. 1919) 262 Fed. 607. Regarding this section, the court said:

"It is urged by counsel for plaintiff that, assuming the court was correct in holding that there was a complete and adequate remedy at law, it was error to dismiss the bill. The proper order, it is contended, should have been to transfer the case for trial from the equity to the law side of the court. It was held in *Curriden v. Middleton*, 232 U. S. 633, 636, 34 Sup. Ct. 458, 58 L. Ed. 765, that equity rule 22 of the Supreme Court of the United States (198 Fed. xxiv, 115 C. C. A. xxiv) has no application to the courts of the District of Columbia. The ruling is based upon section 85 of the District Code, which, defining the jurisdiction of the equity court, provides:

"The practice in said court shall be according to the established course of equity and procedure and the rules established by the said Supreme Court of the District not inconsistent with law."

"This brings us to the consideration of section 274a of the federal Judicial Code. . . . This statute was enacted as an amendment to the Judicial Code, and appended to and made a part of chapter 11 thereof, which relates to the jurisdiction common to the courts of the United States generally, in-

cluding the courts of the District of Columbia. It must be held, therefore, that the provisions of 274a are superior to any rule inconsistent therewith formulated under authority of section 85 of the Code.

"Rule 76 of the Supreme Court of the District of Columbia, adopted April 25, 1919, is as follows:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, or that a suit at law should have been brought in equity, it shall be transferred to the law or equity side of the court, as the case may be, and be there proceeded with, with only such alteration in the pleadings as shall be essential."

"This rule is in conformity with section 274a, supra. The statute seems to more particularly define the course of procedure in the District Courts of the United States where the same judge simultaneously holds both an equity and a law court. The rule, however, merely conforms the procedure defined in the statute to the custom of the Supreme Court of the District of Columbia in holding the equity and law courts in separate divisions and presided over by different judges.

"We come now to the procedure which should have been adopted in the court below. It will be observed that, under the statute:

"Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court."

"This, in effect, forbids the dismissal of a bill in equity on the ground of an adequate remedy at law, or the sustaining of a demurrer at law on the ground that the remedy is in equity. When either of these conditions arise, it is the duty of the trial judge, either upon motion of counsel or upon his own motion, to order a recasting of the pleadings and the transfer of the cause to the proper side of the court. In *Collins v. Bradley Co.* (D. C.) 227 Fed. 199, 201, the court, considering the broadening effect of section 274a upon equity rule 22 of the Supreme Court of the United States, said:

"The equity rule and the statute have swept away entirely any and all technical objection whatsoever. While the Constitution preserves the right to a jury trial in every action at law, the practice as to raising the objection is revolutionized. Defendant's motion to dismiss may be taken as a motion to transfer the case to the law side, if the remedy at law is adequate."

"We are in accord with this practical construction of the intent of Congress to establish a simple, speedy, and inexpensive means of according justice, and at the same time closing the door against the bar of the statute of limitations which, under the former practice, frequently furnished an available avenue of escape for the party

justly liable, thereby resulting in a miscarriage of justice.

"Rule 78 had not been adopted when the decree in this case was entered, and therefore is not applicable here. Section 274a was enacted after the original bill was filed, but it was in force when the decree here appealed from was entered, and applies directly to this action. *Collins v. Bradley Co., supra*. The court, therefore, erred in dismissing the bill. The order should have been to recast the pleadings and transfer the cause to the law side of the court." See also *National Sav., etc., Co. v. Ryan*, (App. Cas. D. C. 1919) 262 Fed. 613, wherein this section was applied.

Vol. V, p. 1061, Jud. Code, sec. 274b.

[First ed., 1916 Supp., p. 138.]

Setting up equitable defense in action at law.—Under this section a defense cannot be set up by equitable answer in an action at law. *Breitung v. Packard*, (D. C. Mass. 1919) 260 Fed. 895. In commenting on the scope of this section, the court said:

"The questions are: (1) Whether such facts constitute in equity a defense; and if so (2) whether the defense can be set up by equitable answer in an action at law, under the Act of March 3, 1915, c. 90 (38 Stat. 956).

"Discussing the second of these questions, it is obvious that the third person is a necessary party to such a defense, and that the defense ought not to be allowed unless the third party can be brought into the case. The ordinary practice in actions at law affords no way of doing so. It cannot be done under the act unless the answer be given the effect of a bill in equity to restrain the action at law. There is a dictum in *U. S. v. Richardson*, 223 Fed. 1010, 1013, 139 C. C. A. 386—a jury-waived case—which perhaps sustains that view. But the point has never been decided, and the practical difficulties which such a construction of the act would create in jury trials are so great and apparent, that it seems to me unlikely Congress could have so intended. Bills setting up equitable defenses are often complicated, involving many parties, and raising many questions. A jury trial is not a flexible proceeding, nor well adapted to the determination of complicated and confused issues. If the act be given the broad construction suggested, cases can easily be imagined which it would be impossible to try properly before a jury.

"Massachusetts has had a statute allowing equitable defenses in actions at law since 1883. *Rev. Laws Mass. c. 173, § 28*. The point under discussion seems not to have been raised under it; but I have found no decision in which a third party was brought into an action at law by an equitable answer. It seems to have been assumed that the statute only applied to such defenses as could

be adequately made between the two parties to the original action. That seems to me to be the sound construction of the act in question.

"It follows that, as this answer discloses the necessity of a third party in order to establish the defense which it sets up, it is not good under the act; and the demurrer to it should be sustained."

Effect of failure to plead equitable defense.

—Where the defendant in an action for breach of contract does not avail himself of the provisions of this section and fails to plead mutual mistake and ask for a reformation of the contract, he is estopped from filing a bill on the equity side of the court to restrain the enforcement of a judgment at law in favor of the plaintiff and to reform the contract. *Lyons v. Empire Fuel Co.*, (C. C. A. 6th Cir. 1920) 262 Fed. 465. The court said:

"We think the injunction was improperly granted, for the reason that it plainly appears by the bill that the proposition of fact asserted thereby as necessary basis for relief was, by the judgment in the suit at law, conclusively determined against the Fuel Company's contention. Lyons' suit for damages was planted upon the proposition that the contract required the Fuel Company absolutely to furnish for transportation at least 350 tons of coal per day. The suit was based upon the written contract alleged in the petition to so provide, and the writing itself, which was made part of the petition, expressed Lyons' agreement to 'furnish sufficient barges . . . in which to load not less than 350 tons of coal per day, and . . . to transport all such coal to Pomeroy, Ohio, . . . and to load such coal into such cars as may be furnished at' that place.

"The Fuel Company thus had explicit notice, thorough the petition, of Lyons' construction of the contract, and was thereby given the right and opportunity, under section 274b of the Judicial Code (Act March 3, 1915, 38 Stat. 956), to interpose and have heard the defense that the writing did not express the actual agreement, and to ask affirmative relief by way of its reformation. That (as the company contends) the case for equitable reformation would necessarily be tried as a case in equity (*Union Pacific R. R. Co. v. Syas* [C. C. A. 8] 246 Fed. 561, 566, 158 C. C. A. 531; *Keatley v. Trust Co.* [C. C. A. 2] 249 Fed. 296, 161 C. C. A. 304; *Philippine Sugar Co. v. Philippine Islands*, 247 U. S. 385, 388, 389, 38 Sup. Ct. 513, 62 L. Ed. 1177; arising under the Philippine Code of Civil Procedure) is not, in the view we take of the case, important here; and we think it equally unimportant that, as held in *Railroad Co. v. Syas, supra*, the case for equitable relief should be disposed of before proceeding in the action at law. In any event, the action at law would be stayed pending the hearing on prayer to reform. *Prudential Co. v.*

Miller (C. C. A. 6) 257 Fed. 418, 421, — C. C. A. —. The point is that by the action at law opportunity was given the Fuel Company to try out then and there the case for reformation, and, to all intents and purposes, in the same case, although perhaps without a common-law jury, as to the plea for reformation. The Fuel Company did not take the benefit of this statute, but contented itself with a plea denying every allegation in the petition except its West Virginia incorporation. Had it pleaded mutual mistake, and asked reformation, it clearly could not again raise the question. *Werlein v. New Orleans*, 177 U. S. 390, 399, 20 Sup. Ct. 682, 44 L. Ed. 817. And there is respectable authority that the result would be the same if the existing right was not availed of."

See also another phase of the same case reported in (C. C. A. 6th Cir. 1919) 257 Fed. 890, 169 C. C. A. 40.

Vol. V, p. 1061, Jud. Code, sec. 274c.

[First ed., 1916 Supp., p. 138.]

Amendment of complaint.—Where diversity of citizenship does in fact exist but is not alleged in the complaint, an amendment to show such citizenship may be allowed as of course at any stage of the proceedings. *Cleveland Cliffs Iron Co. v. Kinney*, (D. C. Minn. 1919) 262 Fed. 980.

Vol. V, p. 1066, Jud. Code, sec. 276.

[First ed., 1912 Supp., p. 245.]

Political faith of commissioner.—Under this section the selection of a jury commissioner is left to the sound discretion of the judge, and is not violated by the appointment of a commissioner who is registered as an Independent. *U. S. v. Caplis*, (W. D. La. 1919) 257 Fed. 840. Regarding the purpose of this section, the court said:

"The purpose of the act originally adopted in 1879 (Act June 30, 1879, c. 52, 21 Stat. 43), when many political questions were before the court, was to insure, as far as possible, the selection of jurors without regard to political bias. There were then but two political parties, or at least no third party of any consequence, and so it was provided that the commissioner should be selected from the principal political party opposed to that of the clerk. It was not contemplated, however, that in the making of a jury list each in turn should select a man of his own political faith; but, on the contrary, it was provided that such selection of jurors should be made without reference to party affiliation. This was the end to be obtained.

"Since then other parties have come into existence, and at times in certain districts it might be difficult to say which was the principal political party opposed to that of the clerk. One party might be considered

such to-day, and another a week hence, after an election. Not only have new political parties arisen, but a large proportion of the electorate now aligns itself with no party, choosing rather to remain independent, to vote for those party nominees who may, in the opinion of the voter, be best qualified. As suggested in the query of Judge Pardee, suppose the clerk of the court is an Independent, affiliated with no party, how is the law to be complied with? The case at bar presents the converse of that situation. The clerk belongs to the dominant political party, and the jury commissioner, although a lifelong Republican, is perhaps technically not a member of that party, because, in his registration, he designates himself an Independent. By his registration he denies to himself the right to participate in the primaries of either party, in order that he may remain free to vote in the general election as his own good judgment and conscience may dictate. Why should this disqualify him for appointment as jury commissioner? Would not the very purpose of the act, the elimination of politics or political influence in the selection of juries, be better subverted by the appointment of such an Independent than by the selection of a partison, a well known member of the political party opposed to that of the clerk?"

"The selection of a jury commissioner the law wisely leaves to the good judgment and sound discretion of the judge. Its provisions as to his party affiliation are advisory; but even were the statute in this particular mandatory, rather than directory, in this instance it could not be said that the appointment was not in accord with the spirit of the act and in substantial compliance with its terms."

Vol. V, p. 1078, Jud. Code, sec. 287.

[First ed., 1912 Supp., p. 248.]

Joint indictment.—To the same effect as the original annotation, see *Schaeffer v. U. S.*, (1920) 251 U. S. 466, 40 S. Ct. 259, 64 U. S. (L. ed.) — (*affirming* in part and *reversing* in part (E. D. Pa. 1918) 254 Fed. 135), wherein the court said that the constitutionality of this section "by which several defendants may be treated as one party for the purpose of peremptory challenges is attacked. Its constitutionality is established by *Stilson v. U. S.*, 250 U. S. 583."

"The requirement to treat the parties defendant as a single party for the purpose of peremptory challenges has long been a part of the federal system of jurisprudence; it certainly dates back to 1865, and was adopted in the Revised Statutes, and has now become a part of the Judicial Code." *Stilson v. U. S.*, (1919) 250 U. S. 583, 40 S. Ct. 28, 64 U. S. (L. ed.) —, *affirming* (E. D. Pa. 1918) 254 Fed. 120.

Challenge to favor—*Review on appeal.*—An erroneous ruling in a homicide case upon

defendant's challenge of a juror for cause could not prejudice the accused where such juror was peremptorily challenged by the accused, and the latter was in fact allowed two more than the statutory number of peremptory challenges, and there is nothing in the record to show that any juror who sat upon the trial was in fact objectionable. *Stroud v. U. S.*, (1919) 251 U. S. 15, 380, 40 S. Ct. 50, 176, 64 U. S. (L. ed.) —.

Vol. V, p. 1108, Jud. Code, sec. 207.

[*Venue of suits to enforce, etc.*]

[First ed., 1914 Supp., p. 230.]

Limitation of venue provisions.—The venue fixed by this Act is limited to suits to enforce, suspend, or set aside orders of the commission of which the Commerce Court previously had jurisdiction. It does not include reparation order suits. *Vicksburg, etc., R. Co. v. Anderson-Tully Co.*, (C. C. A. 5th Cir. 1920) 261 Fed. 741.

Venue of suit to set aside order of commission.—See *Alaska Steamship Co. v. U. S.*, (S. D. N. Y. 1919) 259 Fed. 713.

Vol. V, p. 1113, Jud. Code, sec. 208.

[*Appeal, etc.*] [First ed., 1914

Supp., p. 230.]

Appeal to Supreme Court — moot question.

—The enactment of the Transportation Act of February 28, 1920 (see title INTERSTATE COMMERCE, ante, p. 72), which necessitates changes in bills of lading prescribed by the Interstate Commerce Commission, renders moot the controversy presented by a petition which seeks to set aside an order of the commission requiring carriers to use such bills of lading, and requires that an order granting a preliminary injunction to restrain the commission from putting into force the bills of lading in the form prescribed be reversed, and that the cause be remanded to the court below with directions to dismiss the petition without costs to either party, and without prejudice to the right of the complainants to assail in the future any order of the commission prescribing bills of lading after the enactment of the Transportation Act. *U. S. v. Alaska Steamship Co.*, (1920) 253 U. S. 113, 40 S. Ct. 448, 64 U. S. (L. ed.) —, *reversing* (S. D. N. Y. 1919) 259 Fed. 713.

Vol. V, p. 1121, sec. 5. [First ed., 1916 Supp., p. 25.]

Contingent attorney's fee under Omnibus Claims Act.—An existing contract for the payment to an attorney for professional services to be rendered in the prosecution of a Civil War claim against the United States of a sum equal to 50 per cent of whatever might be collected was invalidated by the provision of the Omnibus Claims Act of March 4, 1915, which, after making an appropriation for payment of such claim, made

it unlawful for any attorney to exact, collect, withhold, or receive any sum which, in the aggregate, exceeds 20 per cent of the amount of any item appropriated in that act, on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. *Calhoun v. Massie*, (1920) 253 U. S. 170, 40 S. Ct. 474, 64 U. S. (L. ed.) —, *affirming* (1918) 123 Va. 673, 97 S. E. 576.

The provision of other parts of this Act limiting to twenty per cent the payments to attorneys and agents, out of moneys appropriated by said Act, for payment of certain claims against the United States, is not a denial of due process, or of the liberty of contract, to an attorney who has rendered professional services in the prosecution of one of such claims, under a contract whereby he was to receive a fee equal to fifty per cent of whatever might be awarded or collected. *Black v. Crouch*, (W. Va. 1919) 100 S. E. 749, wherein the court said: "Since the entry of the decree the Supreme Court of the United States has rendered a decision in which the statute in question has been held to be valid and constitutional. *Capital Trust Co. v. Calhoun*, 250 U. S. 208, 39 S. Ct. 486, 63 U. S. (L. ed.) —. It holds that the money appropriated by the Act cannot be subjected in any manner to a charge for fees in excess of twenty per cent."

Vol. V, p. 1123, sec. 721. [First ed., vol. IV, p. 517.]

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I. GENERAL RULES AND PRINCIPLES

5. Questions of Unwritten or Common Law

c. Local Law; Rules of Property (p. 1130)

Rules of property.—The validity and interpretation of surrender clauses in oil and gas leases is the kind of question which, as held in *Guffey v. Smith*, (1915) 237 U. S. 101, 35 S. Ct. 526, 59 U. S. (L. ed.) 856, is to be settled by the local law as determined by the highest court of the state. *Washburn v. Gillespie*, (C. C. A. 8th Cir. 1920) 261 Fed. 41, 171 C. C. A. 637.

6. Constitutional and Statutory Questions Generally

a. General Rule Stated (p. 1133)

To same effect as original annotation, see *Hotel Woodward Co. v. Ford Motor Co.*, (C. C. A. 2d Cir. 1919) 258 Fed. 322, 169 C. C. A. 338.

c. Conflicting Decisions of State Courts Generally (p. 1138)

To same effect as original annotation, see *Washburn v. Gillespie*, (C. C. A. 8th Cir. 1920) 261 Fed. 41, 171 C. C. A. 637.

e. Questions Not Decided until after Accrual of Rights (p. 1140)

To the same effect as the original annotation, see *U. S. v. Cargill*, (C. C. A. 8th Cir. 1920) 263 Fed. 856, *reversing* (E. D. Ark. 1919) 258 Fed. 458; *Hopkins v. Zeigler*, (C. C. A. 6th Cir. 1919) 259 Fed. 43, 170 C. C. A. 43.

f. Effect of Earlier Federal Decisions or Institution of Action in Federal Court (p. 1141)

If by reason of an oversight a federal court has reached a different conclusion from what has theretofore been decided by the highest court of the state, it is the duty of the federal court to follow the construction of the state court of last resort, when that fact is called to its attention. *U. S. v. Cargill*, (E. D. Ark. 1919) 258 Fed. 458.

II. APPLICATION OF RULES TO PARTICULAR SUBJECTS

5. Commercial Paper

a. Absence of State Statute (p. 1157)

Liability of bank accepting commercial paper for collection.—The question of the liability of a bank accepting commercial paper for collection is one of general rather than local law, and the federal courts are not bound by the decisions of the highest court of a state on the subject. *Taylor, etc., Co. v. National Bank*, (N. D. Ohio 1919) 262 Fed. 168, wherein it was said:

"In my opinion, the true question of law upon which the case turns is not that assumed by counsel. There is, in my opinion, no question involved of conflict in law, and therefore no inquiry need be made as to where the contract was made, or by the law of what state or forum it is to be controlled. The applicable rule is that stated in *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *B. & O. Railroad v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. The rule thereby established is that, when the question is one of general law, and not of purely local law, it is to be determined by reference to all the authorities, and upon due consideration of the principles of general jurisprudence applicable to the subject, and not by reference merely to those of the state in which the cause of action arose.

"*Swift v. Tyson*, *supra*, involved the question of whether or not one who acquired negotiable paper for a pre-existing debt in due course before maturity and without notice of any defense thereto was to be regarded as a holder for value. The cause of action arose in New York, by the decisions of which one taking a note for a pre-existing debt was not regarded as a holder for value. It was held that this was a question, not of local law, but of general commercial law, and was to be decided upon an examination of all the authorities and due consideration of the principles underlying the general commercial law of the land. The result was that the United States Supreme Court held in that case that one taking negotiable paper for a pre-existing debt was a holder in due course. Mr. Justice Story, delivering the opinion, says that the laws of the state, which were made by the original Judiciary Act the rule of decision in the United States court, mean state laws, strictly local; that is to say, positive statutes of the state and the construction thereof adopted by the local tribunals, and decisions relating to rights or titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and intra-territorial in their nature and character.

"In *B. & O. Railroad v. Baugh*, *supra*, this and all the intervening cases were fully reviewed, and the law reiterated to the same effect. It was therein held that the rule of fellow servantry in negligence cases was

not a question of local law, but of general jurisprudence, and that the Ohio vice principal rule would not be followed and applied in the United States courts, even when the injury was sustained and the cause of action arose in Ohio after the pronouncement by its Supreme Court of that rule. It results that, if the United States Supreme Court has declared a rule applicable to the present controversy, it must control, and hence it is immaterial to inquire whether the so-called New York or Massachusetts rule is the true rule, or which has been adopted in Ohio."

b. Effect of State Statute and Construction Thereof by State Court (p. 1159)

The question of validity of a note for the purchase of stock of a corporation organized in a state whose constitution forbids corporations to issue stock except for money paid, etc., is one of general commercial law, in deciding which the federal courts are not bound to follow the decisions of the highest state courts. *Wilson v. Spencer*, (C. C. A. 5th Cir. 1919) 261 Fed. 357.

10. Courts (p. 1168)

A decision of the highest court of a state, defining the powers of an inferior court under the state constitution and laws, is binding on the federal courts. *Barnett v. Kunkel*, (C. C. A. 8th Cir. 1919) 259 Fed. 394, 170 C. C. A. 370.

12. Decedents' Estates Generally (p. 1169)

Nature of state inheritance tax.—Decisions of the highest court of a state regarding the nature of a state inheritance tax are binding on the federal courts. *Lederer v. Northern Trust Co.*, (C. C. A. 3d Cir. 1920) 262 Fed. 52, *affirming* (E. D. Pa. 1919) 257 Fed. 812.

13. Death by Wrongful Act

a. Generally (p. 1171)

To same effect as original annotation, see *Jones v. Chicago, etc., R. Co.*, (C. C. A. 8th Cir. 1919) 260 Fed. 929.

c. Damages (p. 1173)

The federal court will follow the decision of the highest court of a state that no recovery can be had for the suffering and anguish of either parent in an action under the state statute for the death of a minor. *Bristol Gas, etc., Co. v. Boy*, (C. C. A. 6th Cir. 1919) 261 Fed. 297.

14. Deeds, Mortgages and Leases of Realty

a. Deeds (p. 1174)

In general.—The question whether a foreclosure sale and sheriff's deed are invalid because the order of sale was not authenticated by the seal of court is one as

to which decisions of the state court are controlling. *Harlan v. Houston*, (C. C. A. 8th Cir. 1919) 258 Fed. 611, 170 C. C. A. 65.

Sufficiency of order approving deed.—A decision of the highest court of a state determining when an order approving a deed of real property in the state is sufficient to give the deed full validity, constitutes a rule of real property and is probably binding upon a federal court sitting in the state. *Barnett v. Kunkel*, (C. C. A. 8th Cir. 1919) 259 Fed. 394, 170 C. C. A. 370.

b. Mortgages (p. 1175)

In general.—To same effect as original annotation, see *Blackshear v. Dothan First Nat. Bank*, (C. C. A. 5th Cir. 1919) 261 Fed. 601; *Rader v. Star Mill, etc., Co.*, (C. C. A. 8th Cir. 1919) 258 Fed. 599, 169 C. C. A. 541.

Foreclosure of deed of trust.—The provision of a state statute that a foreign corporation or individual trustee cannot foreclose a deed of trust covering property in the state without joining a resident trustee as a party plaintiff, does not control the bringing of such a foreclosure suit in a federal court in that state by a foreign corporation. *Lane v. Equitable Trust Co.*, (C. C. A. 8th Cir. 1919) 262 Fed. 918.

23. Interest and Usury (p. 1196)

Interest generally.—A federal District Court sitting in bankruptcy will follow the interpretation given by the highest state court to a provision in a state statute specifying what obligations shall bear interest after they become due and the rate thereof. *In re Morrison*, (C. C. A. 7th Cir. 1919) 261 Fed. 355.

25. Liens (p. 1199)

Attorney's lien.—To same effect as original annotation, see *Sun L. Assur. Co. v. Casanova*, (C. C. A. 1st Cir. 1919) 260 Fed. 449, 171 C. C. A. 275; *Turner v. Woodard*, (C. C. A. 1st Cir. 1919) 259 Fed. 737, 170 C. C. A. 537.

26. Limitation of Actions

a. Actions at Law (p. 1200)

Rule stated.—To same effect as original annotation, see *Graham v. Englemann*, (S. D. Tex. 1920) 263 Fed. 166.

29. Mortgages, Sales and Bailments of Personality (p. 1210)

Rights of parties under conditional sale contract.—The federal courts will accept as binding the decisions of the highest courts of a state regarding the question whether a vendee under a contract retaining title to personal property can convey good title thereto, against the vendor, to a purchaser without notice. *Evanston First Nat Bank v. Waynesboro Bank*, (C. C. A. 8th Cir. 1919)

262 Fed. 754; *Murphy v. Waynesboro Bank*, (C. C. A. 8th Cir. 1919) 262 Fed. 756.

Fraudulent sales.—The question whether a sale of personal property is fraudulent, is one of fact on which decisions of state courts construing a state statute on the subject are controlling. *Young v. Gordon*, (E. D. N. Y. 1919) 257 Fed. 846.

30. *Municipal and Quasi Municipal Corporations* (p. 1211)

The doctrine of the United States Supreme Court that municipalities will not be regarded as possessed of the right to bind themselves to a specified public service rate and term, except only under statutes granting to them express power to contract or agree as to such rates and time, controls in the lower federal courts "unless a settled course of decision in the court of last resort of [the particular state] requires a different conclusion." *Knoxville Gas Co. v. Knoxville*, (C. C. A. 6th Cir. 1919) 261 Fed. 283, overruling the contention "that the rule thus established as to the necessity of explicit statutory language does not prevail in the courts of Tennessee."

33. *Practice, Procedure and Remedies Generally* (p. 1217)

As to granting new trial limited to question of damages only, pursuant to state law and practice, see *McKeon v. Central Stamping Co.*, (D. C. N. J. 1919) 259 Fed. 917, as cited in notes to vol. VI, p. 21, sec. 914, V, 24, c, *infra*, this page.

35. *Private Corporations*

i. *Foreign Corporations* (p. 1222)

To same effect as third paragraph of original annotation, see *Hayes Wheel Co. v. American Distributing Co.*, (C. C. A. 6th Cir. 1919) 257 Fed. 881, 169 C. C. A. 31.

36. *Recording and Filing Acts* (p. 1224)

To same effect as original annotation, see *Frank Lynch Co. v. National City Bank*, (C. C. A. 8th Cir. 1919) 261 Fed. 480.

38. *Taxation*

i. *Levy and Collection of Taxes Generally* (p. 1231)

To same effect as second paragraph of original annotation, see *U. S. v. Cargill*, (E. D. Ark. 1919) 258 Fed. 458.

k. *Special or Local Assessments* (p. 1231)

To same effect as first paragraph of original annotation, see *Oklahoma City v. Orthwein*, (C. C. A. 8th Cir. 1919) 258 Fed. 190, 169 C. C. A. 258, wherein it was held that a federal court was bound by the decision of the highest court of a state regarding the right of a city to assess under a state statute a railroad company for paving along its right of way in the city.

Vol. VI, p. 21, sec. 914. [First ed., vol. IV, p. 563.]

V. *Applicability in particular instances.*

24. *Judgments and proceedings subsequent thereto.*

- c. *Motions for new trials.*
- d. *Bill of exceptions.*
- f. *Methods of review.*

26. *Jurisdiction.*

36. *Pleadings.*

- d. *Joinder of causes of action.*
- f. *Plea in abatement.*

V. *APPLICABILITY IN PARTICULAR INSTANCES*

24. *Judgments and Proceedings Subsequent Thereto*

c. *Motions for New Trials* (p. 42)

Necessity for motion.—A state practice requiring a motion for a new trial as prerequisite to an appellate review is not adopted by the Conformity Act. *Chicago L. Ins. Co. v. Tiernan*, (C. C. A. 8th Cir. 1920) 263 Fed. 325.

New trial in respect of damages only.—Rule 73 of the New Jersey Practice Act of 1912 provides that "when a new trial is ordered because the damages are excessive or inadequate, and for no other reason, the verdict shall be set aside only in respect of damages, and shall stand good in all other respects." A rule of the state supreme court adopted the statutory rule above quoted. In a case subsequently decided by the New Jersey Court of Errors and Appeals it was held that the New Jersey courts have power to set aside a verdict and grant a new trial in respect of damages only. In *McKeon v. Central Stamping Co.*, (D. C. N. J. 1919) 259 Fed. 917, an action to recover damages for a tort, brought in the federal district court for New Jersey, the court ordered a new trial solely for inadequacy of damages, deeming that the New Jersey rule above cited was mandatory and necessary to be followed by force of this section and R. S. sec. 721 [5 Fed. Stat. Ann. (2d ed.) 1123], both of which sections were quoted by the court, the latter also saying: "Neither the Constitution, treaties, nor statutes of the United States require a procedure in setting aside verdicts and ordering new trials otherwise than is provided in this rule of the New Jersey Supreme Court."

Requiring remittitur as condition to denying motion for new trial.—In *Bristol Gas, etc., Co. v. Boy*, (C. C. A. 6th Cir. 1919) 261 Fed. 297, affirming judgment on a verdict for the plaintiff rendered in a federal District Court in Tennessee, the court said:

"We are clearly of opinion that the trial judge's action in requiring remittitur as a condition of denying motion for a new trial is not reviewable. In the absence of statute providing therefor, such would plainly be the case. *Woodworth v. Chesbrough*, 244 U. S. 79, 37 Sup. Ct. 583, 61 L. Ed. 1005. The

statute of Tennessee, however, gives a plaintiff a right to a review of an order of remittitur (complied with under protest) made because of the trial judge's opinion that the verdict is 'so excessive as to indicate passion, prejudice, corruption, partiality, or unaccountable caprice on the part of the jury.' Acts Tenn. 1911, c. 29; Thompson's Shannon's Code, §§ 4694a, 4694a1. But were the instant case thought to be within the terms of that statute (although the only finding was that the verdict was 'excessive'), the statute itself is inapplicable, because not within the federal Conformity Act. That act does not apply to the personal conduct and administration of the judge in the discharge of his separate functions, nor to motions for new trial nor to proceedings on review. Were this Tennessee statute applicable, it would result, not only in requiring a trial judge, sitting in a federal court, to decide on motion for new trial the question of fact whether the size of the verdict is such as to indicate 'passion, prejudice,' etc., but also in requiring a federal court of review to determine for itself this same question of fact—all contrary to the settled practice in the federal courts. *U. P. Ry. Co. v. Hadley*, 246 U. S. 330, 334, 38 Sup. Ct. 318, 62 L. Ed. 751.

"That a state statute having such effect is not within the Conformity Act appears to us too plain for argument. It seems enough to refer to this court's discussion of the general subject in *Knight v. Illinois Central R. R. Co.*, 180 Fed. 370, 103 C. C. A. 514. The decisions giving effect in the federal courts to state statutes guaranteeing as of absolute right, and as matter of law, a second trial of an action for the recovery of real property within the state (*Equator Co. v. Hall*, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. Ed. 114; *Smale v. Mitchell*, 143 U. S. 99, 12 Sup. Ct. 353, 36 L. Ed. 90) are not analogous. Such statutes are not merely remedial, but are matter of substantive right, like the right to voluntary nonsuit. *Barrett v. Virginian Ry. Co.*, 250 U. S. 473, 478, 39 Sup. Ct. 540, 64 L. Ed. —; *Knight v. Illinois Central R. R. Co.*, supra. *Simms v. Simms*, 175 U. S. 162, 169, 20 Sup. Ct. 58, 44 L. Ed. 115, is not opposed to the conclusion we have reached."

d. Bill of Exceptions (p. 42)

To same effect as original annotation, see *Blisse v. U. S.*, (C. C. A. 2d Cir. 1920) 263 Fed. 961; *Goldfarb v. Keener*, (C. C. A. 2d Cir. 1920) 263 Fed. 357.

f. Methods of Review (p. 45)

A state statute giving a plaintiff a right to a review of an order of remittitur (complied with under protest) made because of the trial judge's opinion that the verdict is "so excessive as to indicate passion, prejudice, corruption, partiality, or unaccountable caprice on the part of the jury" is not within this section and is not binding on a federal Cir-

cuit Court of Appeals. *Bristol Gas, etc., Co. v. Boy*, (C. C. A. 6th Cir. 1919) 261 Fed. 297.

26. Jurisdiction (p. 46)

Nature of action.—The question whether an action is local or transitory is to be determined by the law of the state. *Josevig-Kennecott Copper Co. v. James F. Howarth Co.*, (C. C. A. 9th Cir. 1919) 261 Fed. 567.

36. Pleadings

d. Joinder of Causes of Action (p. 55)

To same effect as original annotation, see *United Mine Workers v. Coronado Coal Co.*, (C. C. A. 8th Cir. 1919) 258 Fed. 829, 169 C. C. A. 549.

A federal court will follow the state rule as to whether the causes of action set up by the plaintiff and the parties defendant are properly joined. *Compania Minera Y Compradora, etc. v. American Metal Co.*, (W. D. Tex. 1920) 262 Fed. 183.

Personal injury under Federal Employers' Liability Act and at common law.—Rights conferred by federal law are not denied by the refusal of a state court to permit the joinder in a single count of a cause of action against a railway company to recover damages under the federal Employers' Liability Act, and of a common-law action against the railway employee whose concurrent negligence was alleged to have contributed in producing the injury. *Lee v. Central of Georgia R. Co.*, (1920) 252 U. S. 109, 40 S. Ct. 254, 64 U. S. (L. ed.) — (affirming (1918) 21 Ga. App. 558, 94 S. E. 888), wherein the court said: "An injured employee brought an action in a state court of Georgia jointly against a railroad and its engineer, and sought in a single count, which alleged concurring negligence, to recover damages from the company under the federal Employers' Liability Act, and from the individual defendant under the common law. Each defendant filed a special demurrer on the ground of misjoinder of causes of action and misjoinder of parties defendant. The demurrers were overruled by the trial court. The Court of Appeals—an intermediate appellate court to which the case went on exceptions—certified to the Supreme Court of the state the question whether such joinder was permissible. It answered in the negative. 147 Ga. 428, 94 S. E. 558. Thereupon the Court of Appeals reversed the judgment of the trial court (21 Ga. App. 558, 94 S. E. 888) and certiorari to the Supreme Court of the state was refused. The plaintiff then applied to this court for a writ of certiorari on the ground that he had been denied rights conferred by federal law, and the writ was granted.

"Whether two causes of action may be joined in a single count or whether two persons may be sued in a single count are matters of pleading and practice relating solely to the form of the remedy. When they arise in state courts the final deter-

mination of such matters ordinarily rests with the state tribunals, even if the rights there being enforced are created by federal law. *John v. Paullin*, 231 U. S. 583, 34 Sup. Ct. 178, 58 L. Ed. 381; *Nevada-California-Oregon Railway v. Burrus*, 244 U. S. 103, 37 Sup. Ct. 576, 61 L. Ed. 1019. This has been specifically held in cases arising under the federal Employers' Liability Act. *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U. S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86, Ann. Cas. 1916E, 505; *Atlantic Coast Line Railroad Co. v. Mims*, 242 U. S. 532, 37 Sup. Ct. 188, 61 L. Ed. 476; *Louisville & Nashville Railroad Co. v. Holloway*, 246 U. S. 525, 38 Sup. Ct. 379, 62 L. Ed. 867. It is only when matters nominally of procedure are actually matters of substance which affect a federal right, that the decision of the state court therein becomes subject to review by this court. *Central Vermont Railway Co. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; *New Orleans & North Eastern Railroad Co. v. Harris*, 247 U. S. 367, 38 Sup. Ct. 535, 62 L. Ed. 1167.

"The federal Employers' Liability Act does not modify in any respect rights of employees against one another existing at common law. To deny to a plaintiff the right to join in one count a cause against another employee with a cause of action against the employer in no way abridges any substantive right of the plaintiff against the employer."

f. Plea in Abatement (p. 56)

In general.—To same effect as original annotation, see *Philadelphia, etc., Coal, etc., Co. v. Kever*, (C. C. A. 2d Cir. 1919) 280 Fed. 534, 171 C. C. A. 318.

Vol. VI, p. 80, sec. 921. [First ed., vol. IV, p. 587.]

Objection to the consolidation of causes of action can only be made if the parties are deprived of a right material to their defense, and such objection can only be made at the trial of the cause and not by demurrer to the complaint. *United Mine Workers v. Coronado Coal Co.*, (C. C. A. 8th Cir. 1919) 258 Fed. 829, 169 C. C. A. 549. In distinguishing this case from *Mutual L. Ins. Co. v. Hillmon*, (1892) 145 U. S. 285, 12 S. Ct. 909, 36 U. S. (L. ed.) 707, in the original annotation, the court said: "It is contended that there is an act of Congress regulating the consolidation of causes (section 921, Rev. Stat.), and that in *Mutual Life Insurance Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706, this has been construed adversely to the ruling of the court below. We do not so construe the opinion of the court. What the court decided was that—

"Where the English consolidation rule has not been adopted, the American courts, state and federal, have exercised the authority of ordering several actions by one

plaintiff against different defendants to be tried together, whenever the defense is the same and unnecessary delay and expense will be thereby avoided."

"The court then proceeded:

"But although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remain distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defense, whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately."

"In the instant case there was no consolidation of actions, but assuming, without deciding, that the same rule applies to actions originally brought by several plaintiffs, or against several defendants, which could properly be consolidated under that section, objection can only be made if the parties are deprived of a right material to their defense, 'whether by way of challenge of juror or of objection to evidence to which it would have been entitled if the causes had been tried separately.' Of course, such rights can only be claimed at the trial of the cause, and not by demurrer to the complaint. There is no claim that the defendants were deprived of either of these rights at the trial. To entitle the defendants to insist in the appellate court that they were entitled to more than three peremptory challenges of jurors, that right must be claimed at the trial, and also that the parties complaining had exhausted their right of peremptory challenges. It was so held in *Connecticut Mutual Life Insurance Co. v. Hillmon*, 188 U. S. 208, 212, 23 Sup. Ct. 294, 47 L. Ed. 446, when the case, reported in 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706, was for the second time before the Supreme Court. The record here shows that the defendants only challenged one juror peremptorily. It fails to show that they had made any claim to more than three challenges. How, then, can it be claimed that the court erred, when it was never called on to rule on the question, when the jury was selected, and the defendants were not prejudiced by having exhausted the three challenges?"

Vol. VI, p. 98, sec. 954. [First ed., vol. IV, p. 596.]

VIII. PLEADINGS

2. Declaration, Complaint or Bill in Equity
h. Other Particular Matters and Instances
(p. 109)

Statute of limitations as affecting power to amend.—The allowance of an amendment to the declaration after the statute of limitations had run is not error, where the original declaration was sufficient, and the amendment plainly left the cause of action

unchanged. *Fidelity Title, etc., Co. v. Du Bois Electric Co.*, (1920) 253 U. S. 212, 40 S. Ct. 514, 64 U. S. (L. ed.) —.

Vol. VI, p. 120, sec. 722. [First ed., vol. IV, p. 529.]

Power of United States district attorney to present charges to grand jury as affected by state rule of law.—A state rule of law which forbids a district attorney, without first obtaining leave of court, to present to one grand jury charges which a previous grand jury has ignored, can have no application by virtue of this section to a prosecution in the federal courts for a crime against the United States, committed within such state, in view of the existence of a controlling federal rule which would be overthrown by applying the state rule. *U. S. v. Thompson*, (1920) 251 U. S. 407, 40 S. Ct. 289, 64 U. S. (L. ed.) —.

Vol. VI, p. 124, sec. 648. [First ed., vol. IV, p. 389.]

III. TRIAL BY REFEREE OR AUDITOR (p. 126)

A compulsory reference to an auditor to simplify and clarify the issues, in an action at law involving long accounts with many disputed items, and to make tentative findings of fact, is within the inherent power of a federal district court as a trial court. *Matter of Peterson*, (1920) 253 U. S. 300, 40 S. Ct. 543, 64 U. S. (L. ed.) —, wherein the court said: "A compulsory reference with power to determine issues is impossible in the federal courts because of the 7th Amendment (*United States v. Rathbone*, 2 Paine, 578, Fed. Cas. No. 16,121) but no reason exists why a compulsory reference to an auditor to simplify and clarify the issues and to make tentative findings may not be made at law, when occasion arises, as freely as compulsory references to special masters are made in equity. Reference of complicated questions of fact to a person specially appointed to hear the evidence and make findings thereon has long been recognized as an appropriate proceeding in an action at law. *Hecker v. Fowler*, 2 Wall. 123, 17 L. ed. 759. The inherent power of a federal court to invoke such aid is the same whether the court sits in equity or at law. We conclude, therefore, that the order, in so far as it appointed the auditor and prescribed his duties, was within the power of the court."

Vol. VI, p. 130, sec. 649. [First ed., vol. IV, p. 393.]

Review of rulings of court.—In *Raymer v. Netherwood*, (C. C. A. 7th Cir. 1919) 257 Fed. 284, 168 C. C. A. 368, Evans, J., in a dissenting opinion, said of this section: "Plaintiff brought this action for damages for alleged breach of contract. The

contract, if any, grew out of two letters, one, written by defendant in California, which may well be called the offer; the other, written by plaintiff at Madison, Wis., and termed the acceptance. Whether the second letter was an acceptance of the offer found in the first was the sole disputed issue in the case. No question of fact, but simply one of law, was involved. Had a jury been drawn, the District Court, in disposing of the action, would have been compelled to direct a verdict.

"Under these circumstances, it seems to me, it was the duty, as well as the privilege, of counsel to avoid the expense to litigants and to the government incident to a jury trial. On the other hand, the litigants' right to review the decision of the District Court should be as clear and as extensive as in case the idle formality of calling a jury was respected.

"In either case any adverse ruling in the course of the trial, to which exception was taken, should be subject to review upon writ of error. Section 649 R. S. did not take from the litigants the right to review the rulings of the lower court. This section was intended to give litigants the right to waive jury trials in law actions, and to give to the findings of the court the force of a verdict of a jury. Rulings on questions of law, properly presented, were subject to review in such a trial, the same as in a case of trial by jury."

Vol. VI, p. 130, sec. 1. [First ed., vol. IV, p. 557.]

Conclusiveness of findings.—To same effect as original annotation, see *The Bern*, (C. C. A. 2d Cir. 1919) 261 Fed. 995; *The Martin Mullen*, (C. C. A. 6th Cir. 1919) 260 Fed. 916; *Chicago, etc., Transit Co. v. Moore*, (C. C. A. 6th Cir. 1919) 259 Fed. 490, 170 C. C. A. 466; *The Mahanoy*, (C. C. A. 2d Cir. 1919) 258 Fed. 114, 169 C. C. A. 200; *Aetna Ins. Co. v. Davidson Steamship Co.*, (C. C. A. 7th Cir. 1919) 257 Fed. 68, 168 C. C. A. 280.

To same effect as fourth paragraph of original annotation, see *The J. L. Miner*, (C. C. A. 6th Cir. 1919) 260 Fed. 901, but holding that the evidence in the case decidedly preponderated against the concurrent findings of the commissioner and the lower court.

Appeals to Circuit Courts of Appeals.—The hearing of an admiralty appeal is a trial de novo. *Pennsylvania R. Co. v. Naam Looze Vennoot Schap*, (C. C. A. 4th Cir. 1919) 261 Fed. 269; *Pennsylvania R. Co. v. Dyason*, (C. C. A. 4th Cir. 1919) 261 Fed. 274.

Vol. VI, p. 139, sec. 17. [First ed., 1916 Supp., p. 279.]

In *Mississippi Valley Trust Co. v. Railway Steel Spring Co.*, (C. C. A. 8th Cir.

1919) 258 Fed. 346, 169 C. C. A. 362, it was held that an order granting a preliminary injunction because of numerous irregularities failed to conform to the provisions of this section and equity rule 73, but that objections to such irregularities were not made at the proper time.

Vol. VI, p. 141, sec. 20. [First ed., 1916 Supp., p. 280.]

What constitutes labor dispute.—A strike to enforce a secondary boycott is not within the act. *Vonnegut Machinery Co. v. Toledo Mach., etc., Co.*, (N. D. Ohio 1920) 263 Fed. 192, wherein it was said: "The construction which would emasculate the act is no more unjust than that liberality of interpretation which would expand its provisions beyond the clearly understood purpose of the measure. What is the scope of the language 'terms and conditions of employment,' for these words, from section 20 of the act in question, need interpretation here? The court should not attempt an inelastic definition. One should be given which would keep step with the advance in sentiment, as conditions change, to make good the very proper demand that the laboring man should receive consideration from his employer which will maintain his health and self-respect, and secure to him the full measure of the fruits of his toil, while preserving to him all those opportunities for social intercourse and self-improvement which should be his to enjoy that he may realize his aspirations. But even a most liberal definition in this direction has its limitations. The mind, in considering the words 'terms and conditions of employment,' unconsciously, but directly, goes to a contemplation of such things as hours of labor, wages, classification of employes, sanitary and physical conditions controllable by the employer, opportunities for reasonable redress of grievances, and for bargaining respecting the conditions of employment, whether collectively, as enlightened public sentiment as well as convenience approves, or individually. This view is well supported in this case by the character of the new contract which the labor organization tendered in writing to the defendant company, and which had been under consideration before the strike. Its fifteen paragraphs deal exclusively with subjects, as 'terms and conditions of employment,' which come within the above limitations. At the time of the strike, the factory was what is known as an open shop, and the proposed new agreement with the defendant labor organization recognizes, as a condition tendered by the latter itself, that the factory should remain open. In no case, however, does it seem possible that the definition of this term should be so wide as to make the employé a dictator to his employer respecting the manner generally, and beyond the above-indicated limitations, in which the latter should conduct his busi-

ness. It is possible, of course, to conceive of things which have a collateral tendency to affect those considerations to which the employé is entitled. He may have a collateral interest in the success of a labor dispute with another employer, so that he nurses an impulse to help through a sympathetic strike against his own employer, with whose conditions of employment he is entirely satisfied. But to enter the field of collateral possibilities is to explore a territory without boundaries, where lurk immeasurable and unbearable restraints upon industrial freedom. A certain line must be drawn somewhere. It surely is at the place where a man whose asset is his daily toil has guaranteed to him sufficient recompense and proper environment. Therefore no conceits or whims, or mere prejudices, of the employé, may be by him elevated to the dignity of terms and conditions of employment, to be protected in any degree by the statute in question, and thereby to become the basis for a demand under it of a discriminatory nature. The employé may refuse to work—that is, he may strike—for any reason, however frivolous; but if he strikes for a whim the controversy so brought about does not gain that status which would bring into operation the act in question.

"In the present instance the testimony shows that on the 13th of August last certain employes of the defendant company struck, not because they objected to hours of labor, not for better wages, not for new classifications, not because there was anything objectionable in physical or sanitary conditions at the factory, not because they were interfered with in any degree respecting their privilege for bargaining, but simply and solely because they did not like a customer with whom the employer was doing business—only because they did not care to work on certain contracts their employer had. It is true that a new working agreement to supersede the one whose term had expired, and upon which the men were insisting, had not been signed; but it is most clear that the objection to Overland work alone precipitated the strike. Before this action was taken, the Grand Lodge of Machinists was consulted under union rules respecting sanction of strikes, and 'sanction' was given, by this superior authority, to go out for this cause only. The last action of the 'shop committee' of the men was simply on this ground. The evidence is clear that no other reason was offered. Some time afterwards attempts were made to negotiate for reinstatement on the basis of a new agreement, coupled with the company's abandonment of the work in question; but it is quibbling only to argue that on August 13 the controversy actually involved anything else than the latter condition."

Where there has been a strike, but the employer has fully replaced the striking employees and has restored his plant to normal

productiveness, there is no longer a dispute between employer and employees within this section, and picketing and similar practices may be enjoined. *Dail-Overland Co. v. Willys-Overland*, (N. D. Ohio 1920) 263 Fed. 171. The court said: "What are the obvious facts? When the dispute arose May 5, 1919, the plant had 12,842 employes. It continued in operation for three days, with a greatly reduced force, closing May 8 because of the unrestrained violence to which its loyal employees were subjected. May 26 it resumed operations, continuing with a force augmented to a little over 20 per cent. of normal, until June 2, when again violence of extreme character forced it to comply with the request of the local authorities to close. June 13 operations were resumed under the mandatory order of this court, enforced by our special officer. The initial working force was 1,276. This number of employes has steadily increased, until, on December 20, the day these motions were submitted, 13,556 persons were at work, an increase of more than 700 over the number at work more than seven months ago, when were last at work the persons who are represented in this case by the labor defendants and in whose behalf 'picketing' is still carried on. The plant is in successful operation, turning out more machines daily than ever before.

"As long as conditions are such that what is called a 'settlement' might seem reasonably possible between the company and its late workmen, the latter, it seems, should be considered 'employees,' within the meaning of that term in the Clayton Act. But when the controversy has reached a practical end, there is no reason why the term 'employee' should not be held to its ordinary meaning of one who actually works for hire for another and under the latter's control. It is obvious that the Willys-Overland Company, which refused to 'settle' last May with 'employees' represented by the labor defendants here, preferring to endure the hardships which the dispute then entailed, will not 'settle' now, when, with no assistance whatever, except the enforcement of its right to operate without unlawful interference, it has built up a working force greater than that from which those 'employees' of last May seceded. The circumstances force the court to find, as we do, that no 'employees' not actually at work in the plant of the Overland are now entitled to special consideration of this court; that those who, because of adherence to their own ideas of how their late employer's business should be conducted, have chosen to remain off the Overland pay roll for more than seven months, no longer are entitled to be called 'employees' of this company; that no dispute, such as existed in May and June last, longer continues between the Overland and any persons entitled to be considered as the company's employees. We cannot recognize the right of individuals to prolong, long after its substance has fled, a labor contro-

versy, and to demand that it be accorded special consideration as a real and substantial industrial dispute, with advantages to them derivable from a law said to discriminate in favor of their class if certain conditions exist.

"The situation on the picket lines established by the court now suggests nothing more real, dignified, or effective than a heckling and nagging of employees who enter the plant, some of whom are exhibiting a natural impatience with the futile and irritating activities of the pickets. The court's observation suggests that the time has come when the semblance of indorsement of picketing, which may seem to exist in the fact that it proceeds under this court's order, should be removed. We ought not to leave a record open to the imputation that activities which amount to mere teasing of the company and its employees is indorsed by the court. We are impressed with the feeling, substantiated by reports which come to us, that at any time the annoyance which picketing naturally gives to the employees of the company may be resented by the latter, and the court may therefore be called upon to consider some conflict between pickets and workmen, on the theory that the former should be protected by the court; in fact, that proposition has been advanced several times in the past. The court owes it as a duty to itself, therefore, to relieve the record of the imputation that picketing, under present conditions, is sanctioned by the court, preserving to the defendants those rights which they undoubtedly have without specific judicial grant—that liberty of action and speech at all times and places which is ordered by law. As we understand the spirit of our institutions, no other variety of freedom or liberty is enjoyed by any one."

Mode of interference with employees.—Where an electric railway company makes nonmembership in a union a condition of employment in its contract with its various employees, union organizers who undertake to interfere with such contract will be enjoined from doing so, where they attempt such interference not by "recommending, or advising, or persuading" the employees to break their contract and stop the work in which they are engaged by any lawful or peaceful means, but by threats, opprobrious epithets, and insults, to such an extent that their actions necessitate the placing of a military guard on the company's cars. *Montgomery v. Pacific Electric R. Co.*, (C. C. A. 9th Cir. 1919) 259 Fed. 382, 169 C. C. A. 398. The court said:

"With the contract between the complainant company and its employees the appellants Montgomery and Farquharson in their respective capacity, and others acting with them, undertook to interfere, not by 'recommending, or advising, or persuading' such employees to break their contract and stop the work in which they were engaged by any peaceful or lawful means, but by threats,

opprobrious epithets, and insults, to such an extent that it became necessary for the commanding officer of the United States Submarine Base at San Pedro to give public warning to all persons concerned against any interference, or attempt to interfere, or attempt to obstruct the free passage of freight or passenger trains or trolley cars to or from San Pedro and the Outer Harbor there, and to actually put naval guards on each car to enforce his command. Surely nothing more need be said to show the absurdity of the pretension that the appellants' interference with the existing contract between the complainant company and its employees was not that peaceful, lawful recommending, advising, or persuading the latter to cease work and terminate their employment, permitted by the provisions of the act of Congress of October 15, 1914 (38 Stat. 730)."

Vol. VI, p. 149. [*Writs of error, etc.*]
[First ed., 1909 Supp., p. 292.]

III. Construction and sufficiency of indictment.

V. Special pleas in bar.

III. CONSTRUCTION AND SUFFICIENCY OF INDICTMENT (p. 151)

Construction of indictment.—Upon a writ of error under the Criminal Appeals Act the Supreme Court has no authority to revise the mere interpretation of an indictment and is confined to ascertaining whether the court, in a case under review, erroneously construed the statute. *U. S. v. Schrader*, (1920) 252 U. S. 85, 40 S. Ct. 251, 64 U. S. (L. ed.) —, following *U. S. v. Colgate*, (1919) 250 U. S. 300, 39 S. Ct. 465, 63 U. S. (L. ed.) 992, 7 A. L. R. 443.

V. SPECIAL PLEAS IN BAR (p. 152)

A ruling taking the form of a grant of a motion to quash an indictment on the ground that the charges, having been submitted to a previous grand jury which failed to indict, were resubmitted to a later grand jury by the federal district attorney without leave of court first obtained, is a "decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy," within the meaning of this Act, granting the government a right to review in a criminal case. *U. S. v. Thompson*, (1920) 251 U. S. 407, 40 S. Ct. 289, 64 U. S. (L. ed.) —.

Vol. VI, p. 161, sec. 11. [First ed., vol. IV, p. 428.]

I. Necessity of compliance with statute.

1. In general.
2. Excuse for delay.

I. NECESSITY OF COMPLIANCE WITH STATUTE

1. In General (p. 161)

An appeal was dismissed as not prosecuted in time where the decree was entered on

June 14, the petition for appeal, the assignments of error, and the bond were not filed until December 16, the appeal was allowed and the order signed on the latter date, and the matter was not presented to any judge before that date. *Farmers' State Bank v. Thompson*, (C. C. A. 5th Cir. 1919) 261 Fed. 166.

3. Excuse for Delay (p. 162)

"Delay in the mail is no excuse." *Farmers' State Bank v. Thompson*, (C. C. A. 5th Cir. 1919) 261 Fed. 166, where, dismissing an appeal because not perfected within six months, the court said:

"Appellants seek to excuse the delay on the grounds that Judge Meek, judge of the District Court for the Northern District of Texas, was ill and could not be reached to present the papers, and that they were mailed to Circuit Judge Batts, who was designated to hold the District Court in the Northern District of Texas, in time, had the mail been promptly delivered. As to this it is sufficient to say that the District Court is always open for the filing of pleadings, and the appeal could have been allowed by Judge Ervin, who tried the case under proper designation, or by any Circuit Judge. Judicial Code, § 132."

Vol. VI, p. 163, sec. 997. [First ed., vol. IV, p. 605.]

XI. FILING OF ASSIGNMENT OF ERRORS (p. 167)

Sufficiency of assignment of error.—In *J. M. Radford Grocery Co. v. Haynie*, (C. C. A. 5th Cir. 1919) 261 Fed. 349, an assignment of error based upon an exception to a part of the charge given by the court was disregarded because of a noncompliance with the requirement of rule 11 of that court that:

"When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to in totidem verbis whether it be in instructions given or in instructions refused."

Vol. VI, p. 187, sec. 1000. [First ed., vol. IV, p. 612.]

X. DAMAGES AND COSTS (p. 191)

Foreclosure suit.—Where a supersedeas bond causes the postponement of a foreclosure sale for nearly a year, the plaintiff is entitled, as a part of his damage, to interest on the proceeds of the sale during the period of the delay. He should also be allowed the amount of taxes on the property, the payment of which was necessitated by the delay caused by the supersedeas bond, and the amount paid for readvertising the sale of the property. *Graysonia-Nashville Lumber Co. v. Goldman*, (C. C. A. 8th Cir. 1919) 260 Fed. 600, 171 C. C. A. 364. In discussing the amount of damages on such a bond, the court said:

"The next question for consideration is the amount of damages which the plaintiff was entitled to recover on the supersedeas bond. When that bond was given the sale under the foreclosure decree had been advertised to take place on July 10, 1917. The supersedeas bond caused the postponement of that sale until April 29, 1918, when the property was sold for \$250,000, which was but little more than half of the amount due on the bonds which the property was mortgaged to secure. If the sale had been on July 10, 1917, the plaintiff could and probably would have obtained interest on this \$250,000 at 6 per cent. per annum during this delay. The court accordingly allowed him interest during this time as a part of his damages for the delay. The bond is in the usual form, and is conditioned that the Graysonia Company shall answer all damages and costs, if it fails to make its appeal good. It was given and approved under rule No. 13 of this court, which specifies just damages for delay, costs, and interest on the appeal among the matters to be secured by such bonds. Why was not this interest among the damages the plaintiff suffered by the delay?

"Counsel for the Graysonia Company answer, because plaintiff received about \$26,000 above costs and disbursements out of the rents and profits of the mortgaged property which accrued during this stay, and therefore he lost nothing, but gained much, thereby. But this \$26,000 was a part of the fund deposited in the registry under the order of October 24, 1916. It was the proceeds of the sale of the merchantable timber cut and purchased by the Allen Company, and there is no evidence that any of this \$26,000, or, if any of it, how much of it, was derived from the rentals. The record makes it probable that none of it was—that the rentals were less than the amounts paid out of the fund for allowances and disbursements. As, therefore, this \$26,000 must be deemed to have been the proceeds of the timber cut and removed the plaintiff gained nothing therefrom. This sale and removal of the timber presumptively diminished the value of the mortgaged property by the amount paid for the timber. Presumptively the mortgaged property would have sold for \$26,000 more on July 10, 1917, before this \$26,000 worth of timber was removed therefrom, than it did sell for on April 29, 1918, after its removal, and the result is that the plaintiff lost the interest on the \$250,000 by the delay.

"It is said that it was error to allow this interest, because interest is never allowed on any decree that is not for a sum of money or is silent as to interest, and that there was no judgment for money against the Graysonia Company, and no provision for interest in the decree of foreclosure. But this \$12,040 is not interest on any judgment, or on the decree, or on the amount thereof. It is the legal damages the plaintiff sustained because

the Graysonia Company delayed his receipt of the \$250,000 derived from the sale from June 10, 1917, to April 29, 1918. Other arguments against this allowance are that interest is never allowed on an unliquidated amount, and that the Supreme Court in *Kountze v. Hotel Co.*, 107 U. S. 391, 2 Sup. Ct. 911, 27 L. Ed. 609, held that interest on the debt adjudged due by the decree, which accrues pending the appeal, is not properly assignable as damages caused by the appeal bond, but that such damage as arises from the delay incident to the appeal is such damage. This \$12,040, however, is not interest on any unliquidated amount. The amount was liquidated by the sale, and this \$12,040 is the amount which the court below found to be the damage resulting from the postponement of the plaintiff's receipt of the \$250,000 produced by the sale from July 10, 1917, to April 29, 1918. In making this finding it undoubtedly measured this damage, as it lawfully might in the absence of other pertinent evidence, by the legal and prevalent rate of interest commonly paid for the use of money. Nor was this \$12,040 the interest on the debt held inadmissible as the measure of the damages on the supersedeas bond in the *Kountze Case*. The debt was \$471,495.30. It was not interest on that amount. On the other hand, it was one of the damages for delay incident to the appeal held to be allowable by the court in the *Kountze Case*, and there was no error in its allowance."

Vol. VI, p. 205, sec. 700. [First ed., vol. IV, p. 450.]

I. R. S. secs. 649 and 700, in general.

2. To what courts and to what cases applicable.

b. To what cases.

II. Waiving a jury.

3. Stipulation in writing essential.

5. Withdrawal of waiver.

IV. Findings and review.

1. In general.

2. General findings.

3. General and special findings.

a. In general.

b. Effect.

VI. Rulings and exceptions.

1. Necessity.

I. R. S. SECS. 649 AND 700, IN GENERAL

2. To What Courts and to What Cases Applicable

b. To What Cases (p. 206)

In equity suits the appellate court is not concluded by the findings of fact of the lower court, but will disregard them, if it finds them manifestly erroneous or manifestly against the weight of evidence. *Hyman v. Trow Directory Printing, etc., Co.*, (C. C. A. 2d Cir. 1919) 261 Fed. 991.

II. WAIVING A JURY

3. Stipulation in Writing Essential (p. 209)

To same effect as original annotation, see *Ford v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 657, 171 C. C. A. 421.

5. Withdrawal of Waiver (p. 211)

Where, after waiver of a jury trial and the cause had been partly heard by the court, an amendment of the pleadings to conform to the proof was allowed, whereby a new issue of fact was presented, it was held to be within the discretion of the court to allow a jury trial. *Buchholz v. Granite Sav. Bank, etc., Co.*, (C. C. A. 4th Cir. 1911) 261 Fed. 75.

IV. FINDINGS AND REVIEW

1. In General (p. 211)

Where the record contains no finding of facts and no opinion of the court below, so that there is nothing but the decrees it rendered to indicate its findings of fact or its conclusions of law, the legal presumption is that its findings and conclusions were right, and they ought not to be disturbed by an appellate court, unless the record proves that the District Court made a material mistake of fact or committed a serious error of law. *Shearer v. Farmers' L. Ins. Co.*, (C. C. A. 8th Cir. 1919) 262 Fed. 801.

2. General Findings (p. 212)

Sufficiency of complaint.—The review where the finding is general is limited to the sufficiency of the complaint and the ruling in the progress of the trial, if any be preserved, on questions of law. *Kindred v. Black*, (C. C. A. 8th Cir. 1919) 257 Fed. 302, 168 C. C. A. 386.

Sufficiency of evidence.—Where a trial by jury was waived and the record does not show that there was any request by the plaintiff for a finding of facts or for a declaration of law in its favor, the sufficiency of the evidence is a question that cannot be raised by it on appeal. *U. S. v. Bowling*, (C. C. A. 8th Cir. 1919) 261 Fed. 657.

3. General and Special Findings

a. In General (p. 214)

The findings of the court being like a verdict of a jury, the appellate court may review only errors in the admission or rejection of evidence and if the findings are special, whether such findings support the judgment. Where, however, there is no assignment of error covering these points, there is nothing for the appellate court to review. *Cassleton First Nat. Bank v. National City Bank* (C. C. A. 8th Cir. 1919) 261 Fed. 912.

b. Effect (p. 215)

To same effect as second paragraph of original annotation, see *Ellison v. Splain*, (App. Cas. D. C. 1919) 261 Fed. 247; *American Guaranty Co. v. American Fidelity Co.*,

(C. C. A. 6th Cir. 1919) 260 Fed. 897; *Watchmaker v. Barnes*, (C. C. A. 1st Cir. 1919) 259 Fed. 783, 170 C. C. A. 583; *Hamlin v. Grogan*, (C. C. A. 8th Cir. 1919) 257 Fed. 59, 168 C. C. A. 271; *Escanaba Traction Co. v. Burns*, (C. C. A. 6th Cir. 1919) 257 Fed. 898, 169 C. C. A. 48.

Where a chancellor has considered conflicting evidence, and made his findings and decrees thereon, they must be deemed to be presumptively correct by the Circuit Court of Appeals, and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they will not be disturbed. *Benedict v. Setters*, (C. C. A. 8th Cir. 1919) 261 Fed. 402.

Where there is a conflict of testimony and the credibility of witnesses is involved, the finding of the District Court will not be disturbed, unless it is clearly wrong. Where, however, there is no conflict and the finding is a conclusion from admitted facts, the rule does not apply. *Dunn v. Trefry*, (C. C. A. 1st Cir. 1919) 260 Fed. 147, 171 C. C. A. 183.

VI. RULINGS AND EXCEPTIONS

1. Necessity (p. 221)

To same effect as original annotation, see *Ford v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 657, 171 C. C. A. 421; *Flour City Ornamental Iron Works v. Schuler*, (C. C. A. 8th Cir. 1919) 260 Fed. 662, 171 C. C. A. 426.

Where by stipulation a case is tried by the court without a jury, and no exceptions are taken to any ruling of the court nor any request made for special findings, the judgment must be affirmed, unless the complaint fails to state a cause of action. *Northern Idaho, etc., Co. v. A. L. Jordan Lumber Co.*, (C. C. A. 9th Cir. 1920) 262 Fed. 765.

In *Haynes Automobile Co. v. Kansas Casualty, etc., Co.*, (C. C. A. 8th Cir. 1919) 261 Fed. 347, affirming a judgment in an action at law tried by the court upon waiver of a jury, the court said:

"The record discloses no objection or exception to any ruling or proposed ruling of the court below, no request or motion for any judgment for the plaintiff on the ground that there was no substantial evidence in support of the defense which the court below found to be proved, or for any declaration of law to that effect, or to any other effect. Since in an action at law this is exclusively a court for the review of errors of law of the court below, and a record of an objection and exception to any ruling on evidence or an exception to the refusal of a request for a ruling or declaration of law denied is ordinarily indispensable to a review by this court, there is nothing in the record or briefs in this case to require the consideration or decision of any question by this court. *Wear v. Imperial Window Glass Co.*, 224 Fed. 60, 63, 139 C. C. A. 622, 625, and cases there cited. Notwithstanding this fact, the court has examined the record and

learned that the only important question of law in this case that might have been presented for review was whether or not there was any substantial evidence to sustain the finding of the court, and in order to be certain that no injustice results to the plaintiff in error, has attentively listened to the arguments of counsel, read their briefs and the evidence, and become convinced that there was such evidence before the court below, and that there was no error in the trial of this case."

Vol. VI, p. 224, sec. 701. [First ed., vol. IV, p. 458.]

Remanding case with instructions.—Error below in overruling the objection of Treasury officials in a suit by attorneys against their client and such officials, that a valid act of Congress prohibited the recovery sought, requires that a judgment for plaintiffs be reversed upon the appeals of such officials, and that the cause be remanded, with directions to dismiss the bill as to them. *Newman v. Moyers*, 253 U. S. 182, 40 S. Ct. 478, 64 U. S. (L. ed.) —, reversing in part (1917) 47 App. Cas. (D. C.) 102, Ann. Cas. 1918E 528.

Effect of dismissal of appeal for want of prosecution.—A dismissal of an appeal for want of prosecution will remit the cause to the lower court in the same condition as before the appeal was taken, and will leave the lower court free to take appropriate action to prevent itself from being used as an instrument in illegality. *Newman v. Moyers*, (1920) 253 U. S. 182, 40 S. Ct. 478, 64 U. S. (L. ed.) —, reversing in part (1917) 47 App. Cas. (D. C.) 102, Ann. Cas. 1918E 528.

Vol. VI, p. 228, sec. 1010. [First ed., vol. IV, p. 623.]

II. AFFIRMANCE BY CIRCUIT COURT OF APPEALS (p. 230)

Affirming a decree for the United States against the surety on a contractor's bond, in a suit for the benefit of subcontractor claimants, the court said: "Taxable costs cannot be made to reimburse the claimants for the expenses of briefs and oral arguments on appeal. Paragraph 3 of rule 28 should be applied. The decree is affirmed, with interest and costs, and with damages in the sum of 10 per cent. of the face of the claims." *Chicago Bonding, etc., Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 261 Fed. 266.

Vol. VI, p. 230, sec. 1011. [First ed., vol. IV, p. 624.]

V. QUESTIONS OF FACT AND EVIDENCE (p. 231)

In general.—To same effect as first paragraph of original annotation, see *O. C. Barber Min., etc., Co. v. Brown Hoisting*

Machinery Co., (C. C. A. 6th Cir. 1919) 258 Fed. 1, 169 C. C. A. 139.

Motion for judgment on issues.—Where a case is tried by the court without a jury, a request or motion to adjudge either all the issues or some specific issues in favor of the requesting party or against the adverse party, must make apparent that it is based on the ground that there is no substantial evidence to sustain any other conclusion in order to be reviewable. *Raymer v. Netherwood*, (C. C. A. 7th Cir. 1919) 257 Fed. 284, 168 C. C. A. 368.

Weight of evidence.—Where there was evidence proper for the consideration of the jury, the objection that the verdict was against the weight of the evidence cannot be considered. *Erie R. Co. v. Connors*, (C. C. A. 6th Cir. 1919) 261 Fed. 303.

Questions as to verdict being excessive.—Objection that the damages awarded by the jury were excessive cannot be considered where there was evidence to support the verdict. *Erie R. Co. v. Connors*, (C. C. A. 6th Cir. 1919) 261 Fed. 303.

Vol. VI, p. 234, sec. 10. [First ed., vol. IV, p. 428.]

I. DISPOSITION OF CASE ON APPEAL OR WRIT OF ERROR (p. 235)

Remand with leave to amend, etc.—The action of a federal Circuit Court of Appeals in simply reversing the judgment of a District Court against a collector of internal revenue for the recovery back of certain taxes paid under protest without remanding the case for a new trial, is not open to attack in the federal Supreme Court where there was no objection made to that action and no request for a remand of the case,—especially where there was nothing to retry, the case involving only propositions of law. *Forged Steel Wheel Co. v. Lewellyn*, (1920) 251 U. S. 511, 40 S. Ct. 285, 64 U. S. (L. ed.) —, affirming (C. C. A. 3d Cir. 1919) 258 Fed. 533, 169 C. C. A. 473.

1918 Supp., p. 401, sec. 1.

Constitutionality of amendment saving remedies under State Workmen's Compensation Law.—This amendment, so far as it provides that "rights and remedies under the workmen's compensation law of any state" are saved to claimants, is unconstitutional. *Knickerbocker Ice Co. v. Stewart*, (1920) 253 U. S. 149, 40 S. Ct. 439, 64 U. S. (L. ed.) —, reversing (1919) 226 N. Y. 302, 123 N. E. 382. See *The Howell*, (S. D. N. Y. 1919) 257 Fed. 578.

Retroactive effect of amendment.—It was held prior to the decision above, holding the amendment unconstitutional, that a state workmen's compensation law may not be applied to an injury sustained prior to the above amendment by a longshoreman while he was unloading a vessel lying in navigable

waters. *Peters v. Veasey*, (1919) 251 U. S. 121, 40 S. Ct. 65, 64 U. S. (L. ed.) —, *reversing* (1918) 142 La. 1012, 77 So. 948. See to the same effect *White v. John W. Cowper Co.*, (W. D. N. x. 1919) 260 Fed. 350.

Election of remedies by person injured.—Prior to the decision above, that the amendment was unconstitutional, it was held that a person injured, in a case of tort cognizable in admiralty, might elect whether to proceed in admiralty, at common law or under the provisions of the Workmen's Compensation Law, where it exists. In such case, if a settlement was made under the Workmen's Compensation Law in such a manner as to exclude any further recovery, that fact might be set up in defense, as courts of admiralty administer the broadest equity, and would not permit two recoveries for the same tort. *Hogan v. Buja*, (E. D. La. 1920) 262 Fed. 224. See further to the same effect *Rohde v. Grant, Smith-Porter Ship Co.*, (D. C. Ore. 1920) 263 Fed. 204; *Lund v. Griffiths, etc., Stevedoring Co.*, (1919) 108 Wash. 220, 183 Pac. 123.

1918 Supp., p. 411, sec. 2. [Writs of error, etc.]

II. Writ of error.

III. Certiorari.

II. WRIT OF ERROR (p. 412)

Validity of state statute or authority.—Writ of error, not certiorari, is the proper mode of reviewing, in the federal Supreme Court, a judgment of the highest court of a state upholding a state statute challenged as repugnant to the Federal Constitution. *Kenney v. Supreme Lodge, etc.*, (1920) 252 U. S. 411, 40 S. Ct. 371, 64 U. S. (L. ed.) —, *reversing* (1918) 285 Ill. 188, 120 N. E. 631, 4 A. L. R. 964.

The mere objection to an exercise of authority under a state statute whose validity is not attacked cannot be made the basis of a writ of error from the federal Supreme Court to a state court since the amendment of September 6, 1916, to the Judicial Code, § 237. There must be a substantial challenge of the validity of the statute or authority upon the claim that it is repugnant to the Federal Constitution, treaties, or laws, so as to require the state court to decide the question of validity in disposing of the contention. *Jett Bros. Distilling Co. v. Carrollton*, (1920) 252 U. S. 1, 40 S. Ct. 255, 64 U. S. (L. ed.) —, *dismissing writ of error to review* (1917) 178 Ky. 561, 199 S. W. 37, wherein the court said: "Drawing in question the validity of a statute or authority as the basis of appellate review has long been a subject of regulation in statutes of the United States, as we had occasion to point out in *United States ex rel. Champion Lumber Co. v. Fisher*, 227 U. S. 445, 450, 451, 57 L. ed. 591, 593, 594, 33

Sup. Ct. Rep. 329. What is meant by the validity of a statute or authority was discussed by this court in *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503, in which this court, speaking by Mr. Chief Justice Fuller, said: 'Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise.' And the chief justice added, upon the authority of *Millingar v. Hartupee*, 6 Wall. 258, 261, 262, 18 L. ed. 829, 830, that the word 'authority' stands upon the same footing.

"In order to give this court jurisdiction by writ of error under amended § 237, Judicial Code, it is the validity of the statute or authority which must be drawn in question. The mere objection to an exercise of authority under a statute whose validity is not attacked cannot be made the basis of a writ of error from this court. There must be a substantial challenge of the validity of the statute or authority, upon a claim that it is repugnant to the Federal Constitution, treaties, or laws, so as to require the state court to decide the question of validity in disposing of the contention. *Champion Lumber Co. v. Fisher*, *supra*, and cases cited."

Overruling petition for rehearing as basis for writ.—The overruling by the highest court of a state without opinion of a petition for rehearing cannot be made the basis of a writ of error from the federal Supreme Court. *Jett Bros. Distilling Co. v. Carrollton*, (1920) 252 U. S. 1, 40 S. Ct. 255, 64 U. S. (L. ed.) —, *dismissing writ of error to review*, (1917) 178 Ky. 561, 199 S. W. 37.

Federal question set up in petition for rehearing.—To give the federal Supreme Court jurisdiction to review the judgment of a state court upon writ of error, the essential federal question must have been specially set up there at the proper time and in the proper manner, and if first presented in a petition for rehearing to the state court of last resort, it comes too late, unless the court actually entertains the petition and passes upon the point. *Godchaux Co. v. Estopinal*, (1919) 251 U. S. 179, 40 S. Ct. 116, 64 U. S. (L. ed.) — (*dismissing writ of error to review*) (1918) 142 La. 812, 77 So. 640, wherein the court said: "The record fails to disclose that plaintiff in error at any time or in any way challenged the validity of the state constitutional amendment because of conflict with the Federal Constitution until it applied for a rehearing in the supreme court. That application was refused without more. Here the sole error assigned is predicated upon such supposed conflict; and, unless that point was properly raised below, a writ of error cannot bring the cause before us."

See to the same effect *Mergenthaler Linotype Co. v. Davis*, (1920) 251 U. S. 256, 40

S. Ct. 133, 64 U. S. (L. ed.) —, *dismissing* writ of error to review *State v. Robertson*, (1917) 271 Mo. 475, 196 S. W. 1132.

The assertion of a title, right, privilege, or immunity under the Federal Constitution may afford the basis for a writ of certiorari from the federal Supreme Court to a state court, but it constitutes no ground for a writ of error. *Mergenthaler Linotype Co. v. Davis*, (1920) 251 U. S. 256, 40 S. Ct. 133, 64 U. S. (L. ed.) —, *dismissing* writ of error to review *State v. Robertson*, (1917) 271 Mo. 475, 196 S. W. 1132.

III. CERTIORARI (p. 413)

A hearing was had on writ of certiorari to the Georgia Court of Appeals in *Evans v. Savannah Nat. Bank*, (1919) 251 U. S. 108, 40 S. Ct. 58, 64 U. S. (L. ed.) —; to the Mississippi Supreme Court in *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co.*, (1919) 251 U. S. 27, 40 S. Ct. 69, 64 U. S. (L. ed.) —; to the California Supreme Court in *Southern Pac. Co. v. Industrial Acc. Commission*, (1920) 251 U. S. 259, 40 S. Ct. 130, 64 U. S. (L. ed.) —; to the Louisiana Supreme Court in *Brooks-Scanlon Co. v. Railroad Commission*, (1920) 251 U. S. 396, 40 S. Ct. 183, 64 U. S. (L. ed.) —; to the Georgia Court of Appeals in *Lee v. Central of Georgia R. Co.*, (1920) 252 U. S. 109, 40 S. Ct. 254, 64 U. S. (L. ed.) —; to the Oklahoma Supreme Court in *Chicago, etc., R. Co. v. Ward*, (1920) 252 U. S. 18, 40 S. Ct. 275, 64 U. S. (L. ed.) —; to the Maryland Court of Appeals in *Hull v. Philadelphia, etc., R. Co.*, (1920) 252 U. S. 475, 40 S. Ct. 358, 64 U. S. (L. ed.) —; to the Oklahoma Supreme Court in *Ward v. Love County*, (1920) 253 U. S. 17, 40 S. Ct. 419, 64 U. S. (L. ed.) —; to the Virginia Supreme Court of Appeals in *Calhoun v. Massie*, (1920) 253 U. S. 170, 40 S. Ct. 474, 64 U. S. (L. ed.) —; to the Pennsylvania Supreme Court in *Philadelphia, etc., R. Co. v. Hancock*, (1920) 253 U. S. 284, 40 S. Ct. 512, 64 U. S. (L. ed.) —, and *Pennsylvania R. Co. v. Kittanning Iron, etc., Mfg. Co.*, (1920) 253 U. S. 319, 40 S. Ct. 532, 64 U. S. (L. ed.) —.

Reported cases.—*Certiorari was granted* in *Bracht v. San Antonio, etc., R. Co.*, (1919) 250 U. S. 658, 40 S. Ct. 16, 63 U. S. (L. ed.) 1193, to the Missouri Court of Appeals; *Philadelphia, etc., R. Co. v. Hancock*, (1919) 250 U. S. 658, 40 S. Ct. 54, 63 U. S. (L. ed.) 1193, to the Pennsylvania Supreme Court; *Union Pac. R. Co. v. Burke*, (1919) 251 U. S. 548, 40 S. Ct. 56, 64 U. S. (L. ed.) —, to the New York Supreme Court; *Pemberton v. Illinois Commercial Men's Assoc.*, (1920) 251 U. S. 549, 40 S. Ct. 178, 64 U. S. (L. ed.) —, to the Illinois Supreme Court; *Western Union Tel. Co. v. Southwick*, (1920) 251 U. S. 549, 40 S. Ct. 219, 64 U. S. (L. ed.) —, to the Texas Court of Civil Appeals; *Yazoo, etc., R. Co.*

v. Nichols, (1920) 251 U. S. 550, 40 S. Ct. 219, 64 U. S. (L. ed.) —, to the Mississippi Supreme Court; *Norfolk-Southern R. Co. v. Owens*, (1920) 251 U. S. 550, 40 S. Ct. 342, 64 U. S. (L. ed.) —, to the North Carolina Supreme Court; *Western Union Tel. Co. v. Speight*, (1920) 252 U. S. 576, 40 S. Ct. 344, 64 U. S. (L. ed.) —; *New York Cent., etc., R. Co. v. York, etc., Co.*, (1920) 253 U. S. 479, 40 S. Ct. 481, 64 U. S. (L. ed.) —, and *York, etc., Co. v. New York Cent., etc., R. Co.*, (1920) 253 U. S. 478, 40 S. Ct. 481, 64 U. S. (L. ed.) —, to the Massachusetts Superior Court; *Lang v. New York Cent. R. Co.*, (1920) 253 U. S. 479, 40 S. Ct. 482, 64 U. S. (L. ed.) —, to the New York Supreme Court; *Culpepper v. Ocheltree*, (1920) 253 U. S. 480, 40 S. Ct. 482, 64 U. S. (L. ed.) —, to the California Supreme Court; *Western Union Tel. Co. v. Boston*, (1920) 253 U. S. 480, 40 S. Ct. 482, 64 U. S. (L. ed.) —, to the South Carolina Supreme Court; *Philadelphia, etc., R. Co. v. Di Donato*, (1920) 253 U. S. 480, 40 S. Ct. 482, 64 U. S. (L. ed.) —, to the Pennsylvania Supreme Court; *Philadelphia, etc., R. Co. v. Polk*, (1920) 253 U. S. 480, 40 S. Ct. 482, 64 U. S. (L. ed.) —, to the Pennsylvania Supreme Court; *Michigan Cent. R. Co. v. Owen*, (1920) 253 U. S. 481, 40 S. Ct. 483, 64 U. S. (L. ed.) —, to the Illinois Supreme Court; *Philadelphia, etc., R. Co. v. Smith*, (1920) 253 U. S. 481, 40 S. Ct. 584, 64 U. S. (L. ed.) —, to the Pennsylvania Supreme Court.

Certiorari was denied in *Houston Oil Co. v. Brown*, (1919) 250 U. S. 659, 40 S. Ct. 9, 63 U. S. (L. ed.) 1194, to the Texas Court of Civil Appeals; *Schreiber v. German Evangelical Protestant Cong., etc.*, (1919) 250 U. S. 677, 40 S. Ct. 9, 63 U. S. (L. ed.) 1202, to the Missouri Supreme Court; *Erie R. Co. v. Kirby*, (1919) 250 U. S. 659, 40 S. Ct. 10, 63 U. S. (L. ed.) 1194, to the New York Supreme Court, Appellate Division; *Nordyke v. Indianapolis*, (1919) 250 U. S. 660, 40 S. Ct. 10, 63 U. S. (L. ed.) 1194, and *H. Lauter Co. v. Indianapolis*, (1919) 250 U. S. 660, 40 S. Ct. 10, 63 U. S. (L. ed.) 1194, to an Indiana Superior Court; *Keown v. Hayden*, (1919) 250 U. S. 661, 40 S. Ct. 10, 63 U. S. (L. ed.) 1195, to the Massachusetts Supreme Judicial Court; *Chicago, etc., R. Co. v. Van De Zande*, (1919) 250 U. S. 661, 40 S. Ct. 10, 63 U. S. (L. ed.) 1195, to the Wisconsin Supreme Court; *Turner v. Turner*, (1919) 250 U. S. 662, 40 S. Ct. 10, 63 U. S. (L. ed.) 1195, to the Oklahoma Supreme Court; *Neidlein v. Southern Pac. Co.*, (1919) 250 U. S. 662, 40 S. Ct. 10, 63 U. S. (L. ed.) 1195, to the California Supreme Court; *Morrison v. Louisville, etc., R. Co.*, (1919) 250 U. S. 663, 40 S. Ct. 11, 63 U. S. (L. ed.) 1195, to the Tennessee Supreme Court; *Keown v. Trudo*, (1919) 250 U. S. 664, 40 S. Ct. 11, 63 U. S. (L. ed.) 1196, to the Massachusetts Superior

Court; *Shapley v. Kline*, (1919) 250 U. S. 661, 40 S. Ct. 11, 63 U. S. (L. ed.) 1196, to the Massachusetts Supreme Judicial Court; *Hogarty v. Philadelphia, etc., R. Co.*, (1919) 250 U. S. 650, 40 S. Ct. 12, 63 U. S. (L. ed.) 1189, to the Pennsylvania Supreme Court; *National Surety Co. v. Virginia*, (1919) 250 U. S. 665, 40 S. Ct. 13, 63 U. S. (L. ed.) 1197, to the Virginia Supreme Court of Appeals; *Wysong, etc., Co. v. Planters Nat. Bank*, (1919) 250 U. S. 665, 40 S. Ct. 13, 63 U. S. (L. ed.) 1197, to the North Carolina Supreme Court; *Nashville, etc., R. Co. v. Austin*, (1919) 250 U. S. 667, 40 S. Ct. 14, 63 U. S. (L. ed.) 1198, to the Tennessee Supreme Court; *Philadelphia, etc., R. Co. v. Philadelphia, etc., R. Co.*, (1919) 250 U. S. 668, 40 S. Ct. 14, 63 U. S. (L. ed.) 1198, to the Pennsylvania Supreme Court; *Prudential Ins. Co. v. Ragan*, (1919) 250 U. S. 668, 40 S. Ct. 14, 63 U. S. (L. ed.) 1198, to the Kentucky Court of Appeals; *Crenshaw v. Southern Pac. Co.*, (1919) 250 U. S. 669, 40 S. Ct. 14, 63 U. S. (L. ed.) 1198, to the California District Court of Appeal; *Hamlin v. Wellington*, (1919) 250 U. S. 672, 40 S. Ct. 14, 63 U. S. (L. ed.) 1200, to the Surrogate's Court of Erie County, New York; *Toledo, etc., Cent. R. Co. v. Public Utilities Commission*, (1919) 250 U. S. 670, 40 S. Ct. 15, 63 U. S. (L. ed.) 1199, to the Ohio Supreme Court; *New York, etc., R. Co. v. Pugh*, (1919) 250 U. S. 670, 40 S. Ct. 15, 63 U. S. (L. ed.) 1199, to the Ohio Court of Appeals; *Kelly v. McKeown*, (1919) 250 U. S. 671, 40 S. Ct. 16, 63 U. S. (L. ed.) 1199, to the Minnesota Supreme Court; *Seaboard Air Line R. Co. v. Baltimore Trust Co.*, (1919) 250 U. S. 673, 40 S. Ct. 16, 64 U. S. (L. ed.) 1200, to the Georgia Supreme Court; *Columbus Packing Co. v. Ohio*, (1919) 250 U. S. 671, 40 S. Ct. 16, 63 U. S. (L. ed.) 1199, to the Ohio Supreme Court; *Cudahy Packing Co. v. Pryor*, (1919) 250 U. S. 673, 40 S. Ct. 16, 63 U. S. (L. ed.) 1200, to the Missouri Court of Appeals; *Bruce v. Tobin*, (1919) 251 U. S. 552, 40 S. Ct. 56, 64 U. S. (L. ed.) —, to the South Dakota Supreme Court; *Kansas City Southern R. Co. v. Smith*, (1919) 251 U. S. 552, 40 S. Ct. 56, 64 U. S. (L. ed.) —, to the Missouri Supreme Court; *Oregon-Washington R., etc., Co. v. Fuller*, (1919) 251 U. S. 551, 40 S. Ct. 56, 64 U. S. (L. ed.) —, to the Oregon Supreme Court; *Missouri Pac. R. Co. v. Bollis*, (1919) 251 U. S. 538, 40 S. Ct. 57, 64 U. S. (L. ed.) —, to the Tennessee Supreme Court; *Drago v. Central R. Co.*, (1919) 251 U. S. 553, 40 S. Ct. 118, 64 U. S. (L. ed.) —, to a New Jersey Circuit Court; *Washington v. Belknap*, (1919) 251 U. S. 553, 40 S. Ct. 118, 64 U. S. (L. ed.) —, to the Washington Supreme Court; *Virginia-Western Power Co. v. Virginia*, (1920) 251 U. S. 557, 40 S. Ct. 179, 64 U. S. (L. ed.) —, to the Supreme Court of Appeals of Virginia; *Gulf, etc., Island R. Co. v. Boone*, (1920) 251 U. S. 561, 40 S. Ct. 220, 64 U.

S. (L. ed.) —, to the Mississippi Supreme Court; *Wabash R. Co. v. Sheahan*, (1920) 251 U. S. 562, 40 S. Ct. 342, 64 U. S. (L. ed.) —, to the Illinois Appellate Court; *Postal Tel.-Cable Co. v. Bowman, etc., Co.*, (1920) 251 U. S. 562, 40 S. Ct. 342, 64 U. S. (L. ed.) —, to the Illinois Supreme Court; *Chicago, etc., R. Co. v. Swaim*, (1920) 252 U. S. 577, 40 S. Ct. 344, 64 U. S. (L. ed.) —, to the Iowa Supreme Court; *Capps v. Atlantic Coast Line R. Co.*, (1920) 252 U. S. 580, 40 S. Ct. 345, 64 U. S. (L. ed.) —, to the Supreme Court of North Carolina; *Atchafalaya Land Co. v. Capdevielle*, (1920) 252 U. S. 581, 40 S. Ct. 346, 64 U. S. (L. ed.) —, to the Supreme Court of Louisiana; *Leden v. Union Pac. R. Co.*, (1920) 253 U. S. 485, 40 S. Ct. 482, 64 U. S. (L. ed.) —, to the Kansas Supreme Court; *Lehigh Valley R. Co. v. Howell*, (1920) 253 U. S. 482, 40 S. Ct. 482, 64 U. S. (L. ed.) —, and *Lehigh Valley R. Co. v. Royal Indemnity Co.*, (1920) 253 U. S. 483, 40 S. Ct. 482, 64 U. S. (L. ed.) —, to New Jersey Court of Errors and Appeals; *Philadelphia, etc., R. Co. v. Reynolds*, (1920) 253 U. S. 486, 40 S. Ct. 482, 64 U. S. (L. ed.) —, to the Pennsylvania Supreme Court; *Chicago, etc., R. Co. v. Owens*, (1920) 253 U. S. 489, 40 S. Ct. 485, 64 U. S. (L. ed.) —, to the Oklahoma Supreme Court; *Atlantic Coast Line R. Co. v. Alabama*, (1920) 253 U. S. 489, 40 S. Ct. 485, 64 U. S. (L. ed.) —, to the Alabama Supreme Court; *Pennsylvania R. Co. v. Stiedler*, (1920) 253 U. S. 489, 40 S. Ct. 485, 64 U. S. (L. ed.) —, to the New Jersey Court of Errors and Appeals; *Delaware, etc., R. Co. v. Candee*, (1920) 253 U. S. 490, 40 S. Ct. 584, 64 U. S. (L. ed.) —, to the New Jersey Supreme Court; *Mayfield v. Tennessee*, (1920) 253 U. S. 492, 40 S. Ct. 586, 64 U. S. (L. ed.) —, to the Tennessee Supreme Court; *Missouri Pac. R. Co. v. Block*, (1920) 253 U. S. 493, 40 S. Ct. 586, 64 U. S. (L. ed.) —, to the Arkansas Supreme Court; *Canfield v. Brink*, (1920) 253 U. S. 493, 40 S. Ct. 586, 64 U. S. (L. ed.) —, and *Canfield v. Cornelius*, (1920) 253 U. S. 493, 40 S. Ct. 586, 64 U. S. (L. ed.) —, to the Oklahoma Supreme Court; *Morgan v. Louisiana*, (1920) 253 U. S. 498, 40 S. Ct. 588, 64 U. S. (L. ed.) —, to the Louisiana Supreme Court.

In *Ft. Smith Lumber Co. v. Arkansas*, (1920) 251 U. S. 532, 40 S. Ct. 304, 64 U. S. (L. ed.) —, affirming judgment of a state court on writ of error, the court said: "As this case properly comes here by writ of error, an application for a writ of certiorari that was presented as a precaution will be denied."

1918 Supp., p. 414, sec. 2.

Constitutionality of amendment saving remedies under state Workmen's Compensation Law.—This amendment so far as it provides that "rights and remedies under the Workmen's Compensation Law of any

state" are saved to claimants is unconstitutional. *Knickerbocker Ice Co. v. Stewart*, (1920) 253 U. S. 149, 40 S. Ct. 438, 64 U. S. (L. ed.) —, *reversing* (1919) 226 N. Y. 302, 123 N. E. 382.

See to the same effect *Sudden v. Industrial Acc. Commission*, (Cal. 1920) 188 Pac. 803. And see *The Howell*, (S. D. N. Y. 1919) 257 Fed. 578.

Retroactive effect of amendment.—It was held that a state Workmen's Compensation Law could not, prior to the above amendment, be applied to an injury sustained by a longshoreman while he was unloading a vessel lying in navigable waters. *Peters v. Veasey*, (1919) 251 U. S. 121, 40 S. Ct. 65, 64 U. S. (L. ed.) —, *reversing* (1918) 142 La. 1012, 77 So. 948. See further *Hogan v. United Fruit Co.*, (1920) 266 Pa. St. 266, 109 Atl. 668; *O'Brien v. Det Forende Dampphibs Selskab*, (N. J. 1920) 109 Atl. 517.

1918 Supp., p. 421, sec. 4. [*Review of judgment or decree, etc.*]

Under this section and Judicial Code, sec. 274b.—To same effect as original annotation, see *St. Louis Southwestern R. Co. v. Consolidated Fuel Co.*, (C. C. A. 8th Cir. 1919) 260 Fed. 638, 171 C. C. A. 402.

Both appeal and writ of error taken.—In *Lo Hop v. U. S.* (C. C. A. 6th Cir. 1919) 257 Fed. 489, 168 C. C. A. 493, it appeared that it was the purpose of the appellant to have the lower court's decree considered on both appeal and writ of error. The Circuit Court of Appeals held that in view of this section it would treat the case as properly before it on appeal.

1918 Supp., p. 422, sec. 5.

A writ of certiorari was denied in *Hermanos v. Insular Collector of Customs*, (1920) 251 U. S. 562, 40 S. Ct. 342, 64 U. S. (L. ed.) —; *Roecha v. Tuason y Patino*, (1920) 252 U. S. 578, 40 S. Ct. 344, 64 U. S. (L. ed.) —; *Vargas v. Yaptic*, (1920)

253 U. S. 493, 40 S. Ct. 586, 64 U. S. (L. ed.) —.

A petition for a writ of certiorari was dismissed for want of prosecution in *Vieglmann v. Insular Collector of Customs*, (1919) 251 U. S. 563, 40 S. Ct. 56, 64 U. S. (L. ed.) —.

1919 Supp., p. 231. [*New trials, etc.*]

Defect in pleading.—An indictment under the Act of Feb. 13, 1913, ch. 50 (4 Fed. Stat. Ann. (2d ed.) 573), which charged the defendant with the receipt and possession of goods knowing that they had been stolen from a certain freight car, and that they were part of an interstate shipment contained in such car, was held sufficient in view of this statutory amendment and R. S. sec. 1025 (2 Fed. Stat. Ann. (2d ed.) 681), a criticism that it failed to charge that the goods were in fact so stolen being regarded as technical and unsubstantial. *Grandi v. U. S.*, (C. C. A. 6th Cir. 1920) 262 Fed. 123.

Error in instruction.—An error in the court's charge, which does not cause substantial injury to the defendant, is not sufficient ground for reversal of the judgment under this amendment. *Doremus v. U. S.*, (C. C. A. 5th Cir. 1920) 262 Fed. 849.

Consideration of ruling not excepted to is not authorized. *Storgard v. France, etc., Steamship Corp.*, (C. C. A. 2d Cir. 1920) 263 Fed. 545. The court said: "We do not construe the section as authorizing appellate courts to decide on the whole record whether exceptions have been taken or not. The mischief it was intended to correct is just the opposite of overlooking defects due to negligence, ignorance, or inadvertence, viz., the reversal of judgments because of errors, defects, or exceptions which, though raised with technical accuracy, do not affect substantial right."

Ordering judgment for the party entitled thereto on reversal is not authorized by this section. *New York L. Ins. Co. v. Anderson*, (C. C. A. 2d Cir. 1920) 263 Fed. 527.

LABOR

1918 Supp., p. 428. [*Eight-Hour Law, etc.*]

The proviso relating to overtime pay for work in excess of eight hours, applies to laborers and mechanics engaged upon work covered by contracts with the United States. (1917) 31 Op. Atty-Gen. 144.

1918 Supp., p. 435, sec. 26.

Assignment of claim to government.—Neither the taking over and the operation of the railroads by the government nor the order of the Director General of Railroads

requiring that an action to recover damages against a government controlled railroad be brought directly against the said Director General of Railroads deprived the United States Employees' Compensation Commission of the power to require a beneficiary to assign his right of action to the United States or prosecute said action as a condition to settlement. 31 Op. Atty-Gen. 365.

1918 Supp., p. 437, sec. 32.

Decision of questions arising under act.—Under this section the United States Employees' Compensation Commission has

power, when the question is properly presented, to decide whether employees of the United States Shipping Board Emergency Fleet Corporation, or other persons, are entitled to the benefits of the provisions of said Act. (1918) 31 Op. Atty.-Gen. 252, wherein it was said: "The commission was likewise empowered to 'decide all questions arising under this Act.' Terms so familiar need no definition, and it is quite obvious that they are to be taken in their ordinary and colloquial meaning. To decide is to render judgment, or, as the Supreme Judicial Court of Massachusetts in *Commonwealth v. Anthes*, 5 Gray 185, 253, put it, 'to decide' includes the power and right to deliberate, to weigh the reasons for and against, to see which preponderate, and to be governed by that preponderance'; while all questions which springing from the act involve its construction or application necessarily arise under it.

"It is the commission, therefore, which must determine whether the claimant has or has not been injured while in the performance of his duty or as a result of his own willful misconduct or intoxication; whether his disability is total or partial in character; whether upon review the amount awarded shall be increased or diminished; how it shall be apportioned among the beneficiaries; and when it may be commuted for cash, etc. But before any of these questions can come on for disposal it must first of all appear that the claimant is an employee of the United States, and this basic fact the commission must decide at the very threshold.

"I have no hesitation, therefore, in concluding that the commission has power when the question is properly presented to decide whether employees of the United States Shipping Board Emergency Fleet Corporation, or other persons, are entitled to the benefits of the provisions of the act.

"To this general conclusion, however, certain qualifying considerations may properly be added. Section 36 of the act provides with somewhat more detail than elsewhere appears for the manner in which the conclusions of the commission shall be delivered. This section is as follows:

"The commission, upon consideration of the claim presented by the beneficiary, and the report furnished by the immediate superior and the completion of such investigation as it may deem necessary, shall determine and make a finding of facts thereon and make an award for or against payment of the compensation provided for in this Act. Compensation when awarded shall be paid from the employees' compensation fund." (39 Stat. 749.)

"The propriety, therefore, of any expression by the commission or its individual members as to the rights of any persons or class of persons in advance of the presentation of a specific claim may well be doubted. Such an expression would certainly be in-

formal in character, could give rise to no substantive rights in any individual, and could have no binding future force upon the commission or its members. In view of the diversities which constantly appear among cases which upon first impression seem of the same general character the unwisdom of dealing with them in the mass would seem to be apparent."

1918 Supp., p. 438, sec. 40.

Assistant United States district attorney as "employee."—An assistant United States district attorney is not an employee of the United States. (1918) 31 Op. Atty.-Gen. 201, wherein it was said:

"The chief functions of a district attorney are to conduct proceedings in the grand jury room and prosecutions in the court. When they become too heavy for one man, the Attorney General is authorized to appoint an assistant district attorney. He is not appointed merely to assist the district attorney in the discharge of his duties. He is appointed an assistant district attorney and takes upon himself the discharge of some of the duties that would otherwise be discharged by the district attorneys. When he appears in the grand jury room or in court he appears with precisely the same authority the district attorney would have if present. Clearly, Congress has created an office to be filled by the Attorney General when required by the public needs, and the incumbent is an officer in the strictest sense."

Surgeon in Public Health Service as "civil employee."—Dr. von Ezdorf, a surgeon in the Public Health Service, having been appointed by the President by and with the advice and consent of the Senate, was an officer of the United States, and therefore not within the operation of the federal Employees' Compensation Act of September 7, 1916 (39 Stat. 742), which provides "compensation for employees of the United States suffering injuries while in the performance of their duties." (1917) 31 Op. Atty.-Gen. 184, wherein it was said:

"The act, in section 1, provides broadly that the United States shall pay compensation 'for the disability or death of an employee' as specified in that and following sections. And in section 40 it is provided that 'the term "employee" includes all civil employees of the United States and of the Panama Railroad Co.' Clearly, the word 'civil' was intended to exclude those employed in the military and naval service. And the question is what civilians in the service of the United States are described by the word 'employee.' In its broadest sense, an employee is anyone who is engaged in the service of or is employed by another. In this sense, all who serve the Government, from the highest official to a laborer employed by the day, are employees. But usually it is applied only to clerks, workmen, laborers, etc., and but rarely to the

higher officers of a corporation or government. In the usual acceptance of the term, it is understood to apply to those, other than officers, in the service of the Government. No one would think of calling a Cabinet officer, a Senator, or a Justice of the Supreme Court an employee of the Government. They are all civilians in the service of the Government. They can be distinguished from employees only upon the ground that they are officials or officers and, therefore, not employees as that word is commonly understood. In other words, 'there are two classes of public servants, officers, or those whose functions appertain to the administration of Government, and employees, or those whose employment is merely contractual.' *Moll v. Sbisà*, 25 South. 141. Ordinarily, without doubt, the term in question is understood as including only the latter class. The most that can be claimed is that it is possible to use that term in a broader sense, and that, therefore, the intent of Congress must be determined from the context and by applying the accepted rules of construction. In the present case, the actual context gives but little, if any, help, for no qualifying words are used. The most that

can be said is that the act, as a whole, shows that the chief concern of Congress was those whose compensation was small. No one is excluded because receiving compensation in excess of \$100. But the monthly benefits received are in no case to exceed two-thirds of a salary of \$100 a month.

"It is always permissible to consider the sense in which Congress has been accustomed to use a given word. I am not aware that it has ever been held that the term 'employee' of the Government in an act of Congress includes officers. And Congress has evidently understood that, if it intended to include officers, it must name them. Thus, the expression 'officers, clerks, and employees' or 'officers and employees' occurs in numerous statutes."

1918 Supp., p. 446, sec. 1.

Application to wages of Panama Canal employee.—This provision did not apply to the wages of employees of the Panama canal paid under authority of sec. 4 of the Panama Canal Act of Aug. 24, 1912 (see vol. IX, p. 111). (1918) 31 Op. Atty-Gen. 328.

LIMITATION OF VESSEL OWNERS' LIABILITY

Vol. VI, p. 336, sec. 4283. [First ed., vol. IV, p. 839.]

VI. MEASURE OF LIABILITY

1. Value of Vessel (p. 348)

"Vessel" as including float and disabled tug lashed to tug causing collision.—The value of a car float and a disabled tug lashed to either side of another tug which was actually responsible for a collision cannot, although they were all owned by the same person, be included, when limiting liability, conformably to this section, which provides that the liability of the owner of any vessel for any injury by collision shall in no case exceed the value of the interest of such vessel. *Liverpool, etc., Steam Nav. Co. v. Brooklyn Eastern Dist. Terminal*, (1919) 251 U. S. 48, 40 S. Ct. 66, 64 U. S. (L. ed.) — (*affirming* (C. C. A. 2d Cir. 1917) 250 Fed. 1021, 162 C. C. A. 664) wherein the court said: "This is a libel in admiralty brought by the petitioner against the respondent for a collision with the petitioner's steamship *Vauban* while it was moored at a pier in Brooklyn. The respondent does not deny liability but claims the right to limit it under Rev. Stats. §§ 4283, 4284 and 4285, to the value of the vessel that caused the damage. The moving cause was the respondent's steam tug *In-*

trepid which was proceeding up the East River, with a car float loaded with railroad cars lashed to its port side and on its starboard side a disabled tug, both belonging to the respondent. By a stipulation dated August 3, 1917, it was agreed that the damage sustained was \$28,036.98 with \$5,539.84 interest. The value of the tug *Intrepid* was found to be \$5,750, and the liability of the respondent was limited by the District Court to that sum with interest. The Circuit Court of Appeals affirmed the decree without an opinion. 250 Fed. 1021, 162 C. C. A. 664. The case is brought here on the question whether the value of the whole flotilla should not have been included in the decree.

"The car float was the vessel that came into contact with the *Vauban*, but as it was a passive instrument in the hands of the *Intrepid* that fact does not affect the question of responsibility. *The James Gray v. The John Fraser*, 21 How. 184, 16 L. Ed. 106; *The J. P. Donaldson*, 167 U. S. 599, 603, 604. 17 Sup. Ct. 951, 42 L. Ed. 292; *The Eugene F. Moran*, 212 U. S. 466, 474, 475, 29 Sup. Ct. 339, 53 L. Ed. 600; *Union Steamship Co. v. Owners of the Aracan*, L. R. 6 P. C. 127. The rule is not changed by the ownership of the vessels. *The John G. Stevens*, 170 U. S. 113, 123, 18 Sup. Ct. 544, 42 L. Ed. 969; *The W. G. Mason*, 142 Fed. 913, 917, 74 C. C. A.

83: *The Eugene F. Moran*, 212 U. S. 466, 475, 29 Sup. Ct. 339, 53 L. Ed. 600; *L. R. 8 P. C.* 127, 133. These cases show that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it. If this were a proceeding in rem it may be assumed that the car float and disabled tug would escape, and none the less that they were lashed to the *Intrepid* and so were more helplessly under its control than in the ordinary case of a tow.

"It is said, however, that when you come to limiting liability the foregoing authorities are not controlling—that the object of the statute is 'to limit the liability of vessel owners to their interest in the adventure.' (*The Main v. Williams*, 152 U. S. 122, 131, 14 Sup. Ct. 486, 488, 38 L. Ed. 381), and that the same reason that requires the surrender of boats and apparel requires the surrender of the other instrumentalities by means of which the tug was rendering the services for which it was paid. It can make no difference, it is argued, whether the cargo is carried in the hold of the tug or is towed in another vessel. But that is the question, and it is not answered by putting it. The respondent answers the argument with the suggestion that if sound it applies a different rule in actions in personam from that which, as we have said, governs suits in rem. Without dwelling upon that, we are of opinion that the statute does not warrant the distinction for which the appellant contends."

Determination of value of vessel—Tug and tow used together.—Where both a ship and a tug have been held in fault for a collision between the former and a car float in tow of the latter, the owner of the tug and float may limit its liability to the value of the tug. *The Begona II*, (D. C. Md. 1919) 259 Fed. 919, wherein it was said: "The facts of the collision out of which this case arises were told in an opinion handed down some time since. (D. C.) 241 Fed. 285. Both the ship and the tug were held in fault for the collision between the former and a car float in tow of the latter. Both tug and float belonged to the Atlantic Transport Company. It seeks to limit its liability to the value of the tug. The owners of the damaged cargo on the ship say that it must surrender the float as well."

"In the Sixth and Ninth circuits their contention would prevail. *The Columbia*, 73 Fed. 226, 19 C. C. A. 436; *Shipowners' & Merchants' Tugboat v. Hammond Lumber Co.*, 218 Fed. 161, 134 C. C. A. 575; *Thompson Towing & Wrecking Ass'n v. McGregor*, 207 Fed. 209, 124 C. C. A. 479. In the Second circuit it would not. *The Transfer No. 21*, 248 Fed. 469, 160 C. C. A. 469. None of the other six Circuit Courts of Appeals appear to have passed upon it. In *The Erie Lighter*, 250 Fed. 490, District (now Circuit) Judge Haight, of the New Jersey district, followed the rule prevailing in the Second circuit.

"Counsel for the owners of the tug and float claim that the principles laid down by the Circuit Court of Appeals for the First Circuit in *The Coastwise*, 233 Fed. 1, 147 C. C. A. 71, would logically require a like ruling there; but that is not absolutely certain, in view of the delicacy of the line which is sometimes drawn on this question even by the same court, as, for example, by the Circuit Court of Appeals for the Second Circuit between *The W. G. Mason*, 142 Fed. 913, 74 C. C. A. 83, and *The Transfer No. 21*, *supra*, on the one side, and *The Anthracite*, 168 Fed. 693, 94 C. C. A. 179, on the other.

"The fact, of course, is that the question is an extremely close one. In the Second circuit, the owner of two vessels, jointly engaged for profit in the doing of a single piece of work, may limit his responsibility for the damage done by them to the value of that one which was in fault. The liability is said to be strictly in rem, and yet the result may be, as it was in *The Transfer No. 21*, *supra*, and in the instant case, that the thing which physically did the damage is not called upon to answer, either in itself or through its owner, while the other vessel, which itself was not in collision at all, is held solely liable, because, in the person of its navigator, it was adjudged blameworthy.

"Moreover, if *The Anthracite* is properly decided, it is not always necessary that the navigator shall be himself either technically master of the ship which is responsible for his acts, or even be on that ship at the time the fault was committed. It suffices if he is actually directing its movements, when he makes the mistake, and it does the damage. But is not the captain of a tug, which has a tow lashed to it, or, as in the case at bar, is towing a craft which has neither power nor rudder of its own, the only person which has any control over its movements? However that may be, what the Supreme Court said and held in *The Eugene F. Moran*, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600, seems more in harmony with the practice in the Second circuit than with that prevailing in the Sixth and Ninth circuits.

"It follows that the owner of tug and float may limit its liability to the value of the former."

Vol. VI, p. 368, sec. 18. [First ed., vol. IV, p. 852.]

Collision with tow through negligence.—A tug owner, who has agreed to tow a vessel, may limit his responsibility under this section, when in the performance of the contract the tug negligently collides with and sinks the tow. *The Soerstad*, (S. D. N. Y. 1919) 257 Fed. 130, wherein the court said:

"The bald question raised by this case is whether a tug owner, who has agreed to tow a vessel, may limit his responsibility

under section 18 of the Act of June 26, 1884, c. 121, when in performance of that contract the tug negligently collides with and sinks the tow. The libellant's position depends upon what it supposes to be the effect of *Pendleton v. Benner Line*, 246 U. S. 353, 38 Sup. Ct. 330, 62 L. Ed. 770, and *Luckenbach v. McCahan Sugar Co.*, 248 U. S. 139, 39 Sup. Ct. 53, 63 L. Ed. —. In each of these cases the owner was held liable without limitation for breach of a covenant of seaworthiness in a charter which he personally signed. Hence it is reasoned the breach of any stipulation in a contract made by the owner personally must result in unlimited liability, whether or not the act which causes the damage be done with the privity of the owner.

"A warranty is a promise that a proposition of fact is true. Theoretically it is extremely difficult to interpret it otherwise than as a promise to make whole the warrantee, if the warranty turns out to be false, since a promise is normally a stipulation for some future conduct by the promisor. If it is so regarded, then clearly the breach of warranty is with the warrantor's privity, for by hypothesis he has deliberately refused to make whole the warrantee. However, it must be conceded that the law regards the breach as arising at once if the warranty be false, and the warrantee's loss as damages, not as a condition for the warrantor's performance. So viewed, the warrantor has misled the warrantee by falsely assuring him of the truth through the warranty, and the wrong consists of the assurance, the warrantee's reliance upon it, and his loss; just as in cases of deceit, except that no scienter is necessary. And so the action on warranty was originally 'a pure action of tort' (Ames, *History of Assumpsit*, 2 Harv. L. R. 1, 8), and arose a century before action on the case for assumpsit. The action sounded indeed in deceit (Y. B. 11 Ed. IV, 6, plac. 11), and it was not till 1778, in *Stuart v. Wilkins*, 3 Doug. 118, that assumpsit appears to have been used on a seller's warranty.

"Regarded in this way, which is probably the correct way historically, it follows inevitably that a breach of warranty should be held to be with the warrantor's privity, because all the elements of the cause of action are 'done, occasioned, or incurred' by him personally; that is to say, he personally gives the false assurance, he intends the warrantee to rely upon it, and the loss arises from the mistaken reliance, as he knows it will. Thus he personally occasions the loss. It is impossible to see how the Supreme Court could have held that knowledge of the falsity of the warranty was an element in the cause of action to which the warrantor must be privy. To have done so would have been in effect to treat the action as limited to one in fraud, not an action in warranty at all. The decisions, therefore, give no color to the libellant's position.

"Where, however, the promise, as a promise to tow a boat, involves the future conduct of the promisor, the loss is 'done, occasioned, or incurred,' not by the promisee and the promisee's reliance upon it, but by the failure to perform the act stipulated; and if that failure results without the knowledge or privity of the promisor, he is entitled to the immunity of the statute. It will so result when he delegates that performance, provided he selects such delegates as the contract permits, and the miscarriage results from their failure. Now the contract here obviously permitted the respondent to select for the towage any master whom he had good reason to suppose capable, and the breach occurred because that master did not do what the respondent promised to do. This breach was not 'done, occasioned, or incurred' with the respondent's privity, and its liability is limited.

"Perhaps all this analysis is unnecessary, for the opinion in *Richardson v. Harmon*, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110, presupposes throughout that the act of 1884 includes contracts, and the logical consequence of the libellant's position is that no promisor can limit his liability. I have thought it, nevertheless, better to show just where the distinction lay, for the Supreme Court in *Pendleton v. Benner Line*, *supra*, certainly had no such far-reaching purpose as the libellant supposes, and there is not the faintest reason in principle to confuse that case, which follows necessarily upon an analysis of warranty, with the case at bar, which does not."

Vol. VI, p. 377, sec. 3. [First ed., vol. IV, p. 857.]

- I. In general.
- II. Properly manned and equipped.
- IV. Seaworthy vessel.
- V. Navigation or management of ship.
- VI. Burden of proof.

I. IN GENERAL (p. 378)

General average — Jettisoned cargo.—This section does not apply to a case where a portion of a vessel's cargo is jettisoned in order to lighten the vessel and save it from being a total loss. Under such circumstances the vessel owner is not exonerated by this section from liability for general average contribution in respect of the cargo jettisoned. *The Ernestina*, (C. C. A. 1st Cir. 1919) 259 Fed. 772, 170 C. C. A. 572, wherein it was said: "Clearly, the chief purposes of the Harter Act were to authorize or effect substantial changes in the relations between vessel owners as common carriers and cargo owners as shippers. But we are unable to believe that this act was intended to work a radical change in the relations of coadventurers arising out of a voluntary sacrifice in the common interest in order to save the ship and remaining cargo from a peril of

the sea or from an act of God. The general principles underlying general average seem to us to put such a case as the one at bar, where no negligence, actual or imputable, is involved, outside the scope of the Harter Act. *Ralli v. Troop*, 167 U. S. 386, 15 Sup. Ct. 657, 39 L. Ed. 742. We find it impossible to believe that Congress intended to make it possible for the captain of the ship to sacrifice all or a large part of the cargo in order to save his ship, without any obligation on the part of the saved ship to contribute to the loss of the cargo owner. Only plain and unmistakable language would warrant a court in inferring a legislative purpose so inconsistent with the fundamental principles both of general average and of common carrier duty."

Seizure under legal process of the vessel exempts it from liability to carry freight received but not yet loaded. *The Brunswick*, (E. D. La. 1920) 263 Fed. 907.

II. PROPERLY MANNED AND EQUIPPED (p. 382)

Competency of pilot.—Where an accident to a tug and tow is due to the drunken condition of the pilot of the tug, the owners of the tug are not chargeable with any lack of care and diligence in employing him so as to prevent from limiting their liability, where it appears that he was a licensed pilot, that the owners made inquiries regarding him of his former employers, who recommended him, and that for more than a month prior to the accident his conduct was entirely satisfactory. *The Ice King*, (C. C. A. 2d Cir. 1919) 261 Fed. 897.

IV. SEAWORTHY VESSEL (p. 384)

Defective boiler.—In an action to recover for injuries caused by an explosion of a ship's boiler, it appeared that the boiler was old and defective, and that it had not been properly repaired and inspected. It was held that the boiler was not in such safe and suitable condition as to warrant its use in the business in which the ship was engaged, but was unseaworthy prior to and at the time of the action, and that the owners of the vessel were not entitled to limit their liability. *The Annie*, (E. D. Va. 1919) 261 Fed. 797.

V. NAVIGATION OR MANAGEMENT OF SHIP (p. 389)

Knowledge of impending storm.—For the master of a small vessel to put to sea with knowledge of an approaching hurricane is negligence which will be attributed to the owners and preclude limitation. *Texas, etc., Steamship Co. v. Parker*, (C. C. A. 5th Cir. 1920) 263 Fed. 864. The court said: "The remaining question is whether the negligence of the master is to be attributed to the owners of the *Pilot Boy*, so as to prevent a limitation of liability or an exemption from liability under the Harter Act. Guyton tes-

tified that the *Pilot Boy* was owned by appellant, that he was manager of appellant, and that he had the management of the *Pilot Boy*, the loading of her cargo, and her movements. The evidence tended to show that he was in Galveston the day the *Pilot Boy* departed. He said he was present when the master telephoned the Weather Bureau. The evidence also tended to show that he told the master that the boat was loaded and to go ahead. Conceding that Guyton gave no order to the master to sail, and that the master had the responsibility of deciding, still the evidence tended to show that Guyton knew of the master's decision before the departure of the *Pilot Boy*, and, if it was a negligent one, knew of the master's negligence. Guyton's knowledge was that of his principal, the appellant, and established privity on the part of the owners, with the negligence of the master, and prevents their limiting their liability for the loss. *The Benjamin Noble*, 244 Fed. 98, 156 C. C. A. 523.

"The *Pilot Boy* may have been seaworthy for ordinary weather. She was not, because of her size and strength, a boat adapted to live out a hurricane. If she left her home port, when her master and manager knew, or should have known, that a tropical hurricane was approaching her path, dangerous for any kind of vessels to approach, and especially one of her limited size and resistance, then the owners would be responsible for her departure from her home port in an unseaworthy condition, in view of the weather she was likely to encounter, and could not claim the protection of the Harter Act."

Leaving hatches open is not an act connected with the management of the vessel. *Andean Trading Co. v. Pacific Nav. Co.*, (C. C. A. 2d Cir. 1920) 263 Fed. 559. The court said:

"The District Judge found that the damage must have been caused by sea water coming through the open hatches, but that leaving them open was an act of management of the vessel, within section 3 of the Harter Act, and because the Railroad Company had exercised due diligence to make the vessel seaworthy it was not liable. Accordingly he dismissed the libel. Section 3 of the Harter Act must be read in connection with section 1, which prohibits any provision in the bill of lading from relieving owners of liability for damage arising from any fault or failure in proper loading, stowage, custody, care, and proper delivery of cargo. For such negligence a common carrier cannot escape liability. The duty of proper care and custody continues after stowage of the cargo until delivery at destination. Acts of the master on the voyage, resulting in damage to cargo, may be either acts in the navigation and management of the vessel, under section 3, or in the care and custody of the cargo during the voyage, under section 1. For the first the owners are not liable, but for the latter they are.

"The ventilators had all been removed,

and the only way to ventilate the cargo was to leave the hatches open in fine weather. When near New York the steamer ran into an easterly gale, and had to be hove to for several hours. The act of opening and closing the hatches related, not to the ship, nor to the ship and cargo, though primarily to the ship. It related primarily, and indeed exclusively, to the cargo. Therefore it was not an act of management of the vessel. *The Germanic*, 124 Fed. 1, 59 C. C. A. 521; *Id.*, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610. It was not an act, to use the language

of the court in *Knott v. Botany Mills*, 179 U. S. 69, 74, 21 Sup. Ct. 30, 32 (45 L. Ed. 90), 'primarily connected with the navigation or the management of the vessel, and not with the cargo.' The District Judge disapproved the decision in *The Jean Bart* (D. C.) 197 Fed. 1002, which we think correctly construes the Harter Act."

VI. BURDEN OF PROOF (p. 391)

Seaworthy vessel.—To same effect as original annotation, see *The Annie*, (E. D. Va. 1919) 261 Fed. 797.

MINERAL LANDS, MINES AND MINING

Vol. VI, p. 508, sec. 2318. [First ed., vol. V, p. 4.]

Generally.—"Public lands containing valuable mineral deposits are opened to exploration, occupation, and acquisition for mining purposes; and as an inducement to effective exploration the discoverer is given the right to locate a substantial area embracing his discovery, to hold the same and extract the mineral without payment of rent or royalty, so long as he puts one hundred dollars' worth of labor or improvements—called assessment work—upon the claim each year, and to demand and receive a patent at a small sum per acre after he has put five hundred dollars' worth of labor or improvements upon the claim.

"In advance of discovery an explorer in actual occupation and diligently searching for mineral is treated as a licensee or tenant at will, and no right can be initiated or acquired through a forcible, fraudulent, or clandestine intrusion upon his possession. But if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another enters peaceably, and not fraudulently or clandestinely, and makes a mineral discovery and location, the location so made is valid and must be respected accordingly. *Belk v. Meagher*, 104 U. S. 279, 287, 26 L. ed. 735, 738, 1 Mor. Min. Rep. 510; *Union Oil Co. v. Smith*, 249 U. S. 337, 346-348, 63 L. ed. 635, 640, 641, 39 Sup. Ct. Rep. 308, and cases cited.

"A location based upon discovery gives exclusive right of possession and enjoyment, is property in the fullest extent, is subject to sale and other forms of disposal, and, so long as it is kept alive by performance of the required annual assessment work, prevents any adverse location of the land. *Gwillim v. Donnellan*, 115 U. S. 45, 49, 29 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110, 15 Mor. Min. Rep. 482; *Swanson v. Sears*, 224 U. S. 180, 56 L. ed. 721, 32 Sup. Ct. Rep. 455.

"While the two kinds of location—lode and placer—differ in some respects, a dis-

covery within the limits of the claim is equally essential to both. But to sustain a lode location the discovery must be of a vein or lode of rock in place, bearing valuable mineral (sec. 2320), and to sustain a placer location it must be of some other form of valuable mineral deposit (sec. 2329), one such being scattered particles of gold found in the softer covering of the earth. A placer discovery will not sustain a lode location, nor a lode discovery a placer location. As is said by Mr. Lindley, § 323: 'Gold occurs in veins of rock in place, and when so found the land containing it must be appropriated under the laws applicable to lodes. It is also found in placers, and when so found the land containing it must be appropriated under the laws applicable to placers;' and again, § 419: 'It is the mode of occurrence, whether in place or not in place [meaning in rock in place], which determines the manner in which it should be located.'

"Location is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim. Nor does assessment work take the place of discovery, for the requirement relating to such work is in the nature of a condition subsequent to a perfected and valid claim and has 'nothing to do with locating or holding a claim before discovery.' *Union Oil Co. v. Smith*, *supra*, p. 350. In practice, discovery usually precedes location, and the statute treats it as the initial act. But, in the absence of an intervening right, it is no objection that the usual and statutory order is reversed. In such a case the location becomes effective from the date of discovery; but in the presence of an intervening right it must remain of no effect. *Creede & C. Creek Min. & Mill Co. v. Uinta Tunnel Min. & Transp. Co.*, 196 U. S. 337, 348-351, 49 L. ed. 501, 508, 509, 25 Sup. Ct. Rep. 266, and cases cited; *Union Oil Co. v. Smith*, *supra*, p. 347.

"When an application for a patent to mineral land is presented at the local land

office and an adverse claim is filed in response to the notice required by the statute (§ 2325), further proceedings upon the application must be suspended to await the determination by a court of competent jurisdiction of the question whether either party, and, if so, which, has the exclusive right to the possession arising from a valid and subsisting location. A suit appropriate to the occasion must be brought by the adverse claimant, and in that suit each party is deemed an actor and must show his own title, for the suit is 'in aid of the Land Department.' If neither establishes the requisite title the judgment must so declare. Rev. Stat. § 2326, Act March 3, 1881, chap. 140, 21 Stat. at L. 505, [6 Fed. Stat. Annot. 2d ed. p. 599]; *Jackson v. Roby*, 109 U. S. 440, 27 L. ed. 990, 3 Sup. Ct. Rep. 301; *Perego v. Dodge*, 163 U. S. 160, 167, 41 L. ed. 113, 118, 16 Sup. Ct. Rep. 971, 18 Mor. Min. Rep. 364; *Brown v. Gurney*, 201 U. S. 184, 190, 50 L. ed. 717, 720, 26 Sup. Ct. Rep. 509; *Healey v. Rupp*, 37 Colo. 25, 28, 80 Pac. 1015; *Tonopah Fraction Min. Co. v. Douglass*, 123 Fed. 936, 941. If final judgment be given in favor of either party,—whether the applicant for patent or the adverse claimant,—he may file in the land office a certified copy of the judgment, and then will be entitled, as respects the area awarded to him, to go forward with the patent proceedings and to have the judgment recognized and respected as a binding adjudication of his exclusive right to the possession. Rev. Stat. § 2336. *Cole v. Ralph*, (1920) 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, reversing (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

Vol. VI, p. 509, sec. 2319. [First ed., vol. V, p. 4.]

State statute as local custom.—"The laws of the United States with reference to the location of mining claims expressly recognize the validity of local mining regulations and customs governing locations, and state statutes are construed to have the same force and effect as such regulations." *Stock v. Plunkett*, (Cal. 1919) 183 Pac. 657.

Department rules not controlling.—General land department regulations are not controlling as to mining locations.

"These rules clearly refer only to contests arising out of entries of land initiated in a local land office and in which the contest also originated in that office. These rules have no application to mining claims, for the reason that mining locations are not initiated in any local land office of the government, but take their origin under authority of the United States statutes 'under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States.'" *Double Eagle*

Min. Co. v. Hubbard, (Cal. App. 1919) 183 Pac. 282.

Number of claims.—There is no federal law or regulation made in pursuance thereof limiting the number of placer mining claims an individual or association of individuals may make. Fraud or wrongdoing, therefore, is not to be inferred or imputed solely because of the number of locations made in any particular case. *U. S. v. California Midway Oil Co.*, (S. D. Cal. 1919) 259 Fed. 343.

Vol. VI, p. 512, sec. 2320. [First ed., vol. V, p. 8.]

III. DISCOVERY OF VEIN OR LODE (p. 517)

"Discovery of the vein or lode."—In *U. S. v. Safe Invest. Gold Min. Co.*, (C. C. A. 8th Cir. 1919) 258 Fed. 872, 169 C. C. A. 592, the court said regarding the expression "discovery of the vein or lode:"

"We do not think an extended discussion of the authorities cited is necessary. They clearly indicate that the expression 'discovery of the vein or lode' has no rigidly fixed meaning; and this, of necessity, owing to widely varying conditions to which the expression must be applied.

"In *Erhardt v. Boaro*, 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113, the court, in speaking of the requisites of a valid location, said:

"There must be something beyond a mere guess on the part of the miner to authorize him to make a location which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence."

"In *King v. Mining Co.*, 152 U. S. 222, 227, 14 Sup. Ct. 510, 511 (38 L. Ed. 419), the court, in speaking of section 2320, R. S., said it was 'in effect a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode.'

"In *Chrisman v. Miller*, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770, the court said:

"When the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. . . . But even in such a case . . . there must be such a discovery of minerals as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining."

"Lindley on Mines, § 336, cites approvingly the definition of Judge Hawley contained in Book v. Justice Mining Co., (C. C.) 58 Fed. 106, 120:

"When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

Vol. VI, p. 523, sec. 2322. [First ed., vol. V, p. 13.]

III. EXTRALATERAL RIGHTS (p. 527)

Extent of right.—In Maine the proprietor of lands owns all of the soil, rock, ore, and other natural products lying directly beneath the surface. His boundaries are planes produced by projecting his boundary lines vertically downward and upward. But a different rule prevails in the case of mining claims derived from the public domain. The boundaries of such claims are governed by the so-called "apex law." *Arizona Commercial Min. Co. v. Iron Cap Copper Co.*, (Me. 1920), 110 Atl. 429.

Vol. VI, p. 532, sec. 2323. [First ed., vol. V, p. 18.]

Tunnel site is a "mining property" within a state statute providing certain remedies against interference with such property. *Primeau v. Acton*, (Colo. 1919) 185 Pac. 255.

Vol. VI, p. 533, sec. 2324. [First ed., vol. V, p. 19.]

I. In general.

IV. Notice of location.

I. IN GENERAL (p. 535)

Necessity of compliance with statute.—The statutes, federal and state, provide the method by which the rights of the locator may be acquired, preserved and protected. If he has complied with these requirements, or substantially complied with them, his claim is protected from intrusion by others. But he does not withdraw his alleged claim from the public domain, nor deprive another of a right to locate upon the same ground, unless he has complied with the mining statutes or is in actual possession of the land." *Blake v. Cavins*, (1919) 25 N. M. 574, 185 Pac. 374, holding relocation notice to be invalid under state law.

IV. NOTICE OF LOCATION (p. 541)

Failure to comply with state law.—A notice of location which complies with the federal law and gives actual notice of the prior location is good though it is not dated as re-

quired by a state statute. *Stock v. Plunkett*, (Cal. 1919) 183 Pac. 657.

Vol. VI, p. 563, sec. 2326. [First ed., vol. V, p. 35.]

VII. Parties.

VIII. Pleadings.

IX. Evidence and proof.

VII. PARTIES (p. 568)

Citizenship of adverse claimant.—In *Ginaca v. Peterson*, (C. C. A. 9th Cir. 1920) 262 Fed. 904, it was contended that an adverse claimant to unpatented mining claims must be a citizen of the United States or must have declared his intention to become a citizen. Answering this contention, the court said:

"That is the rule, doubtless, where the adverse claimant endeavors to prosecute an adverse suit against one who applies for a patent under the mining laws of the United States, and herein such adverse claimant seeks to obtain title to the mining claim for himself or herself. On the other hand, an alien is not prevented from owning unpatented mining claims, and an alien so owning may protect his property rights in the mining claims in adverse proceedings before the Land Department of the United States or in the courts, although he may not acquire title from the United States through such proceedings. *Altoona Q. M. Co. v. Integral Q. M. Co.*, 114 Cal. 100, 45 Pac. 1047.

"It is urged that, where the defendants apply for patent, the plaintiff in a suit pending prior to such application should, by supplemental proceedings, base the existing suit upon the rights granted by section 2326 of the Revised Statutes, and have the controversy determined accordingly. This may be accepted as correct where the adverse claimant is lawfully qualified to receive a patent from the United States, and, as already indicated, where she seeks such patent in the adverse suit. But the proposition is not pertinent to the case before us, for here the adverse claimant is not qualified to receive patent from the United States, and has not sought such patent in these suits, but only endeavors to protect her property from being unlawfully taken from her, and from having a cloud put upon the title by the unlawful acts of the appellants."

Husband as proper party plaintiff after conveyance of interest in placer claim to wife.—The conveyance by a husband to his wife of his interest in a placer mining claim under such circumstances that by the local law such interest became community property which he could lease or convey without the wife's concurrence, and could sue in respect of it in his own name alone, did not make him an inadmissible party plaintiff in a suit in support of such claim adverse to a conflicting lode location. *Cole v. Ralph* (1920) 252 U. S. 296. 40 S. Ct.

321, 64 U. S. (L. ed.) —, *reversing* C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

Party to unrecorded contract executed by locators of placer mining claim.—The interest of a party to an unrecorded contract executed by the locators of a placer mining claim which gave him a right to a specified share in the output or proceeds of the claim, and possibly a right to have it worked and thereby made productive, though not such as to make him an essential party to a suit in support of such claim adverse to a conflicting lode location, is such as to make him an admissible party plaintiff. *Cole v. Ralph*, (1920) 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

Effect of attachment proceedings against party plaintiff prior to beginning of adverse suit.—Attachment proceedings against a placer claimant, begun before he filed a claim adverse to a conflicting lode location, but not resulting in a transfer of his title until after an adverse suit was begun, did not make him an inadmissible party plaintiff in the latter suit. *Cole v. Ralph*, (1920) 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) 81, 161 C. C. A. 133.

VIII. PLEADINGS (p. 570)

Mistake in name of party.—A mistake in the given name of a party to adverse proceedings in the land office is properly disregarded by the court in a suit in support of the adverse claims, where this was a mere inadvertence and did not mislead or prejudice anyone. *Cole v. Ralph*, (1920) 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

IX. EVIDENCE AND PROOF (p. 571)

Discovery.—Recitals of discovery in the recorded notices of location of lode mining claims are mere ex parte self-serving declarations on the part of the locators, and are not evidence of discovery. *Cole v. Ralph*, (1920) 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

Admissions.—Placer claimants, by mistakenly posting a notice stating that they had relocated the ground as a lode claim, did not thereby admit the validity of a prior conflicting lode location, where the mistake was promptly corrected the next day by the substitution of another notice stating that the ground was located as a placer claim, and no one was misled by the mistake. *Cole v. Ralph*, 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

Contents of assay reports as admissible evidence.—Defendant in a suit by placer mining claimants against a conflicting lode claimant has no right to complain that he was not permitted, on cross-examination of

a witness for the plaintiffs, to show the contents of certain assay reports, where, though some of these reports were at first excluded, they were all produced under a new ruling of the court except two, which covered samples taken from openings made after the placer claims were located, and defendant did not call for them when the witness was recalled, or reserve any exceptions to the new ruling, and it is more than inferable from the record that he acquiesced in it. *Cole v. Ralph*, (1920) 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

Vol. VI, p. 577, sec. 2330. [First ed., vol. V, p. 42.]

Extent of claim.—Under this section and R. S. sec. 2331 (6 Fed. Stat. Ann. (2d ed.) 579) no mining claim shall exceed 20 acres for an individual or 160 acres for an association of eight persons. Any device, therefore, by which a person or an association may acquire more than the prescribed amount is a violation of law and a fraud upon the government. *U. S. v. California Midway Oil Co.*, (S. D. Cal. 1919) 259 Fed. 343.

Vol. VI, p. 579, sec. 2331. [First ed., vol. V, p. 43.]

Policy and purpose of statute.—"It is the policy of the government to have mining locations in compact form. No shoestring claim will receive the government's sanction. Locations upon unsurveyed lands, as well as those upon surveyed lands, are within the purview of the statute. If the lands have been surveyed by the government, the location, in its exterior limits, must conform to the public survey, if reasonably practicable; if the land be unsurveyed, the location, as reasonably as practicable, must be rectangular in form, with east and west and north and south boundary lines, and otherwise approximating conformity to the public survey system within the limits of practicability." *Dripps v. Allison's Mines Co.*, (Cal. App. 1919) 187 Pac. 448.

Conformity not practicable.—Conformity with the United States public survey system would not be reasonably practicable in the location of public land surrounded by prior claims; and whether the claim be on surveyed or unsurveyed lands, if it be surrounded by such prior claims, its boundaries may conform thereto regardless of the irregularity of the form thus produced. *Dripps v. Allison's Mines Co.*, (Cal. App. 1919) 187 Pac. 448.

Plat and survey not essential to location.—"The plat and survey referred to by the section . . . are the plat and survey to be made and filed when the application for a patent is made, and are not an essential to the perfecting of a valid location." *Dripps v. Allison's Mines Co.*, (Cal. App. 1919) 187 Pac. 448.

Vol. VI, p. 580, sec. 2332. [First ed., vol. V, p. 44.]

Necessity of discovery as dispensed with by virtue of this section.—The necessity of a discovery to sustain a lode mining location is not dispensed with nor may its absence be cured by virtue of the provisions of this section, that evidence of holding and working a mining claim for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated shall be sufficient to establish a right to a patent thereto in the absence of any adverse claim. *Code v. Ralph*, (1920) 252 U. S. 286, 40 S. Ct. 321, 64 U. S. (L. ed.) —, reversing (C. C. A. 9th Cir. 1918) 249 Fed. 81, 161 C. C. A. 133.

Vol. VI, p. 581, sec. 2333. [First ed., vol. V, p. 45.]

Knowledge of lode or vein—*Vein known to exist at time of application.*—To same effect as original annotation, see *South Butte Min. Co. v. Thomas*, (C. C. A. 9th Cir. 1919) 260 Fed. 814, 171 C. C. A. 540, wherein the court said concerning this section:

"Long before the present case arose this court had occasion to construe that section, in the case of *Migeon et al. v. Montana Cent. Ry. Co.*, 77 Fed. 249, 23 C. C. A. 156, where we said of it:

"This section of the statute was primarily intended for the benefit and protection of the locators of placer claims. If a lode is known to exist within the boundaries of a placer claim, the applicant for a patent must state that fact, and then, by paying \$5 an acre for that portion of the ground, and \$2.50 an acre for the balance, a patent will issue to him, covering both the lode and placer ground; but if the lode is known to exist, and is not included in the application for a patent, then it will be construed as a conclusive declaration that the owner of the placer claim has no right of possession, by virtue of his patent for the placer ground, to the vein or lode. It matters not whether there is a lode or vein actually within the limits, which subsequent developments may prove, if it is not known to exist at the time of the application, the patent for the placer claims will include such lode or vein. In such cases the Supreme Court has repeatedly declared that it is not enough that there may have been some indications, by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other precious metals to justify their designation as "known veins or lodes"; that, in order to meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. *Mining Co. v. Reynolds*, 124 U. S. 374, 383, 8 Sup. Ct. 598, 603 [31 L. Ed.

466]; *U. S. v. Iron Silver Min. Co.*, 123 U. S. 674, 683, 9 Sup. Ct. 195, 199 [32 L. Ed. 571]; *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 U. S. 394, 404, 424, 12 Sup. Ct. 543, 553 [36 L. Ed. 201]; *Sullivan v. Mining Co.*, 143 U. S. 431, 12 Sup. Ct. 555 [36 L. Ed. 214]; *Brownfield v. Bier* [15 Mont. 403] 39 Pac. 461, and authorities there cited. This construction as to the meaning of section 2333 is, in our opinion, founded in reason, and is in harmony with the construction given by the courts to the other sections of the statute relative to the rights of locators of mining claims upon the public lands of the United States. But, in any event, the rule, as above stated, is now too well settled to be departed from.

"The decisions of the Supreme Court upon controversies arising between mineral claimants on one side and parties holding town-site patents on the other are applicable to this class of cases. The doctrines therein announced are directly in line with the cases we have referred to. In such character of cases the court has repeatedly declared that, under the acts of Congress which govern such cases, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be "known" to contain mineral of such extent and value as to justify expenditures for the purpose of extracting them and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. *Deffebach v. Hawke*, 115 U. S. 393, 404, 6 Sup. Ct. 95, 101 [29 L. Ed. 423]; *Davis' Adm'r v. Weibbold*, 130 U. S. 507, 525, 11 Sup. Ct. 628, 635 [35 L. Ed. 238]; *Dower v. Richards*, 151 U. S. 658, 663, 14 Sup. Ct. 452, 454 [38 L. Ed. 305]."

Vol. VI, p. 593, sec. 2347. [First ed., vol. V, p. 55.]

Relinquishment of entry.—The Coal Lands Act contains no restrictions against the relinquishment of rights by an entryman to another. *Weikel v. Davis*, (Wash. 1919) 186 Pac. 323.

1918 Supp., p. 461, sec. 1.

Public lands reserved as national forests are affected by this act authorizing exploration for and disposition of potassium. (1919) 31 Op. Atty.-Gen. 433, wherein it was said:

"The legislative history of the Potassium Act confirms the view that it was intended to apply to public lands reserved for national forest purposes. It was Senate bill 2156, and as introduced it applied to 'public lands belonging to the United States.' The com-

mittee in its report recommended the substitution of the words 'lands of the United States not known to contain valuable deposits of the kinds above described.' (S. Rept. 100, 65th Cong., 1st sess.) Objection to this amendment was made on the ground that the Act would thus be made to apply to national parks and lands purchased for watershed protection in the Appalachian region under the Act of March 1, 1911 (36 Stat. 961). It was therefore amended by substituting for the words of the committee amendment the words of the Act 'public lands of the United States.' No specific reference was made to the effect of the Act on the public

lands reserved for national forests, and the effect of the words adopted, as stated by Senator Nelson and accepted by the senator in charge of the bill, was that 'The term "public land" has a well-defined meaning in the land laws of the United States. It means land that is open to public entry of some kind.' (55 Cong. Rec. 5936.) This definition would include lands in national forests that were open to entry under the general mining law, but would not include lands in national parks or the Appalachian reserves, which were not subject to entry under any general law."

MOTOR BOATS

Vol. VI, p. 642, sec. 3. [First ed., 1912 Supp., p. 39.]

"Motor boats as defined in this Act."—The language of the proviso of this section, "motor boats as defined in this Act," means

vessels under sixty-five feet in length, and does not apply to a vessel eighty-seven feet long which is propelled by sail and machinery. *The Alice M. Guthrie*, (E. D. Va. 1919) 257 Fed. 472.

NATIONAL BANKS

Vol. VI, p. 654, sec. 5136. [First ed., vol. V, p. 95.]

III. Directors, president, and other officers.

3. President.
4. Vice-president.
5. Cashier.

V. "Incidental powers as shall be necessary," etc.

4. Indorser, guarantor, or surety.
5. "Discounting and negotiating evidences of debt."
 - b. Purchase of notes, etc.
6. "Receiving deposits."
 - b. Special deposits.
8. Collecting agents.
12. Miscellaneous transactions.
 - a. Independent business enterprises.

III. DIRECTORS, PRESIDENT, AND OTHER OFFICERS

3. President (p. 657)

Powers.—Where a foreign creditor of a decedent's estate is an incorporated bank, its president has authority as an incident of his office, to submit the bank's claim to a court in the state in which the bankrupt resided and bind the bank by such action. *Old Dominion Trust Co. v. Oxford First Nat. Bank*, (C. C. A. 4th Cir. 1919) 260 Fed. 22, 171 C. C. A. 58.

4. Vice-President (p. 659)

The vice-president of a bank, though acting as its principal executive officer, has no authority to bind the bank by pledging its credit in order to borrow money for his own personal use. This is especially true where he forges resolutions of the board of directors purporting to authorize him to obtain the loan and the transaction is so out of the usual course of banking business as to put the lender on inquiry. *Drovers', Nat. Bank v. Sutton First Nat. Bank*, (C. C. A. 4th Cir. 1919) 260 Fed. 9, 171 C. C. A. 45.

5. Cashier (p. 659)

Acting as loan agent for depositor.—The cashier of a national bank has no power as such to enter into an agreement to loan out the money of a depositor, and his acts in so doing do not bind the bank. *Holmes v. Uvalde Nat. Bank*, (Tex. Civ. App.) 1920) 222 S. W. 640.

V. "INCIDENTAL POWERS AS SHALL BE NECESSARY," ETC.

4. Indorser, Guarantor or Surety (p. 665)

In general.—To same effect as second paragraph of original annotation, see *Ellis v. Citizens' Nat. Bank* (1919) 25 N. M. 319, 183 Pac. 34, 6 A. L. R. 166.

Borrower representing bank.—When a national bank, desiring to borrow money, puts forward a third person as borrower, the

proceeds of the loan being received and used by the bank, it has power to guarantee the repayment of the loan by the ostensible borrower. *Ellis v. Citizens' Nat. Bank*, (1919) 25 N. M. 319, 183 Pac. 34, 6 A. L. R. 166.

5. "Discounting and Negotiating Evidences of Debt"

b. Purchase of Notes, etc. (p. 669)

Purchase of drafts with bills of lading attached.—Under this section of the Revised Statutes, a national bank is allowed to discount and negotiate drafts, bills of exchange, and other evidence of indebtedness. It is thereby authorized to purchase drafts with bills of lading attached. When, as a consequence of such purchase, it becomes the owner of personal property, this is but an incident to the purchase of the draft and is not prohibited. *Citizens' Bank, etc., Co. v. Harpeth Nat. Bank*, (1919) 120 Miss. 505, 82 So. 329.

6. "Receiving Deposits"

b. Special Deposits (p. 670)

Special deposit defined.—"A special deposit implies the custody of property without authority in the custodian to use it, and the right of the owner to receive back the identical thing deposited.

"In the case of a special deposit, the bank assumes merely the charge or custody of property, without authority to use it, and the depositor is entitled to receive back the identical money or thing deposited. In such case, the right of property remains in the depositor, and if the deposit is of money, the bank may not mingle it with its own funds. The relation created is that of bailor and bailee, and not that of debtor and creditor." 3 R. C. L. 522." *Tuckerman v. Mearns*, (App. Cas. D. C. 1919) 262 Fed. 607.

8. Collecting Agents (p. 673)

To same effect as original annotation, see *Taylor, etc., Co. v. National Bank*, (N. D. Ohio 1919) 262 Fed. 166, holding, however, that such an action may be maintained only against the receiving bank. The court said:

"Upon this proposition there can be no doubt. See *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392; *Exchange National Bank v. Third National Bank*, 112 U. S. 276, 5 Sup. Ct. 141, 28 L. Ed. 722. Neither of these cases has ever been overruled, criticised, or distinguished, and while I do not find that the question involved has ever again been under consideration by the Supreme Court, I do find that these cases have ever since been uniformly followed by all inferior federal courts. The law, as established by these cases, is that a bank receiving commercial paper in one state for collection in another state from a maker or drawer residing there is liable for any neglect of duty occurring in its collection, whether arising from the default of its own officers or employes, or from that of its correspondent or its agents

in another state. This obligation, it is true, may be modified by contract; but a modification of the bank's obligation will not be inferred from knowledge that the receiving bank must, or intends, in due course of business, to forward the same to another bank for collection. The sound reasoning and policy upon which this rule rests is sufficiently stated in *Exchange National Bank v. Third National Bank*, *supra*, and in *Reeves v. State Bank*, 8 Ohio St. 465.

"The contrary doctrine is that a bank receiving commercial paper and performing these duties is merely obliged to exercise due care in the selection of competent agents and in the transmission of such paper with proper instructions. The result of this doctrine is that the receiving bank is impliedly authorized to select subagents, who thereby become agents of the owner of the paper, and is not liable for the neglect or default of its subagents. On the other hand, under the correct doctrine as established by the decisions above cited, the receiving bank contracts to make collection, and is, in effect, an independent contractor, which may avail itself of such agencies as are necessary or proper in the performance of its contract, but remains itself liable to the owner for due performance by its agents or representatives thus employed, and they do not become subagents of the owner; nor is the receiving bank exonerated from liability to the owner, no matter what degree of care or diligence it exercises in selecting its agents.

"The case of *Bank of Washington v. Triplett*, 1 Pet. 25, 7 L. Ed. 37, sometimes cited as holding the contrary, is distinguished, on the ground that the bank, upon the facts, was held to have contracted directly with the holder of the bill to collect it, and that the forwarding bank was the holder's agent merely to transmit the bill for collection. This is also the doctrine in Ohio. See *Reeves v. State Bank*, 8 Ohio St. 466. This case has been followed once, and the law therein stated has been approved twice in later cases. There is nothing to the contrary in *Hilsinger v. Trickett*, 86 Ohio St. 286, 99 N. E. 305, Ann. Cas. 1913D 421, as contended on behalf of plaintiff. In this case, Judge Spear, delivering the opinion, says that it is unnecessary to consider the proposition stated in *Reeves v. State Bank*, *supra*, because neither the bank taking the paper for collection nor the bank to which it was forwarded was shown to be guilty of any neglect of duty, and, further, no loss to the owner had resulted from the alleged negligence.

"Thus far there is no difficulty. The question, however, remains to be considered whether or not the real owner may maintain an action against the bank or agent to which the paper was forwarded by the bank first taking it for collection, as well as against the receiving bank. It is undisputed that the owner may maintain an action against the receiving bank. The apparent difficulty in plaintiff's situation has impelled me to give

the most careful consideration to this question. As a result, I am of the opinion that plaintiff may maintain an action only against the bank with which it made its contract for collection, and not against any other bank to which the receiving bank forwarded it, based on the latter's negligence or breach of duty, as a result of which collection was not made. This conclusion is amply supported by the following authorities: *Hoover v. Wise*, 91 U. S. 308, 23 L. Ed. 392; *Hyde v. First National Bank*, 7 Biss. 156, 12 Fed. Cas. 1110, No. 6970; *Balcomb v. Old National Bank*, (C. C. A. 7) 201 Fed. 680, 120 C. C. A. 27; *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459; *Morris v. First National Bank of Allegheny*, 201 Pa. 160, 50 Atl. 1000; note of editor, 50 Am. St. Rep. 123, 124."

12. Miscellaneous Transactions

a. Independent Business Enterprises (p. 674)

Operation of street railroad.—A national bank is without power to obligate itself to operate a street or interurban railroad, and it is not estopped by its purchase and temporary operation of such a railroad from pleading its want of power. *Gress v. Ft. Laramie*, (1919) 100 Ohio St. 35, 125 N. E. 112, 8 A. L. R. 242.

Vol. VI, p. 687, sec. 5138. [First ed., vol. V, p. 95.]

"City" as including "city and county of Honolulu."—In (1917) 31 Op. Atty-Gen. 120, an opinion was rendered that a national bank could be chartered at Schofield Barracks, Territory of Hawaii, with a capital of \$100,000. The material part of the opinion was as follows:

"Schofield Barracks is a place within the boundaries of a municipal corporation known as 'the city and county of Honolulu,' which consists of the island of Oahu, containing some 600 square miles, and many outlying islands, some of them separated from the island of Oahu by 1,100 miles of water. The city of Honolulu proper is the seat of this municipal corporation. Schofield Barracks is 21 miles from the city of Honolulu proper and is not a part of it except in the sense that both places fall within the boundaries of the municipal corporation known as 'the city and county of Honolulu.' The intervening territory is either devoted to agriculture or is uncultivated, practically devoid of improvements, and is very thinly populated.

"While the population of the entire 'city and county of Honolulu' according to the census of 1910 is 82,028, the population of Schofield Barracks is approximately only 8,000.

"Unless, therefore, 'the city and county of Honolulu,' which embraces Schofield Barracks, is a city within the meaning of the

last sentence of section 5138, there is nothing to prevent the organization of a national bank at Schofield Barracks with a capital of \$100,000.

"I am of the opinion that it would be a *reductio ad absurdum* to say that a political subdivision of the character of 'the city and county of Honolulu' is a 'city' within the meaning of this provision of law. The name itself, 'the city and county of Honolulu,' indicates that the lawmaker had in mind an entity differing from a city in the common acceptance of the term. But even had the law called this political subdivision a city, the name given to it would not necessarily make it such within the meaning of the Revised Statutes.

"It follows that a national bank can be chartered at Schofield Barracks with a capital of \$100,000.

"This opinion is not to be taken as overruling the opinion of Attorney General McReynolds of June 6, 1913, 30 Op. 173. In the first place, there are differences between the two cases. In the second place, that opinion expressly recognizes that there might be 'anomalous cases' to which its reasoning would not apply, and if there be an 'anomalous case' it would seem to be the present one."

College Point, N. Y., is a part of New York city and therefore, though being a detached community of about 15,000 inhabitants, there cannot be organized there a national bank with a capital of \$100,000 consistently with the provisions of this section. 31 Op. Atty-Gen. 384, wherein it was said: "My predecessor held (30 Op. 173) that a 'place,' within the meaning of this section, is a city, town, or village with a corporate or quasi-corporate organization for the purpose of self-government within a definite territory. While it was recognized both in that opinion and in my opinion of June 5, 1917 (31 Op. 120), that exceptional circumstances may warrant some extension of this definition, there is here a further difficulty. In the latter opinion I pointed out that what was called 'the city and county of Honolulu' was not, for reasons which I gave, a city within the meaning of the last sentence of section 5138. Here the case is otherwise.

"The city of Greater New York is undoubtedly such a city. Despite its isolation, College Point is a part thereof. It has no powers of self-government."

Vol. VI, p. 711, sec. 5153. [First ed., vol. V, p. 109.]

A bank is charged with notice of regulations made by the Secretary of the Treasury as to the form of checks and the limitation of the authority of federal agents. *National Bank of Commerce v. Seattle Nat. Bank*, (Wash. 1920) 187 Pac. 342.

Vol. VI, p. 744, sec. 5197. [First ed., vol. V, p. 130.]

IV. Interest at rate allowed by state law.
VIII. Payment in advance.

IV. INTEREST AT RATE ALLOWED BY STATE LAW (p. 745)

In general.—The National Bank Act establishes a system of general regulations, adopting the usury laws of the states only in so far as they severally fix the rate of interest. *Evans v. National Bank*, (1919) 251 U. S. 108, 40 S. Ct. 58, 64 U. S. (L. ed.) —, *affirming* (1917) 21 Ga. App. 356, 94 S. E. 611.

VIII. PAYMENT IN ADVANCE (p. 747)

A national bank, having the power to make discounts at the interest rate allowed by the state law, does not incur the penalty prescribed by R. S. sec. 5198 for taking usury merely because, in discounting short-term notes in the ordinary course of business, it reserves interest in advance at the maximum interest rate allowed by the state law, although, under such law, interest charges reserved on a loan in advance by a state bank at the highest permitted rate constitute usury. *Evans v. National Bank*, (1919) 251 U. S. 108, 40 S. Ct. 58, 64 U. S. (L. ed.) —, (*affirming* (1917) 21 Ga. App. 356, 94 S. E. 611) wherein the court said:

"Petitioner maintains the loans in question would have been usurious if made in Georgia by an individual or a state bank, and that the same rule applies notwithstanding the lender happened to be a national bank. Respondent insists that the federal act permits it to discount short-time notes, reserving interest in advance at the maximum interest rate allowed by the state law,—in this instance, 8 per cent.

"In *Fleckner v. Bank of United States*, 8 Wheat. 338, 349, 354, 5 L. ed. 631, 633, 635, the charter of the Bank of the United States inhibited it from taking interest 'more than at the rate of 6 per centum,' and plaintiff claimed that by deducting interest at the rate of 6 per centum from the amount of a discounted note, the bank received usury. Replying to that point, this court, through Mr. Justice Story, said: 'If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal; and probably few, if any, charters contain an express provision, authorizing, in terms, the deduction of the interest in advance upon making loans or discounts. It has always been supposed that an authority to discount, or make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal

construction. Indeed, we do not know in what other sense the word 'discount' is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged that the taking of interest in advance by bankers, upon loans, in the ordinary course of business, is not usurious.' See also *McCarthy v. First Nat. Bank*, 223 U. S. 493, 499, 56 L. ed. 523, 525, 32 Sup. Ct. Rep. 240. This view has been generally adopted. . . .

"Associations organized under the National Bank Act are plainly empowered to discount promissory notes in the ordinary course of business. To discount, *ex vi termini*, implies reservation of interest in advance; and, under the ancient and commonly accepted doctrine, when dealing with short-time paper such a reservation at the highest interest rate allowed by law is not usurious. Recognizing prevailing practice in business and the above-stated doctrine concerning usury, we think Congress intended to endow national banks with the power, which banks generally exercise, of discounting notes reserving charges at the highest rate permitted for interest. To carry out this purpose, the National Bank Act provides that associations organized under it may reserve on any discount interest at the rate allowed by the state; and only when there is reservation at a rate greater than the one specified does the transaction become usurious.

"The maximum interest rate allowed by the Georgia statute is 8 per centum. That marks the limit which a national bank there located may charge upon discounts; but its right to retain so much arises from federal law. The latter also completely defines what constitutes the taking of usury by a national bank, referring to the state law only to determine the maximum permitted rate."

Vol. VI, p. 747, sec. 5198. [First ed., vol. V, p. 133.]

V. Recovery back of twice amount of interest paid.

5. Exclusiveness of remedy provided.

14. Proof.

V. RECOVERY BACK OF TWICE AMOUNT OF INTEREST PAID

5. Exclusiveness of Remedy Provided (p. 754)

In general.—To same effect as original annotation, see *Wysong, etc., Co. v. Bank of North America*, (C. C. A. 4th Cir. 1919) 262 Fed. 130.

Set-off of interest paid.—To same effect as original annotation, see *Wysong, etc., Co. v. Bank of North America*, (C. C. A. 4th Cir. 1919) 262 Fed. 130.

14. Proof (p. 759)

Question for court.—Where the undisputed facts show that a bank knowingly charged

and received usurious interest, and the only reasonable conclusion to be derived from the evidence taken as a whole is that the transaction is usurious, the question is one of law for the court, and not of fact for the jury. *Haskell First Nat. Bank v. Lent*, (1920) 77 Okla. 110, 186 Pac. 1081.

Vol. VI, p. 761, sec. 5200. [First ed., vol. V, p. 139.]

For other annotations affecting this section see annotation to R. S. sec. 5239, *infra*, p. 679,

Liability as surety or indorser.—The limitation upon the total liabilities to a national bank of any single borrower, will not be construed as including his liability as surety or indorser for money borrowed by another, in view of the long-continued practice and administrative rulings of the Comptroller of the Currency not to include such liabilities in the computation. *Corsicana Nat. Bank v. Johnson*, (1919) 251 U. S. 68, 40 S. Ct. 82, 64 U. S. (L. ed.) —.

Loan to two persons as one loan.—An allegation in the amended petition in an action against a director of a national bank for knowingly participating, contrary to this section and R. S. sec. 5239, in an excessive loan, that the transaction set forth was a loan of that character, whether regarded as one loan to two persons designated as a "firm" as the plaintiff alleges the fact to be, or regarded as two loans as contended for by the defendant in his pleadings theretofore filed, is sufficient if the proof tends to show a single and excessive loan made to such persons jointly in any capacity, or made in form one half to each, but in substance as a single loan. *Corsicana Nat. Bank v. Johnson*, (1919) 251 U. S. 68, 40 S. Ct. 82, 64 U. S. (L. ed.) —, which further held that the denial by a director of a national bank, in an action against him for knowingly participating, contrary to this section and R. S. sec. 5239, in an excessive loan, that such loan was a single one, or that he knew it to be such, is not conclusive where there is substantial evidence inconsistent with such denial, tending to show facts and circumstances attendant upon the transaction of which he had knowledge, and subsequent conduct in the nature of admissions by him, also inconsistent with such denial.

Vol. VI, p. 770, sec. 5209. [First ed., vol. V, p. 145.]

I. General considerations.

6. Intent as ingredient of offenses specified.

IV. Misapplication of funds, etc.

1. Definition and scope.

2. Elements of offense.

a. In general.

10. Evidence.

12. Instructions.

VII. False entries.

3. Intent to injure, defraud or deceive.

a. In general.

12. Indictment.

13. Evidence.

a. Admissibility.

VIII. Aiders and abettors.

1. In general.

2. Who may be.

I. GENERAL CONSIDERATIONS

6. Intent as Ingredient of Offenses Specified (p. 772)

Intent as to false entries and misapplication distinguished.—"The criminal intent with which these acts must have been done, in order to warrant a verdict of guilty, differs as to the false entry counts from the misapplication counts. As to the former, the intent required to be proved is that the false entries were made with intent to deceive any officer of the association, or any agent appointed to examine its affairs, while, as to the misapplication counts, the intent, to be criminal, must have been to injure or defraud the bank." *Galbreath v. U. S.*, (C. C. A. 6th Cir. 1918) 257 Fed. 648, 168 C. C. A. 598.

IV. MISAPPLICATION OF FUNDS, ETC.

1. Definition and Scope (p. 776)

The issuance of certificates of deposit gratuitously is a crime distinct from that of misapplying moneys, and the question of the intent of the person issuing them is for the jury. *Matters v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 826.

2. Elements of Offense

a. In General (p. 776)

Intent.—In *Galbreath v. U. S.*, (C. C. A. 6th Cir. 1918) 257 Fed. 648, 168 C. C. A. 598, regarding the intent necessary to establish the offense of misapplication of funds, the court said:

"An intent to injure or defraud, as contemplated by the statute, is not inconsistent with a desire for the ultimate success and welfare of the bank. It may, within the meaning of the law, result from an unlawful act voluntarily done, the natural tendency of which may have been to injure the bank. A wrongful misapplication of funds, even if made in the hope or belief that the bank's welfare would ultimately be promoted, is none the less a violation of the statute, if the necessary effect is or may be to injure or defraud the bank. Such is the well-settled law."

10. Evidence (p. 781)

In *Showalter v. U. S.*, (C. C. A. 4th Cir. 1918) 260 Fed. 719, 171 C. C. A. 457, it was held that the evidence was sufficient to sustain a conviction for misapplication of the funds of a national bank by one of its officers.

12. *Instructions* (p. 781)

In a prosecution for misapplication of the funds of a national bank by one of its officers, the court, in explaining to the jury the distinction between misapplication of funds and embezzlement, said:

"If a man takes funds of the bank from the bank's cash account, for example, and puts them to his own or some one else's use, that is misapplication of the funds at the bank, although he may not intend to embezzle, if he does it with intent. Abstraction implies not only a willful misapplication, but the actual taking of the funds from the bank, and the conversion of them to his own use and benefit, or to the benefit of another, with intent to defraud the bank. Now I think you will see, if you will just bear in mind the words misapplication and abstraction, abstraction means taking out; misapplication, while it stays inside the bank."

It was held that such instruction was not misleading, that the word "intent" was used as meaning intent to injure or defraud. *Showalter v. U. S.*, (C. C. A. 4th Cir. 1918) 260 Fed. 719, 171 C. C. A. 457.

VII. FALSE ENTRIES

3. *Intent to Injure, Defraud, or Deceive*

a. In General (p. 783)

To same effect as original annotation, see *U. S. v. Jenks*, (E. D. Pa. 1919) 258 Fed. 763; *Galbreath v. U. S.*, (C. C. A. 6th Cir. 1918) 257 Fed. 648, 168 C. C. A. 598.

12. *Indictment* (p. 786)

Duplicity.—An indictment under this section is not duplicitious by reason of the allegations that a false entry in a report by a bank president was made with the intent to injure and defraud the bank and to deceive the Comptroller of Currency, or any agent appointed to examine the affairs of the bank. *Boone v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 693, 169 C. C. A. 113. In distinguishing this case from that of *U. S. v. Norton*, (E. D. Okla. 1911) 188 Fed. 256, in the original annotation, the court said:

"Is this count of the indictment duplicitious by reason of the allegations that the false entry in the report was made with the intent to injure and defraud the bank and to deceive the Comptroller of the Currency, or any agent appointed to examine the affairs of the bank?"

"Counsel rely on what they presume was decided by Judge Adams, speaking for this court, in *Billingsley v. United States*, 178 Fed. 653, 101 C. C. A. 465, and *United States v. Norton* (D. C.) 188 Fed. 256, decided by Judge Campbell, who was of the opinion that the *Billingsley* case sustained the contention now made.

"A careful reading of Judge Adams' opinion does not warrant this construction. The issue in that case was whether the indictment charging a false entry in the books of the bank, with the intent to deceive any

agent appointed to examine the affairs of the bank, without charging that the false entry was made with the intent to defraud the association, or any other bank or person, was sufficient to charge an offense. The court held the indictment sufficient, saying:

"There are apparently two separate intents contemplated by this section, either of which, when accompanying a forbidden act, constitutes an offense."

"It was not held that the making of a false entry to defraud and to deceive constituted separate offenses. The intents were separate, but they might both concur in the making of a single false entry and thereby constitute a single crime. That allegations in an indictment charging both intents in one count are not duplicitious has been decided in *McKnight v. United States*, 97 Fed. 208, 215, 38 C. C. A. 115, 123, in which the opinion was delivered by Judge (now Mr. Justice) Day, and was concurred in by Judge (later Mr. Justice) Lurton and Circuit Judge Taft. In *United States v. Britton*, 107 U. S. 655, 665, 2 Sup. Ct. 512, 27 L. Ed. 520, a count charging the acts of the defendant to have been with the intent to injure and defraud the said association and certain persons to the grand jurors unknown was held good and not duplicitious. The same conclusion was reached in *Morse v. United States*, 174 Fed. 539, 548, 98 C. C. A. 321, in *Richardson v. United States*, 181 Fed. 1, 8, 104 C. C. A. 69, and in effect in *United States v. Corbett*, 215 U. S. 233, 30 Sup. Ct. 81, 54 L. Ed. 173.

"In *Crain v. United States*, 162 U. S. 625, 636, 16 Sup. Ct. 952, 40 L. Ed. 1097, a similar question was before the court. A count in the indictment charged three acts, made separate offenses by section 5421, Rev. St., and it was held that a motion in arrest of judgment on that count, on the ground of duplicity, was properly denied. The court said:

"We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute."

"The general rule is that in a criminal pleading, when the statute makes either of two or more distinct acts connected with a more general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes when committed by different persons or at different times, they may, when committed by the same person at the same time be coupled in one count as constituting one offense. *Lehman v. United States*, 127 Fed. 41, 45, 61 C. C. A. 577; *May v. United States*, 199 Fed. 53, 117 C. C. A. 431; *Clark v. United States*, 211 Fed. 916, 918, 128 C. C. A. 294, 296; *Glass v. United States*, 222 Fed. 773, 138 C. C. A. 321."

13. Evidence

a. Admissibility (p. 787)

Evidence of false entries at other times.—To same effect as original annotation, see *Galbreath v. U. S.*, (C. C. A. 6th Cir. 1918) 257 Fed. 648, 168 C. C. A. 598.

Statements of defendant subsequent to entries.—In a prosecution under this section wherein the defendant, a bank president, was charged with having aided and abetted the cashier of the bank in making false entries in reports by the cashier to the Comptroller of the Currency concerning the condition of the bank, it was held that statements made by the defendant at a later date than any of the reports and regarding large loans to and overdrafts by the defendant, and corporations and firms in which he was interested, were admissible as showing knowledge by the defendant of the falsity of the reports. *Boone v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 963, 169 C. C. A. 113. Regarding the admissibility of this evidence, the court said: "The court in overruling the objections to this testimony, said: 'I think this particular testimony is within the boundaries of that rule. It tends to show the knowledge which Mr. Boone had at that time; the knowledge that he had, and at least forms a starting point to go backwards over the period covered by this indictment. I believe it is within the field of collateral facts that may be properly introduced.'

"It must not be overlooked that the defendant is not charged with having made these reports, but to have aided, abetted, incited, and counseled P. A. Ball, the cashier of the bank, of which the defendant was president, to make these false reports. It was therefore essential to prove his knowledge of the falsity of the reports, and his intent to deceive the Comptroller. Besides, the defendant was tried on all nine counts of the indictment, some of which charged the falsity of the reports to consist in the failure to report defendant's overdrafts. There was no error in admitting this testimony. In *Allis v. United States*, 155 U. S. 117, 119, 15 Sup. Ct. 36, 37 (39 L. Ed. 91), a similar question was before the court, and it was held: 'There are two sufficient answers to these objections: (1) While the defendant was found guilty only on one, he was being tried on 25 counts, which counts charged false entries at different times running from February to December, and therefore testimony was competent as to the condition of his account stretching through the entire time. (2) The gravamen of this offense is the false entry with intent to injure, defraud, or deceive, and it was competent to show the state of the defendant's account, not merely at the very day the false entry was made, but also before and after that date, for the purpose of throwing light on the intent with which it was made.'

"The authorities that such evidence is ad-

missible for the purpose of proving the intent of the defendant, where intent is an essential ingredient of the charge, are practically uniform. *Alexander v. United States*, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954; *Clune v. United States*, 159 U. S. 593, 16 Sup. Ct. 125, 40 L. Ed. 269; *Spurr v. United States*, 87 Fed. 701, 710, 31 C. C. A. 202. In *Moffatt v. United States*, 232 Fed. 522, 533, 146 C. C. A. 480, 491, this court, after saying that 'the intent with which an accused does a subsequent act cannot be imputed to him as of the prior date of the crime charged,' proceeds by holding:

"These rules, however, do not conflict with or impair the long-established doctrine that in cases involving fraud, or the intent with which an accused does an act, collateral facts and circumstances, and his other acts of a kindred character, both prior and subsequent, not too remote in time, are admissible in evidence."

VIII. AIDERS AND ABETTERS

1. In General (p. 788)

Aider and abettor as principal.—One who aids and abets another in violating this section is a principal under section 332 of the Penal Laws (7 Fed. Stat. Ann. (2d ed.) 984). *Matters v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 826.

2. Who May Be (p. 788)

An indictment under this section which charges the defendant, a bank president, with being an accessory to the making of a false report by the cashier of the bank to the Comptroller of the Currency, is not defective because it fails to charge the defendant as a principal, for since the defendant did not make the report, he could only be held responsible if he aided and abetted the person who made it. *Boone v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 963, 169 C. C. A. 113.

Vol. VI, p. 796, sec. 5219. [First ed., vol. V, p. 157.]

VI. EXEMPTIONS AND DEDUCTIONS

1. Nontaxable Property Belonging to Bank (p. 805)

To same effect as original annotation, see *Cincinnati First Nat. Bank v. Beaman*, (C. C. A. 6th Cir. 1918) 257 Fed. 729, 169 C. C. A. 17, wherein it was held that the stockholders of a national bank were not entitled for purposes of tax assessment to any deduction from the value of their stockholdings on account of the bank's holding of federal reserve bank stock. The court said: "Plaintiff in error brought suit to restrain the collection of state, county, and municipal taxes assessed by the taxing authorities of Hamilton county, Ohio, under sections 5407 and following of the General Code of Ohio, against the stockholders of plaintiff bank upon the shares of the capital stock of

that bank held by such stockholders, respectively, upon the contention that the assessments were unlawful, in that in valuing the shareholdings there had not been excluded from the assets of the bank the stock held by it in the Federal Reserve Bank, under the provisions of Federal Reserve Act Dec. 23, 1913, c. 6, 38 Stat. 251.

"The crucial question presented is whether such exclusion is required by section 7 of the Federal Reserve Act, which in terms exempts Federal Reserve banks, including the capital stock and surplus therein, and the income derived therefrom, from federal, state, and local taxation, except taxes upon real estate, and section 26 of that act, which repeals all provisions of law inconsistent with or superseded by any of the provisions of that act, to the extent of such inconsistency or superseding, or whether, on the other hand, the power of taxation is governed by section 5219 of the Revised Statutes of the United States, which, as construed by the Supreme Court, expressly authorizes taxation by the states of the value of shares of national bank stock held by stockholders therein, without deduction on account of the fact that the bank's assets include securities of the United States which are declared by the statute authorizing them to be exempt from taxation by or under state authority. Act Feb. 25, 1862, 12 Stat. c. 33, pp. 345, 346; Rev. Stat. § 3701. Judge Sater, who presided in the District Court, in the course of a well-reasoned opinion (*First Nat. Bank of Cincinnati v. Dorr*, 246 Fed. 163) reached the conclusion that section 5219 of the Revised Statutes governed, and thus that the bank's stockholders were not entitled for purposes of tax assessment, to any deduction from the value of their stockholdings on account of the bank's holding of Federal Reserve Bank stock. The bill was accordingly dismissed.

"We are satisfied, not only with the correctness of this conclusion, but with the reasoning of the opinion on which the conclusion is based, and are content to affirm the judgment upon that opinion. We think it clear that Congress intended to place a national bank's holdings of Federal Reserve Bank stock upon precisely the same basis as its holdings of government bonds, so far as exemption from taxation is concerned, and thus not to extend such exemption to the taxation of shares of national bank stock held by stockholders therein."

Vol. VI, p. 825, sec. 7. [First ed., 1914 Supp., p. 267.]

Assessment of national bank stock—Exemptions.—In *Cincinnati First Nat. Bank v. Beaman*, (C. C. 6th Cir. 1918) 257 Fed. 729, 169 C. C. A. 17, it was held that R. S. sec. 5219 (6 Fed. Stat. Ann. (2d ed.) 796) rather than this section governed in determining whether the stockholders of a national bank were entitled, for purposes of

tax assessment, to any deduction from the value of their stockholdings on account of the bank's holding of Federal Reserve Bank stock.

Vol. VI, p. 826, sec. 10. [First ed., 1914 Supp., p. 269.]

Comptroller holding over as de jure officer.—A Comptroller of the Currency whose nomination for reappointment was not acted on by the Senate prior to its adjournment but who continued nevertheless to exercise the duties of the office of comptroller remained Comptroller of the Currency de jure and consequently was a legally qualified member of the Federal Reserve Board and entitled to receive the salary prescribed by this section to be paid to the Comptroller of the Currency as ex officio member of the Federal Reserve Board. (1919) 31 Op. Atty.-Gen. 401, wherein it was said:

"It appears that Mr. Williams was appointed Comptroller of the Currency, by and with the consent of the Senate, under a commission dated January 29, 1914. His appointment was made under section 325 of the Revised Statutes, in which it is provided that the Comptroller of the Currency, so appointed, 'shall hold office for the term of five years unless sooner removed by the President.' Upon the expiration of the five years so provided as the ordinary term of office of the comptroller, on January 19, 1919, the President determined to appoint Mr. Williams to succeed himself and thereupon sent his name to the Senate for confirmation. The Senate adjourned, however, without taking any action in the premises. Since January 19, 1919, Mr. Williams has continued to exercise the duties of the office of Comptroller of the Currency and has received the salary thereof by virtue of the provisions of the Act of March 2, 1895 (28 Stat. 844), which are as follows:

"That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay to all officers under the Treasury Department whose terms of office have expired or shall expire before the appointment and qualification of their successors, and who have been performing or shall perform the duties of their respective offices after the date of such expiration, the salary, compensation, fees, or emoluments authorized or provided by law in each case for the respective incumbents of the offices: *Provided*, That no such payment shall be made for any services rendered by any such officer wrongfully holding after the appointment and qualification of his successor."

"This statute was construed by Mr. Attorney General Moody in an opinion rendered June 27, 1906 (25 Op. 636). In his view the statute provided for the 'continuance in office' of officers under the Treasury Department. I have no reason to question this conclusion which is reinforced by the consideration that under such circumstances

the officer continues obviously to act under and by virtue of his original appointment or commission. In other words, the language must be taken to be equivalent to the phraseology of many state statutes which provide that a term of office shall continue for a specified time and thereafter until the officeholder's successor shall have been appointed and qualified. If this view is sound, and I think it is, the case which you put falls within numerous decisions that under such circumstances the officer holding over holds de jure and not merely de facto."

Vol. VI, p. 843, sec. 5220. [First ed., vol. V, p. 166.]

When corporate existence terminates.—During the progress of liquidation the bank maintains its corporate existence. *Fagan v. Texas Co.*, (Tex. Civ. App. 1920) 220 S. W. 346.

Vol. VI, p. 850, sec. 5234. [First ed., vol. V, p. 170.]

Amendment of section.—This section was amended by the Act of May 15, 1916, ch. 121, see 1918 Supp. Fed. Stat. Ann. 485.

V. ENFORCEMENT OF INDIVIDUAL LIABILITY OF STOCKHOLDERS

2. Limitations (p. 860)

A bill in equity in a federal court by the receiver of a national bank against former directors of the bank charging them with responsibility for mismanagement is governed by the statute of limitations of the state in which such federal court is sitting. *Curtis v. Metcalf*, (D. C. R. I. 1919) 259 Fed. 961.

Vol. VI, p. 865, sec. 5236. [First ed., vol. V, p. 176.]

I. CLAIMS

2. Priority of Claims

f. Claims of Depositors (p. 867)

Action for deposit—*Necessity of demand*.—"When the bank failed and went into the hands of the comptroller, its business was at an end; and when the comptroller . . . directed the receiver to publish a notice for three consecutive months, calling on all persons who might have claims against the bank to present the same and make legal proof thereof, this amounted to a waiver of the necessity for a demand by the depositor before he became entitled to sue for or claim his money. By closing its doors and ceasing to do business the bank said in effect that it would not pay the depositors, and the law does not require a vain or fruitless thing to be done." *England v. Hughes*, (Ark. 1920) 217 S. W. 13.

Vol. VI, p. 873, sec. 5239. [First ed., vol. V, p. 180.]

III. Statutory liability of directors and enforcement thereof.

1. Duties as to management, in general.
 - d. Delegation of duties.
2. Violation of banking laws, in general.
3. "Knowingly violate or knowingly permit, etc."
7. Excessive loans.

III. STATUTORY LIABILITY OF DIRECTORS AND ENFORCEMENT THEREOF

1. Duties as to Management, in General

d. Delegation of Duties (p. 879)

Thefts by teller and bookkeeper.—The directors of a national bank did not necessarily so neglect their duty as to be answerable for thefts by a teller and bookkeeper, concealed by overcharging a depositor, or by a false addition in the column of drafts or deposits in the depositors' ledger, merely because they accepted the cashier's statement of liabilities and did not inspect the depositors' ledger, even after an apparent shrinkage in deposits, where the cashier's statements of assets always were correct, the semiannual examination by the government examiners had disclosed nothing pointing to malfeasance, and they were encouraged in their belief that all was well by the president, whose responsibility as executive officer, interest as large stockholder and depositor, and knowledge from long daily presence in the bank were greater than theirs. *Bates v. Dresser*, (1920) 251 U. S. 524, 40 S. Ct. 247, 64 U. S. (L. ed.) —, *modifying and affirming* (C. C. A. 1st Cir. 1918) 250 Fed. 525, 162 C. C. A. 541. This case held however that the failure of the president and executive officer of a national bank to heed hints and warnings, including an apparent shrinkage in deposits, which, however little they may have pointed to the specific facts of theft by a teller and bookkeeper, would, if accepted, have led to an examination of the depositors' ledger, thereby disclosing past and preventing future thefts, may be treated by the courts as such negligence as renders him liable for thefts by such employee after he had the warnings which should have led to steps that would have made fraud impossible, even though the precise form that the fraud would take hardly could have been foreseen. It was further held that the reduced amount which a circuit court of appeals, modifying a decree of a district court, finds to be due the receiver of a national bank from its president on account of the latter's failure to guard against thefts by a teller and bookkeeper should bear interest from the date of the decree of the district court until the receiver interposed a delay by appealing to the

Supreme Court from the decree of the circuit court of appeals.

2 *Violation of Banking Laws, in General* (p. 879)

Measure of director's legal liability.—In *Fairbanks First Nat. Bank v. Noyes*, (C. C. A. 9th Cir. 1919) 257 Fed. 593, 168 C. C. A. 543, a director was sued for damages for the declaration of an illegal dividend and for making loans in excess of the amount permitted by the National Banking Law. In holding that he was not liable, the court said: "We are led to the inquiry, What is the measure of the appellee's legal liability to the bank of which he was director in causes of action such as are here brought before us? The appellee contends that the only rule of liability is that which is defined in *Yates v. Jones National Bank*, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002, where the court held that the National Banking Act itself affords the exclusive rule by which to measure the right to recover damages from directors based upon loss resulting solely from their violation of the duty expressly imposed upon them by a provision of the act, and that under that act proof of something more than negligence is required, and that there must be proof that the violation was in effect intentional. In that case the charge against the directors was that they had made false reports of the condition of the bank, and the decision was controlled by the consideration that in making and publishing the official reports of the condition of the bank the directors were acting in obedience to the National Banking Act, and that, where a statute creates a duty and prescribes a penalty for nonperformance, the rule prescribed in the statute is the exclusive test of liability. That decision was followed and its doctrine was applied in *Williams v. Spensley*, 251 Fed. 58, 163 C. C. A. 308, where the suit was against directors on their liability for declaring dividends voted out of the capital stock, and where the court said:

"Appellant contends that the liability of a national bank director for voting and declaring dividends out of the capital is an absolute liability, and no question of good faith, diligence, or knowledge on the part of a director that such dividends may impair the bank's capital is involved. This contention must be rejected, both on principle and authority. See *Yates v. Jones National Bank*, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002."

"The appellant in its brief admits that this is not an action founded upon the common-law liability of the appellee, but observes that under the facts developed at the trial the appellee was liable for willful neglect of his duty as director, within the doctrine of the decision of this court in *McCormick v. King*, 241 Fed. 737, 154 C. C. A. 439, where we held that the statutory liability of directors of a national bank, as

prescribed in section 5239, Rev. St. is the measure of the right of recovery against them for loss resulting solely from their violation of the express provisions of the statute, but that that does not exclude their common-law liability for negligence in the management of business of the bank in violation of their oath of office which results in loss to its creditors and stockholders.

"In the present case, in the first, third, fourth, and fifth causes of action, the appellant expressly counts upon violations of that provision of the National Banking Act which prohibits loans in excess of the amount permitted by the act. As to those causes of action we think it clear that the rule of liability is that which is defined in *Yates v. Jones National Bank*, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002. But if we were to apply to all of these causes of action the common-law rule of liability recognized by this court in *McCormick v. King*, there is still nothing in the evidence to show that the appellee has been guilty of negligence in the management of the bank which has resulted in loss to its creditors or stockholders. In *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, the court announced the rule of liability of directors, saying that directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of the bank, but that they shall not be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention, and that they cannot be held responsible for losses resulting from the wrongful acts of other directors, unless the loss is the consequence of their own neglect of duty. In the *McCormick Case* this court said:

"No one would contend that a director must look into details of management, or keep closely in touch with routine matters, or know intimately to whom credits are given."

"The appellee became a director of the bank in consequence of the insistence of the other directors. He was not a banking man. He knew nothing of the banking business, and when he discovered evidences of irregularity in the management of the bank's business he resigned his office. At times he protested against the method in which the business was done. He urged that the branch agencies be closed. In declaring the dividend which gives rise to the second cause of action, the directors acted under the advice of McGinn, the regularly retained attorney for the bank, who is now a director and one of the principal stockholders of the corporation which brings this suit."

3. *Knowingly Violate or Knowingly Permit, etc.* (p. 880)

Participating in or assenting to excessive loans.—Directors of a national bank cannot be held liable, under R. S. sec. 5200 and this

section, for knowingly participating in or assenting to an excessive loan unless such participation or assent was not through mere negligence, but was knowing and in effect intentional. If, however, a director deliberately refrains from investigating that which it is his duty to investigate, any violation of the statute must be regarded as in effect intentional. *Corsicana Nat. Bank v. Johnson*, (1919) 251 U. S. 68, 40 S. Ct. 82, 64 U. S. (L. ed.) —, wherein the court said: "Under the rule settled by familiar decisions of this court, in order for the bank to prevail in this action it must appear, not only that the liabilities of a person, company, firm, etc., to the bank for money borrowed were permitted to exceed the prescribed limit, but that defendant, while a director, participated in or assented to the excessive loan or loans, not through mere negligence, but knowingly and in effect intentionally, *Yates v. Jones Nat. Bank*, 206 U. S. 158, 180; with this qualification, that if he deliberately refrained from investigating that which it was his duty to investigate, any resulting violation of the statute must be regarded as 'in effect intentional.' *Thomas v. Taylor*, 224 U. S. 73, 82; *Jones Nat. Bank v. Yates*, 240 U. S. 541, 555."

7. Excessive Loans (p. 881)

Personal or financial responsibility of borrower as material in action against director.—The question whether a director of a national bank knowingly participated in or assented to, contrary to this section, the making of a loan in excess of the limit prescribed by R. S. sec. 5200, is not to be confused by any consideration of the supposed personal or financial standing of the borrower. *Corsicana Nat. Bank v. Johnson*, (1919) 251 U. S. 68, 40 S. Ct. 82, 64 U. S. (L. ed.) —.

Accrual of cause of action against a director.—A cause of action against a national bank director for knowingly participating in an excessive loan accrues when the bank, through his act, parts with the money loaned, receiving in return negotiable paper that it cannot lawfully accept because the transaction is prohibited. The damage, as well as the injury, is complete at that time, and the bank is not obliged to await the maturity of the paper before suing. *Corsicana Nat. Bank v. Johnson*, (1919) 251 U. S. 68, 40 S. Ct. 82, 64 U. S. (L. ed.) —.

Suit against one of several offending directors.—Every director of a national bank knowingly participating in or assenting to a loan in excess of the limit prescribed by R. S. sec. 5200, is made liable by this section in his personal and individual capacity, without regard to the question whether other directors likewise are liable; and he may alone be sued. *Corsicana Nat. Bank v. Johnson*, (1919) 251 U. S. 68, 40 S. Ct. 82, 64 U. S. (L. ed.) —.

Absence of improper motive as defense in action against director.—The absence of any improper motive or desire for personal profit on defendant's part is no defense to an action against a director of a national bank for violating this section and R. S. sec. 5239, by knowingly participating in or assenting to an excessive loan. *Corsicana Nat. Bank v. Johnson*, (1919) 251 U. S. 68, 40 S. Ct. 82, 64 U. S. (L. ed.) —.

Damages in action by bank against director.—The entire sum loaned, plus interest and less salvage, should be treated as the damages sustained by a national bank through a director's knowing participation in or assent to an excessive loan, and not merely the excess above what lawfully might have been loaned, where the entire excess loan formed but a single transaction. *Corsicana Nat. Bank v. Johnson*, (1919) 251 U. S. 68, 40 S. Ct. 82, 64 U. S. (L. ed.) —.

The question whether a loan company having the same directors and managers as a national bank and identity of stock interest, upon rescinding for fraud a sale to it by the bank of the notes and indebtedness of a borrower for their full face value, received full restitution from the bank, is not material as bearing either upon the bank's right to sue a director for having knowingly participated in, or assented to, an excessive loan to such borrower, or upon the question of damages. *Corsicana Nat. Bank v. Johnson*, (1919) 251 U. S. 68, 40 S. Ct. 82, 64 U. S. (L. ed.) —.

The damages sustained by a national bank by reason of a director's knowing participation in or assent to an excessive loan, are satisfied by a transfer of the borrower's notes and indebtedness to another corporation for their full face value if, and only if, the transfer is good and valid as against such corporation and its stockholders, or is duly ratified by them. *Corsicana Nat. Bank v. Johnson*, (1919) 251 U. S. 68, 40 S. Ct. 82, 64 U. S. (L. ed.) —, which held, however, that a national bank director cannot escape liability for knowingly participating in or assenting to an excessive loan because of a sale of the borrower's notes and indebtedness for their full face value to a loan company having the same directors and managers as the bank, and identity of stock ownership, if the transfer was made under circumstances rendering it voidable as against the loan company and as against the stockholders of both corporations, and the stockholders of the loan company exercised their right to rescind without unreasonable delay and gave notice to the bank, and the bank, recognizing the justness of the claim, restored to the loan company what was accepted as the equivalent in value of that which the bank had received for the transfer, the director not having changed his position and not being prejudiced by such delay as there was in exercising the right to rescind.

A national bank may recover from a di-

rector the damages sustained by reason of his knowing participation in or assent to an excessive loan, contrary to R. S. sec. 5200 and this section, although it remained solvent or even prosperous, and irrespective of any changes in stockholding interest or control occurring between the time the cause of action arose and the time of the commencement of the suit or of the trial, and even if the new stockholders acquired their interests with knowledge of the fact that a loss had been sustained, and that such director was responsible for it. *Corsicana Nat. Bank v. Johnson*, (1919) 251 U. S. 68, 40 S. Ct. 82, 64 U. S. (L. ed.) —.

Vol. VI, p. 915, sec. 1. [First ed., vol. V, p. 183.]

The power of the comptroller to appoint a receiver.—To the same effect as the original annotation see (1917) 31 Op. Atty.-Gen. 157, wherein acting Attorney General John W. Davis said:

"Individual liability for the debts of a national bank was imposed upon its shareholders by section 12 of the national bank act of 1864 (R. S. sec. 5151). Provision was also made in a number of cases for the appointment by the comptroller of a receiver to wind up the affairs of a bank and to enforce where necessary the individual liability of shareholders. . . . Prior to 1876, however, the comptroller possessed no authority to appoint a receiver of a national bank on the ground of its insolvency. To remedy this and other defects in the then existing law, the act of June 30, 1876, was passed, upon the request of the Comptroller of the Currency made in a letter of March 6, 1876, explaining the bill as prepared by him. (See Cong. Rec., 44th Cong., 1st sess., p. 2227.) In this letter the provision of section 1 quoted above was explained as—'intended to authorize the Comptroller to appoint receivers of national banks in all cases of insolvency of such institutions, and experience has shown that such a provision is necessary.'

"The purpose of section 2 was explained as follows:

"In several cases of banks in voluntary liquidation a small amount of indebtedness remains unpaid. Under existing laws the comptroller has no power to appoint receivers in such cases; but it is necessary under the decision of the Supreme Court [*Kennedy v. Gibson*, 8 Wall. 505-6] for him to appoint a receiver in order that the personal liability may be enforced. If the creditors could bring a suit in their own name against the shareholders, it is probable that the amount of indebtedness in every such instance could be collected without the necessity of the expense of a receivership. If the bill under consideration should become a law, any creditor, in his own behalf, or in behalf of himself and other creditors, might enforce individual

liability against shareholders of national banks.'

"It seems clear from this explanation, which was apparently accepted by Congress, that the remedy given to creditors by section 2 was understood to be merely cumulative and not designed to impair or restrict the authority conferred upon the comptroller by section 1.

"It was accordingly held in *Washington National Bank v. Eckels* (1893; 57 Fed. 870) that the comptroller may appoint a receiver, when satisfied that a bank is insolvent, to close up its affairs and enforce the liability of its stockholders, even though the bank has previously gone into voluntary liquidation.

"Doubt is said to be thrown upon this construction of the act by the opinion in the case of *Williamson v. American National Bank* (C. C. A., 4th Cir., 1902; 115 Fed. 793). In that case the assignee of a bank at Asheville, N. C., which was in voluntary liquidation, and a creditor of the bank filed a bill in equity in South Carolina against a single shareholder to enforce his individual liability. The bill was demurred to on the grounds that the Circuit Court of North Carolina alone had jurisdiction of such a bill, that the other shareholders of the bank were necessary parties, and that there was a misjoinder of plaintiffs.

"In sustaining the demurrer it was stated in the opinion by Judge Keller, among other reasons, that the remedy provided by section 2 for enforcing the liability of shareholders of a bank in process of voluntary liquidation 'is exclusive in such cases and must be strictly pursued'; citing *Pollard v. Bailey* (20 Wall. 527) and *Bank v. Franklyn* (120 U. S. 747), which hold that where the same act creates a right and provides a remedy for its enforcement such remedy is exclusive.

"This view of section 2 is expressly disapproved in the more recent case of *King v. Pomeroy* (C. C. A., 8th Cir., 1903; 121 Fed. 287), in which it is clearly shown by the opinion of Judge Sanborn that the act of June 30, 1876, does not create a right against shareholders in favor of creditors and prescribe an exclusive remedy for the enforcement of the right, but that on the contrary the right against shareholders was created by the act of 1864 (R. S. sec. 5151), that from the time of the creation of this right ample remedy has existed for its enforcement through the general powers of the equity courts and that section 2 did not abrogate or limit that remedy but merely added another—'under the familiar rule that where a statute simply gives a new remedy in a case in which the right and an appropriate remedy existed before its enactment, it is cumulative and not exclusive' (p. 292). The opinion of Judge Sanborn, which seems to be supported by *Richmond v. Irons* (121 U. S. 27), is believed to express the proper view of the statute, and

his reasoning is thought to apply with equal force to show that the remedy given in section 2 to the shareholders is likewise cumulative and not exclusive in its relation to the remedy provided in section 1 to be pursued by the comptroller. In my opinion, therefore, the comptroller has authority to appoint a receiver for a bank on the ground of its insolvency after as well as before it has gone into voluntary liquidation and for the same purposes."

1918 Supp., p. 478, sec. 4.

Limitations relating to charges for collection and payment of checks as applicable to state banks.—The limitations contained in section 13 of the Federal Reserve Act, as amended, relating to charges for the collection and payment of checks, do not apply to state banks not connected with the Federal Reserve system as members or depositors. Checks on banks making such charges cannot, however, be cleared or collected through Federal Reserve banks. (1918) 31 Op. Atty-Gen. 245, wherein it was said: "The limitations as to charges referred to in the question submitted are contained in the second proviso quoted above. This proviso, apparently recognizing an existing right of member and nonmember banks to make reasonable charges for the collection or payment of checks and drafts and remission therefor by exchange or otherwise, provides (1) that these charges are 'to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100,' but (2) that 'no charges shall be made against the Federal Reserve banks.' Clearly these limitations apply to national banks, which are compelled to be member banks, to such state banks as become member banks by voluntarily accepting the terms and provisions of the Federal Reserve Act, and to such other state banks as do not become member banks but by becoming depositors in Federal Reserve banks upon the conditions specified avail themselves directly of the facilities of the Federal Reserve clearing system.

"The specific question to be determined is whether these limitations apply to nonmember state banks which do not become deposi-

tors but checks upon which may pass through Federal Reserve banks in process of clearing or collection.

"The theory and scheme of the Federal Reserve legislation seems inconsistent with the purpose on the part of Congress to subject state banks against their will to federal control or regulation. State banks are not compelled to become members of the Federal Reserve system or depositors therein. Those possessing the necessary qualifications are, however, invited to become members. They are not only free to accept or decline, but if they accept remain at liberty to withdraw from the system. (Sec. 9.) By section 13, as amended, state banks not desiring to become members or too small to be eligible for membership are likewise invited to share in the clearing and collection facilities of the system by becoming depositors in Federal Reserve banks. But they may accept or reject the invitation, and if they become depositors may close their accounts at their pleasure.

"It would accordingly seem that the limitations referred to ought not to be regarded as intended to be imposed upon state banks not connected with the Federal Reserve system as members or depositors against the will of such banks, unless that intention clearly appears.

"The term 'nonmember bank,' as used in the proviso, may reasonably be construed as referring to a nonmember bank that has become a depositor as authorized in the preceding provisions of the paragraph. If this term is so construed, obviously the provision requiring charges 'to be determined and regulated by the Federal Reserve Board, but in no case to exceed 10 cents per \$100,' will have no application to nonmember state banks which are not depositors in a Federal Reserve bank. The broad language of the concluding clause, 'no such charges shall be made against the Federal Reserve banks,' may be construed not as directed against state banks which are not depositors but merely as specifying a condition upon which checks may clear through the Federal Reserve banks—in effect a prohibition against the payment of such charges by the Federal Reserve banks."

NATURALIZATION

Vol. VI, p. 944, sec. 2169. [First ed., vol. V, p. 207.]

"Free white persons"—*Hindu*.—A Hindu is a "free white person" within the meaning of this section and entitled to naturalization. In *re Mohan Singh*, (S. D. Cal. 1919) 257 Fed. 209, wherein it was said: "Modern ethnologists use the terms 'white' and 'Caucasian' synonymously and interchangeably. Seemingly the preponderance of respectable opinion includes the Hindus of India as members of the Aryan branch or stock of the so-called Caucasian or white race. See Report of the Immigration Commission, Senate Document No. 662, 61st Congress, Third Session. I have been cited to no anthropological authorities which include the Hindus in any of the other races of mankind. They belong to the Aryan stock, and therefore to the Caucasian or white race, because of certain physical and other peculiarities possessed by them and which indubitably mark their descent. 'Caucasians' are 'white,' whether they live under the tropic sun, and therefore have a very dark skin, or abide in northern climes, and possess a light one. The possession of a 'common racial stamp' is the basis of classification.

"My conclusion is that, in the absence of any more definite expression by Congress, which is the body possessing the power to determine who may lawfully apply for naturalization, any members of the white or Caucasian race, possessing the proper qualifications in every other respect, are entitled to admission under the general wording of the statute respecting 'all free white persons.' In the absence of an authoritative declaration or requirement to that effect, it would seem a travesty on justice that a refined and enlightened high caste Hindu should be denied admission on the ground that his skin is dark, and therefore he is not a 'white person,' and at the same time a Hottentot should be admitted merely because he is 'of African nativity.' The same observation might apply with respect to equally enlightened members of other races who are now denied admission on the ground that they fall without the designation white or Caucasian."

Vol. VI, p. 947, sec. 2171. [First ed., vol. V, p. 208.]

This section was not repealed by the Act of June 29, 1906, ch. 3592 (6 Fed. Stat. Ann. (2d. ed.) 952). *Grahl v. U. S.*, (C. C. A. 7th Cir. 1919) 261 Fed. 487.

Vol. VI, p. 958, sec. 4, par. first. [First ed., 1909 Supp., p. 366.]

The requirement as to declaration of date of arrival is jurisdictional, *In re Elliott*,

(S. D. Tex. 1920) 263 Fed. 143, holding a declaration necessary where the alien passed through the United States before the act, resided for years in Mexico and returned to the United States after the passage of the act. The court said: "The act of 1906 is not concerned with arrivals in the United States which are merely incidental to the passage of persons into and through the country. It is only concerned with those arrivals which are made the basis of the claim to citizenship."

Amendment of declaration of intention by nunc pro tunc order.—A court has no power to admit an alien to citizenship by granting an order nunc pro tunc permitting him to amend his declaration of intention and petition for naturalization by striking out an erroneous renunciation of allegiance to a particular foreign sovereignty and substituting another therefor. *U. S. v. Vogel*, (C. C. A. 2d Cir. 1919) 262 Fed. 262. Regarding the power of the court to allow such an amendment, it was said:

"When the Act of June 29, 1906 (34 Stat. 596), was enacted 'as a uniform rule of naturalization,' Congress dictated in particularity as to what the declaration of intention should consist of, and required the applicant to particularize as to the sovereignty from whence he came and which he was renouncing. The system is statutory, and the only province of the courts is to ascertain the will of Congress and execute it accordingly. Citizenship can only be obtained by complying with the terms as prescribed by Congress. The act itself provides the terms to an explicit degree when 'an alien may be admitted to become a citizen in the manner and not otherwise.' Citizenship may not be obtained by an alien in any other manner. Every material obligation, as imposed by statute, constitutes a part of the manner as contemplated by Congress in the act. The act provides that an alien shall renounce 'particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject' at the appropriate time in each instrument. It is not within the power of courts, in our opinion, to vary this rule and permit the applicant at a later time to recognize his mistake and ask to change it, for to do so would be permitting the applicant to declare his intention of renunciation at a time other than when making his application.

"When making his declaration and signing his petition and filing the same is the time he must announce his renunciation as a citizen or subject of the particular government. It was the intent of Congress to have such renunciation of the particular foreign sovereignty made contemporaneously with the execution and filing of each of the necessary instruments, and the court is without power

later to permit a change to date back by granting an order nunc pro tunc.

"For the court to do so, we think, is reading into the statute a permission which is tantamount to a trespass upon the executive domain, nor can the court say which steps must be complied with and which may be omitted in compliance, and which may be corrected if error creep in. To permit such power in the court would frustrate the whole act; it would place the power of the court above the terms of the act. To permit of a substantive amendment would, in but a step further, permit naturalization to become effective without amending an insufficient declaration. This the courts cannot and should not do. We think the court below was without the power to grant the order nunc pro tunc, and erred in admitting the appellee to citizenship."

Vol. VI, p. 967, sec. 4, par. fourth.
[First ed., 1909 Supp., p. 368.]

II. "CONTINUOUSLY RESIDED" (p. 968)

Absence abroad.—An alien is not entitled to naturalization upon an application, where it appears that he has been absent for four years and seven months of the five-year period required by this paragraph for residence in the United States, and for seven months of the one-year period required for residence in a particular state. *U. S. v. Bragg*, (E. D. Pa. 1919) 257 Fed. 588.

Vol. VI, p. 975, sec. 6. [First ed., 1909 Supp., p. 370.]

Petition filed on verge of war.—The fact that this section provides that, in lieu of the hearing of the alien's request in open court made at the time of the hearing, no hearing shall be had until after a formal petition by the alien has been on file and notice given for ninety days, does not give an alien the right, if he sees that the United States is on the verge of war with the country of his nativity, to file his petition before war is declared, and to acquire thereby a vested right to a hearing during war and to a certificate, if the court find him otherwise qualified, as fully as could an alien from a friendly country. *Grahl v. U. S.*, (C. C. A. 7th Cir. 1919) 261 Fed. 487.

Vol. VI, p. 987, sec. 15. [First ed., 1909 Supp., p. 373.]

III. Grounds for cancellation.

2. Fraud.

IV. Courts having jurisdiction to cancel.

III. GROUNDS FOR CANCELLATION

2. Fraud (p. 991)

False statement as to surrender of foreign allegiance.—To same effect as 1919 Supplement annotation, see *U. S. v. Kramer*, (C. C.

A. 5th Cir. 1919) 262 Fed. 395, wherein it was said:

"The statute, under the provisions of which defendant was admitted to citizenship, provides that if a naturalized citizen returns to the country of his nativity, or goes to any other foreign country, and takes permanent residence therein, within five years after his certificate of citizenship is issued to him, it shall be prima facie evidence of lack of intention to become a permanent citizen at the time of filing his application for citizenship, in the absence of countervailing evidence. Section 15, Act June 29, 1906; *Luria v. U. S.*, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. Ed. 101. Congress thereby clearly indicated that subsequent acts of a naturalized citizen would be sufficient evidence of his fraudulent intention at the time of his admission. If mere removal is sufficient evidence of fraud, why not subsequent acts of disloyalty, or statements indicating his want of allegiance? In the nature of things it is impossible for the government to make more than a cursory examination into the loyalty or the general character of the applicant for citizenship before admission, and the court must of necessity rely upon the good faith and truthfulness of the applicant when appearing before it and taking the oath of allegiance. In a criminal case, a man's intention may be judged by his acts. A conspiracy to defraud is usually proven by showing what the defendants did after the date upon which the conspiracy is alleged to have been formed, and the jury may consider such evidence in opposition to the testimony of defendant on the question of intention, and render a verdict of guilty upon it. Why not the same rule in a suit to cancel a certificate of naturalization?"

"American citizenship is a priceless possession, and one who seeks it by naturalization must do so in entire good faith, without any mental reservation whatever, and with the complete intention of yielding his absolute loyalty and allegiance to the country of his adoption. If he does not, he is guilty of fraud in obtaining his certificate of citizenship.

"There can be no doubt that, had the defendant in this case been guilty of the utterances with which he is charged before his naturalization, and that fact had been known to the court, he would not have been admitted. The proof makes out a prima facie case of the disloyalty of the defendant, and shows his continuing allegiance to the German emperor. We think the court might well have rested a judgment of cancellation upon it, and it was error to dismiss the bill. *U. S. v. Ellis*, (C. C.) 185 Fed. 546; *U. S. v. Olson* (D. C.) 196 Fed. 562; *U. S. v. Wursterbarth* (D. C.) 249 Fed. 908; *U. S. v. Swelgin* (D. C.) 254 Fed. 884."

Belief in anarchistic principles.—The certificate of naturalization of an alien will be canceled where it appears that he was a philosophical anarchist at the time his

application for citizenship was granted but did not divulge such fact to the naturalization officials. *U. S. v. Stuppiello*, (W. D. N. Y. 1919) 260 Fed. 483. Regarding the scope of the word "anarchists," the court said: "In using the word 'anarchists' without qualification Congress intended to include all aliens who had in mind a theory of anarchy, or the absence of all direct government, in opposition to that of organized government. The former is diametrically opposed to the latter, and the philosophical anarchist who exploits and expounds his views is none the less dangerous to the welfare of the country than the anarchist who believes in overthrowing or destroying the government by force or violence. The means of accomplishing the end, though different, are both destructive; one consisting of insidious propaganda to arouse sentiment in opposition to the government, and the other to incite violence and disorder. Both are designed to discredit constituted authority."

IV. COURTS HAVING JURISDICTION TO CANCEL (p. 994)

In general.—To same effect as original annotation, see *Grahl v. U. S.*, (C. C. A. 7th Cir. 1919) 261 Fed. 487, wherein it was said:

"A court that has jurisdiction of a stated subject-matter and has the necessary parties before it is empowered to act honestly upon a mistaken view of the law as fully as upon a correct view; and its judgment, though based on errors of law, is impervious to collateral attack in other courts or in the same court, but not to direct attack. Direct attacks, through motions for rehearing, bills of review, and appeals, are usual and of old-time familiarity. Procedure under section 15 is new and unusual. But none the less it is plainly a direct attack.

"Picturing our dual form of government, state sovereignty over exclusively state matters, national sovereignty over exclusively national matters, zones of concurrent jurisdiction, and the necessity that each sovereign should respect the dignity, rights, functions, and offices of the other, appellant contends (and some of his citations support his urge) that Congress could not have meant to set up the federal courts as reviewing tribunals over state courts.

"So far as Congress had the power, it placed the two kinds of courts on an equality. By the terms of section 15 (in connection with other provisions of the act of 1906) one federal trial court may review the grant of a citizenship certificate of another federal trial court or of a state trial court, and one state trial court may review the grant of another state trial court or of a federal trial court. No discrimination was made.

"But naturalization of aliens, like exclusion or deportation, is exclusively a federal function. So what Congress really did

was to tender to the state court a power of attorney to exercise national authority, and the state court accepted and acted. But we do not know of any grant of power to Congress to force a state to use its treasury, court-houses, judges, and clerks in the administration of a purely national law, and undoubtedly a state could compel its officers to decline to act. So the state court's issuance of appellant's certificate was not a judgment of a state court, protected by the agis of its sovereign, and the present proceeding is merely an inquiry by the United States government into the action of its own agent under a power of attorney.

"If the suggestion should be made and accepted that the issuance of a naturalization certificate is an *ex parte* matter, of essentially an administrative nature, and not properly committed to the judiciary, manifestly appellant would not be aided in holding on to his certificate. Nor would that hypothesis affect the jurisdiction of the District Court under section 15, for Congress may properly commit to the federal court the judicial inquiry whether an administrative act has been legally performed, as is shown in deportation and like cases."

1918 Supp., p. 491, sec. 1, par. eleventh.

As the law stood prior to the enactment of this paragraph, an alien enemy, who had filed his petition subsequent to the declaration of war against the country of which he was a subject, could not be naturalized during the war. *In re Pollock*, (S. D. N. Y. 1918) 257 Fed. 350.

1918 Supp., p. 495, sec. 3.

Declarations of intention dismissed for lack of prosecution.—A dismissal of a declaration of intention for lack of prosecution does not require the filing of a new declaration, since such a dismissal does not go to the fitness of the petitioner nor destroy the declaration. Hence, where a declaration of intention, made in 1899, is dismissed for lack of prosecution, such declaration may be considered under this paragraph on the declarant's petition for naturalization, although it was made more than seven years prior to the existence of a state of war between the United States and the alien's native country, and therefore comes within the prohibition of paragraph 11 of section 1. In such case the declarant should be allowed to amend his petition for naturalization so as to base it on his original declaration rather than on one made at a later date. *In re Pollock*, (S. D. N. Y. 1918) 257 Fed. 350.

1919 Supp., p. 274, sec. 1.

Qualifications of applicant.—An applicant, in order to be entitled to naturalization under this section, must not only bring him-

self within its provision, but must also show that he has the qualifications set forth in section 4 of the Act of June 29, 1906, ch. 3592 (6 Fed. Stat. Ann. (2d ed.) 956). Accordingly, the application of an alien for naturalization under this section will be denied, where it appears that he was subject to registration under the Selective Service Act (9 Fed. Stat. Ann. (2d ed.) 1136), that he surrendered to his consul a previously made declaration of intention to become a citizen of the United States, and filed an affidavit of willingness to return to his native country, that he attempted to claim exemption from military service on the ground of being an alien, and that after being inducted into military service he declined to become a citizen, although requested to do so. *In re Loen*, (W. D. Wash. 1919) 262 Fed. 166. In denying the application, the court said:

"The applicant claims that he was honorably discharged, and that this application is timely, and that he should be admitted. The application is within a year, and he bears an honorable discharge.

"Is the examination of the court as to the applicant's qualification for citizenship limited to the timeliness of the application, and to the discharge, or is the duty still imposed upon the court to determine whether the applicant comes within the other requirements of the law? The exceptions in favor of an honorably discharged soldier appear to be definitely and clearly pointed out, and limited to proof of residence and declaration of intention, as far as the present inquiry is concerned. All of the requisites except residence and declaration of intention must therefore be met by the applicant, as the only limitation placed upon the court, as far as concerns us here, is with relation to declaration of intention and residence. The applicant never left the training camp. So far as appears, no further disposition was made of his claim for exemption by the departments at Washington.

"In the instant case, the applicant had declared his intention to become a citizen, and under oath declared his willingness to renounce all allegiance to foreign sovereignty. By that oath he solemnly swore it to be his bona fide intention to transfer his citizenship and allegiance. This implied willingness and intention to defend the flag, to support the Constitution and laws of the

United States; and, when invitation was extended, he declined to do so, thereby repudiating his declared intention, and asserted under oath preference for his native country. He failed to meet the test. Nothing appears to indicate a change of sentiment or feeling of regret.

"Citizenship and allegiance to this country are made of sterner stuff. He is not fitted to take the oath of allegiance. Interpretation of the oath of allegiance is more than a mere formula of words. It is the translation of the alien applicant for citizenship from foreign language, foreign history, foreign ideals, and foreign loyalty, into a living character of our language, of our history, of our life, of our ideals, and loyalty to our flag. It is that intellectual, spiritual, patriotic development of love for the United States, his adopted country, and its Constitution and laws, which moves him in sincerity to dedicate his life to its service, and conscientiously agree to defend it against all enemies and the implanting in his soul of a sincere determination that in the hour of danger or attack upon the Constitution or the flag, to devote to their defense and support unlimited loyal service to the extent of his life, if required. Any person unwilling to pledge his hands, his heart, his life, to the service and preservation of the government of the United States, first and always, is unworthy to be admitted to citizenship.

"The proof does not show the applicant's loyalty to our flag and his willingness to defend it. This applicant, when the flag was assaulted by a foreign foe, was unceasing in his efforts to evade military service in a conflict forced upon this country, and did nothing which would indicate that he was attached to the principles of the Constitution of the United States, carrying forward liberty, equality, justice, and humanity. It was not until all danger was past, when the armistice was signed, that he made up his mind to again knock at the door of his country, and ask to be admitted to citizenship.

"The application is denied with prejudice, and before he can be admitted to citizenship he will have to serve a probationary period which will justify a court to conclude that he is in truth and in fact attached to the principles of the Constitution and the laws of this country."

NAVY

Vol. VI, p. 1083, sec. 1420. [First ed., vol. V, p. 271.]

Effect of pardon.—A person "who has deserted in time of war from the naval or military service of the United States," and who has been pardoned for the offense, is ineligible for re-enlistment in the naval service. (1918) 31 Op. Atty.-Gen. 225, wherein it was said:

"In an opinion by Attorney General Bonaparte dated June 16, 1908 (26 Op. 617) it was held that a full and unconditional pardon of a deserter from the Navy so far removes all the disabilities incident to his offense that it is in legal contemplation obliterated, so that he can no longer be regarded as a deserter or denied re-enlistment under Revised Statutes, section 1420. For the reasons heretofore stated in answer to your first question, *supra*, I am unable to concur in this view.

"In an earlier opinion (22 Op. 36) Attorney General Griggs, construing a statutory requirement that 'no soldier shall be again enlisted in the Army whose service during his last preceding term of enlistment has not been honest and faithful' (28 Stat. 216), held that a candidate for enlistment whose previous service had not been honest and faithful could be rejected notwithstanding the President's pardon of the offense.

"The reasoning there was that 'whilst the President's pardon restores the criminal to his legal rights and fully relieves him of the disabilities legally attaching to his conviction, it does not destroy an existing fact, viz, that this service was not honest and faithful' (p. 39).

"Neither does a pardon destroy the fact of desertion. This reasoning finds support in the opinion of the Supreme Court in *Carlesi v. New York*, [233 U. S. 51].

"These two opinions of my predecessors are apparently irreconcilable in principle. A later opinion by Attorney General Bonaparte (27 Op. 178, 182-183), holding that a pardon could not convert a dismissal under sentence of court-martial into an honorable discharge, which was a prerequisite to the grant of a pension, seems to return to the reasoning of the earlier opinion of Attorney General Griggs.

"For the reasons stated I am of opinion that a pardon does not remove the disqualification attached to the fact of desertion."

Vol. VI, p. 1121, sec. 1457. [First ed., vol. V, p. 284.]

Rank of line officer retired while serving as Chief of Bureau or Judge Advocate General.—A line officer of the navy, retired while serving as Chief of Bureau or Judge Advocate General, should be placed on the retired list with the rank attached by law to the

said position of Chief of Bureau or Judge Advocate General. (1919) 31 Op. Atty.-Gen. 505.

Vol. VI, p. 1130. [*Officers who have served as bureau chiefs.*] [First ed., 1909 Supp., p. 390.]

Retirement after relinquishment of office.

—This provision was enacted for the benefit of bureau chiefs who are placed on the retired list while so serving, and does not apply to an officer who having served as such is retired after relinquishing said office. *Stokes v. U. S.*, (1919) 54 Ct. Cl. 70.

Vol. VI, p. 1131. [*Rank and pay of retired officers.*] [First ed., 1909 Supp., p. 397.]

Rank on retirement.—This section does not authorize a retirement with a higher rank than the officer would have had if he had successfully passed his examination; and the rank with which the officer is to be retired is not determined by the date of the action of the retiring board. *Tappan v. U. S.*, (1919) 54 Ct. Cl. 76, wherein it was held that the fact that plaintiff was borne on the Navy Register as a rear admiral "subject to examination and confirmation" did not make him such, but indicated simply that he was eligible to become a rear admiral.

1918 Supp., p. 514. [*Commissioned personnel, etc.*]

Promotion of staff officers by President.—

Advancement of staff officers in the Medical, Pay, and Construction Corps, and Corps of Civil Engineers, from captain to rear admiral, may be made upon selection by the President. So promotion of all staff officers of the navy to higher offices may be made upon selection by the President. (1916) 31 Op. Atty.-Gen. 80.

Transmission of record of line officers up for promotion.—The Secretary of the Navy is required to transmit to the board of recommendation for selection for promotion of certain line officers of the navy the entire record of such officers since their appointment to the navy. (1917) 31 Op. Atty.-Gen. 87.

1918 Supp., p. 526, sec. 6.

Promotion of captains, commanders, and lieutenant commanders.—Under this section, the promotion board may consider for promotion captains, commanders, and lieutenant commanders who shall have served four years in their present grades on November 30 of the year of the convening of the board, not-

withstanding that at the time of such consideration they have not served four years in their present grades. (1917) 31 Op. Atty-Gen. 142.

1918 Supp., p. 549. [Provisional grade, etc.]

Examination as prerequisite to higher provisional rank.—When an enrolled member

in the Naval Reserve Force has been given a provisional rank, he may thereafter, either with or without being confirmed in such provisional rank, be given a higher provisional rank without examination by the statutory board of three naval officers of or above the rank of lieutenant commander and the statutory board of naval surgeons. (1917) 31 Op. Atty-Gen. 173.

OFFICERS OF MERCHANT VESSELS

Vol. VI, p. 1256, sec. 4442. [First ed., vol. V, p. 400.]

Suspension of license.—A pilot's license may not be suspended under the provisions of this section on a general charge of inattention to duties, the character of the charges not being specifically set forth. Where, however, he is also specifically charged with violating article 16 of section 1 of the Act of June 7, 1897, ch. 4 (2 Fed. Stat. Ann. (2d ed.) 421) and found guilty, he may be fined fifty dollars under section 3 of that Act (2 Fed. Stat. Ann. (2d ed.) 447). In such case, a federal court may enjoin the local inspectors from suspending his license. *Bulger v. Benson*, (C. C. A. 9th Cir. 1920) 262 Fed. 929, *affirming* (W. D. Wash. 1918) 251 Fed. 757, in the 1919 Supplement annotation. The court said:

"Article 16, already quoted, of the Pilot Rules, is part of section 1, chapter 4, of the Act of June 7, 1897, 30 Stat. 99. Section 3 of the same chapter and same act (30 Stat. 102) provides that every pilot who neglects or refuses to observe the provisions of the act referred to shall be liable to a penalty of \$50. Under section 4405 of the Revised Statutes, as amended by Act Feb. 8, 1907, 34 Stat. 881, the supervising inspector and the supervising inspector general, as a board, shall establish, with the approval of the Secretary of Commerce and Labor, all necessary regulations with respect to the steamboat inspection service and such regulations shall have the force of law. Under a prescribed form (801a) of the General Rules and Regulations of the Board of Supervising Inspectors, edition of November 21, 1916, page 144, it is provided that—

"Upon the revocation or suspension of the license of any such officer, master, or pilot, said license shall be surrendered to the local inspectors ordering such suspension or revocation."

"Under the rules of practice for the government of supervising and local inspectors of steam vessels, in trials of such officers, the inspector shall furnish the 'accused'

with a copy of the charges, 'setting forth specifically their character and the section of the statutes or the rules of the board that have been violated,' and an appeal is provided for to the supervising inspector, who, in turn, is required to proceed to investigate the case under the same rules prescribed for the trial of the accused by the local board.

"The contention of the appellants is that the local inspectors had jurisdiction to make the order of suspension, unless the provisions of the statutes already referred to with respect to such suspension are to be construed as penal rather than remedial. An opinion by the Attorney General (24 Op. Atty-Gen. 136) is cited as holding that, for the crimes and misdemeanors which are defined in the steamboat inspection law, a regular course of procedure through the criminal courts is provided, but that, where a question arises with respect to the revocation of the licenses of pilots and engineers, section 4450, heretofore quoted, is remedial, and not penal, and that the revocation of a license, as provided for in that statute, may be viewed—'not in the light of a punishment for an offense committed, but rather as a remedy placed in the hands of the board of inspectors to insure greater efficiency in the steamboat inspection service, and to guard against obstruction or injury to commerce. . . .'

"We agree with the District Court that the charge of inattention to duties and violation of section 4442 in connection with the navigation of the steamer Tolo does not 'specifically' set forth the character of the charges against the pilot. The statute evidently contemplated some statement of facts upon which the alleged inattention to the duties of his station was predicated, and we think that more than the general language should have been set forth.

"There was a specific charge, however, that the pilot had disregarded the provisions of article 16 of the Pilot Rules as quoted, and the learned judge was correct in ruling that the specific allegation should control, and that the general reference to section 4442 was surplusage. To the specific charge

the accused made answer, and after investigation was found guilty. The question whether or not the statute or rule is strictly penal is not of controlling importance, further than to say that it is penal in its nature, and should receive a strict construction.

"The only charge being that the accused violated article 16 of the Pilot Rules, the inspectors were only authorized to impose the penalty provided for by article 31, section 7180, Barnes' Federal Code. Under this rule every pilot who neglects or refuses to

observe the provisions of the act shall be liable to a penalty of \$50, and for all damages sustained by any passenger to his person or to his baggage by such neglect, provided that nothing in the rule shall relieve any vessel, owner, or corporation from any liability incurred by reason of such neglect or refusal. As no suspension of license is provided for in case of a violation of article 16, the inspectors exceeded their authority in ordering a suspension of the license of the appellee and in directing a surrender of his license."

PASSPORTS

Vol. VI, p. 1266, sec. 4075. [First ed., vol. V, p. 406.]

"Insular possessions of United States."—The governor of Porto Rico may be authorized to issue passports under this section as amended in 1902. (1917) 31 Op. Atty.-Gen. 151, wherein the Attorney General, replying to the Secretary of State, said: "In your letter of April 11, 1917, submitting the question above referred to, it was stated that by the 'rules governing the granting and issuing of passports in the insular possessions of the United States,' signed by the President July 19, 1902, the chief executive of Porto Rico was authorized to issue passports in that island; and it was suggested that in answering the question submitted it seemed 'necessary to determine whether Porto Rico now has the status of one of the "insular possessions of the United States" or whether it is an organized Territory and a part of the United States proper.'

"In the opinion of May 8, 1917, it was stated that inasmuch as Porto Rico has the status of an organized Territory it is no longer an 'insular possession of the United States,' and that accordingly the governor of Porto Rico has not, and cannot be granted, authority to issue passports.

"The acting Secretary of State now transmits with his letter of July 25, 1917, a copy of a letter of the Secretary of War and of a memorandum by the Chief of the Bureau of

Insular Affairs supporting the view that the present political status of Porto Rico as an organized Territory is not inconsistent with that of an 'insular possession of the United States.'

"I am convinced that this view is correct and that the opinion of May 8, 1917, is erroneous. The words 'insular possessions of the United States' in their natural meaning more aptly refer to geographical location than to a particular form of government. Unless, therefore, those words as used in this statute have some other meaning, a Territory of the United States may at the same time be an insular possession of the United States. There is nothing to indicate that Congress intended to use them here in any other than their natural meaning. On the contrary, the instances cited by the Chief of the Bureau of Insular Affairs show that the practice of Congress has been to use the words in a geographical sense and consequently as including Territories, when separated by water from the continental United States, such as Porto Rico and Hawaii.

"It follows that the governor of Porto Rico may still be authorized to issue passports under section 4075 of the Revised Statutes, as amended. In this aspect of the question it is unnecessary for me to express any view as to the present status of Porto Rico as an organized or unorganized Territory, and I accordingly withdraw what was said in my opinion of May 8, 1917, on that point."

PATENTS

Vol. VII, p. 11, sec. 4883. [First ed., vol. V, p. 417.]

I. NATURE OF PATENT (p. 11)

Purpose and effect of patent right.—To same effect as original annotation, see *Crystall Percolator Co. v. Landers*, (D. C. Conn. 1919) 258 Fed. 28.

"A patent is not inherently a grant of the right to make; it is a grant of the right to exclude others from the field." *Bird's-Eye Veneer Co. v. Franck-Philipson*, (C. C. A. 6th Cir. 1919) 259 Fed. 266, 170 C. C. A. 334.

Vol. VII, p. 14, sec. 4884. [First ed., vol. V, p. 419.]

III. CONSTRUCTION (p. 16)

Pioneer patent.—To same effect as original annotation, see *Heyl v. M. A. Hanna Coal, etc., Co.*, (W. D. Wis. 1919) 257 Fed. 97.

Vol. VII, p. 23, sec. 4886. [First ed., vol. V, p. 421.]

- I. In general.
- II. Who may obtain patents.
- III. What may be patented.
- IV. Invention.
- VI. Novelty and anticipation.
- VIII. Abandonment.

I. IN GENERAL (p. 23)

Second application making conflicting claims.—An inventor whose patent application discloses, but does not claim, an invention which conflicts with that of a later unexpired patent, must, in the absence of laches, be deemed to have two years from the date of the conflicting patent in which to file a second application, making conflicting claims, in order to have the question of priority of invention between the two determined in an interference proceeding, in view of this section, as amended by the Act of March 3, 1897, which gives an inventor two years after patent has issued to another for his invention, in which he may file his own application, and the time cannot be cut down to one year on grounds of equity or public policy, or because of the one-year rule prescribed by section 4894, for further prosecution of an application after office action thereon. *Chapman v. Wintroath*, (1920) 252 U. S. 126, 40 S. Ct. 234, 64 U. S. (L. ed.) —, *reversing* (1918) 47 App. Cas. (D. C.) 428.

II. WHO MAY OBTAIN PATENTS (p. 23)

Right to patent—Requirements—Compliance with statutory conditions.—No one

has the right to a patent without bringing himself within all the conditions set forth in this section and R. S. sec. 4887 (7 Fed. Stat. Ann. (2d ed.) 138). *Jost v. Borden Stove Co.*, (E. D. Pa. 1920) 262 Fed. 163, wherein it was said:

"Without the patent he has no property right upon which any one could trespass. Having that property right, he has a cause of action against any one who infringes. In other words, his cause of action depends, not upon whether he is within the provisions of the patent laws, and, in consequence, possessed of the right to a patent, but whether a patent has in fact been granted to him. It is true the right he claims may be open to question, and the validity of his patent to successful attack; yet nevertheless the real condition of things is that without the patent he has nothing, but with it he has all the rights which it grants, until the invalidity of the patent appears. Hence we have the accepted doctrine that evidence of the grant of a patent and of infringement presents a case which, if made out by the evidence, the defendant must overcome, or the plaintiff is entitled to his decree."

Lack of diligence.—To same effect as original annotation, see *Derr v. Gleason*, (App. Cas. D. C. 1919) 258 Fed. 969.

Employer and employee—Hired inventor.—Where an employee is hired for the express purpose of making drawings and designing certain improvements to a machine, and it is apparent from the circumstances attending his employment, the nature of the work he performed and his subsequent conduct that it was not intended that he should retain any personal interest in the results of his efforts in the improvement of the machine, the employer will be held to be entitled to the patent for the improvement. *Ingle v. Landis Tool Co.*, (M. D. Pa. 1919) 262 Fed. 150.

III. WHAT MAY BE PATENTED (p. 35)

Process and apparatus as single invention.—To same effect as original annotation, see *Nestle Patent Holding Co. v. Fredericks*, (C. C. A. 2d Cir. 1919) 261 Fed. 780.

Differentiation from prior art.—"The sustaining of a patent upon a differentiation from the prior art does not authorize the successful party to gather to himself a monopoly of what was old when he entered the field." *T. L. Smith Co. v. Cement Tile Machinery Co.*, (C. C. A. 8th Cir. 1919) 257 Fed. 423, 168 C. C. A. 463.

Improvement of patentable articles.—Infringement of a patented device cannot be avoided by merely improving it. *Otto Coking Co. v. Koppers Co.*, (C. C. A. 3d Cir. 1919) 258 Fed. 122, 169 C. C. A. 208.

Different improvements as separate inventions.—To same effect as original annotation, see *Jay v. Sparks-Withington Co.*, (N. D. Ohio 1918) 258 Fed. 45; *Sandusky Foundry, etc., Co. v. De Lavaud*, (N. D. Ohio 1919) 258 Fed. 640; *Jay v. Weinberg*, (C. C. A. 7th Cir. 1919) 262 Fed. 973, wherein it was said: "Where the general art has been developed by the pioneers, there is room for an adapter to have only a specific patent for his particular form of adaptation, and he is not privileged to exclude others from gleaning in the same open field."

Invention cannot be made to depend upon the length of an advancing step in an art. If the step be an advance, and the means by which the advance is made are new and beyond the conception of a mechanic trained in the art, the invention must be recognized. *Superior Mach. Tool Co. v. Cincinnati Lathe, etc., Co.*, (C. C. A. 7th Cir. 1919) 259 Fed. 273, 170 C. C. A. 341.

Product of process.—To same effect as original annotation, see *Dunn Wire-Cut Lug Brick Co. v. Toronto F. Clay Co.*, (C. C. A. 6th Cir. 1919) 259 Fed. 258, 170 C. C. A. 326.

IV. INVENTION (p. 44)

Attributes of invention.—In *A. Kimball Co. v. Noesting Pin Ticket Co.*, (C. C. A. 2d Cir. 1919) 262 Fed. 148, the court said regarding the attributes of an invention:

"Invention, as we are instructed by the highest court, is not judicially to be defined; i. e., it cannot be determined as to limit of meaning. But many attributes may be marked. Thus patentable invention is a means only; it is the embodiment of the inventive idea (*Corrington v. Westinghouse, & Co.*, 178 Fed. 715, 103 C. C. A. 479); and even the smallest invention, if it merits the title, must meet an existing want, yet that want, invoking invention, may never be apparent until some previous invention, imperfectly satisfying the more universal want, discloses the subordinate and narrower need (1 Rob. Pat. 134).

"It is this thought that justifies, and indeed compels, study of the prior art, as distinguished from anticipatory patents or uses. To know not only what the 'more universal want' was, but how far and by what means it had been supplied, is a process not seldom resulting in the validation of modest inventions, and the destruction of many of great pretense.

"This indicates that 'invention' is not a term of legal art, like 'common carrier' or 'contingent remainder'; nor can applicability be fixed by consulting dictionaries, while reports furnish, not precedent, but only illustrations. What does connect the large word with the perhaps small thing is evidence; and litigations like this become studies of facts, as varying in patent matters as in other human contests."

New application of prior knowledge.—A patent will issue for a new device which is

the result of a new application of prior knowledge. *A. Kimball Co. v. Noesting Pin Ticket Co.*, (C. C. A. 2d Cir. 1919) 262 Fed. 148.

Omission of element.—An invention is patentable if one of the elements of a similar invention is omitted without the substitution of an equivalent. *Russell Grader Mfg. Co. v. F. B. Zeig Mfg. Co.*, (C. C. A. 6th Cir. 1919) 259 Fed. 575, 171 C. C. A. 33.

The doctrine of mechanical equivalents may be invoked in all patents. *Searchlight Horn Co. v. Victor Talking Mach. Co.*, (D. C. N. J. 1919) 261 Fed. 395.

Substitution of equivalents.—To same effect as original annotation, see *Chase v. Union, etc., Trust Co.*, (D. C. Conn. 1919) 256 Fed. 632; *Smith Cannery Machines Co. v. Seattle-Astoria Iron Works*, (C. C. A. 9th Cir. 1919) 261 Fed. 85, holding that the superiority of the equivalent substituted must be due to a difference in function or mode of operation or some essential change in character in order to sustain a patent.

"The patent law does not permit an inventor to variously arrange the parts to cover the entire idea . . . and thus exclude mechanical equivalency and the results accomplished." *Adt v. E. Kirstein Sons Co.*, (W. D. N. Y. 1919) 259 Fed. 277, *affirmed* (C. C. A. 2d Cir. 1919) 259 Fed. 561, 170 C. C. A. 523.

Combination of mechanical equivalents.—The assembling of mechanical equivalents of features old in the art into a single structure does not constitute invention. *In re Smith*, (App. Cas. D. C. 1920) 262 Fed. 643.

Test of patentable combination.—To same effect as original annotation, see *Independent Coal Tar Co. v. Cressy Contracting Co.*, (C. C. A. 1st Cir. 1919) 260 Fed. 463, 171 C. C. A. 289.

Combination of old elements.—"It is no defense to a claim of infringement that one or more elements of a patented combination, or one or more parts of a patented improvement, may be found in one old patent, and others in another, and still others in a third." *Independent Coal Tar Co. v. Cressy Contracting Co.*, (C. C. A. 1st Cir. 1919) 260 Fed. 463, 171 C. C. A. 289.

A new combination of old elements producing old results but in a new, different, and substantially better and cheaper manner, is patentable. *Meurer Steel Barrel Co. v. Draper Mfg. Co.*, (N. D. Ohio 1919) 260 Fed. 410; *Minneapolis, etc., R. Co. v. Barnett, etc., Co.*, (C. C. A. 8th Cir. 1919) 257 Fed. 302, 166 C. C. A. 386.

Combination by union of parts.—To same effect as original annotation, see *Smith Cannery Machines Co. v. Seattle-Astoria Iron Works*, (C. C. A. 9th Cir. 1919) 261 Fed. 85.

Combinations producing result with varying degrees of success.—When the advance toward the desired result in an art is gradual, and several inventors form different

combinations, which accomplish the result sought with varying degrees of success, each is entitled to his own combination, as long as it differs from those of his competitors and does not include theirs. *Minneapolis, etc., R. Co. v. Barnett, etc., Co.*, (C. C. A. 8th Cir. 1919) 257 Fed. 302, 168 C. C. A. 386.

New and useful result necessary.—To same effect as original annotation, see *Crystal Percolator Co. v. Landers*, (D. C. Conn. 1919) 258 Fed. 28, wherein it was said:

"Generally speaking, a combination of old elements, in order to be patentable, must produce by their joint action a novel and useful result, or an old result in a more advantageous way. To arrive at the distinctions between combinations and aggregations definite reference must be had to the decisions of this court. The subject was fully discussed in *Palmer v. Corning*, 156 U. S. 342 [15 Sup. Ct. 381, 39 L. Ed. 445], wherein the previous decisions were reviewed. The rule stated in *Hailes v. Van Wormer*, 20 Wall. 353, 368 [22 L. Ed. 241], was quoted with approval, wherein the court said: 'It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination and not a mere aggregate of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention. No one by bringing together several old devices without producing a new and useful result, the joint product of the elements of the combination and something more than an aggregate of old results, can acquire a right to prevent others from using the same devices, either singly or in other combinations, or, even if a new and useful result is obtained, can prevent others from using some of the devices, omitting others, in combination.' *Hailes v. Van Wormer*, 20 Wall. 353, 368 [22 L. Ed. 241]. In *Richards v. Chase Elevator Co.*, 158 U. S. 299, 302 [15 Sup. Ct. 831, 39 L. Ed. 991], the rule was stated as follows: 'Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements.' In *Specialty Manufacturing Co. v. Fenton Metallic Manufacturing Co.*, 174 U. S. 492, 498 [19 Sup. Ct. 641, 43 L. Ed. 1058], the rule was again tersely stated: 'Where a combination of old devices produces a new result such combination is doubtless patentable, but where the combination is not

only of old elements, but of old results, and no new function is evolved from such combination, it falls within the rulings of this court in *Hailes v. Van Wormer*, 20 Wall. 353, 368 [22 L. Ed. 241]; *Reckendorfer v. Faber*, 92 U. S. 347, 356 [23 L. Ed. 719]; *Phillips v. Detroit*, 111 U. S. 604 [4 Sup. Ct. 580, 28 L. Ed. 532]; *Brinkerhoff v. Aloe*, 146 U. S. 515, 517 [13 Sup. Ct. 221, 36 L. Ed. 1066]; *Palmer v. Corning*, 156 U. S. 342, 345 [15 Sup. Ct. 381, 39 L. Ed. 445]; *Richards v. Chase Elevator Co.*, 158 U. S. 299 [15 Sup. Ct. 831, 39 L. Ed. 991]."

Merely bringing together old devices.—To same effect as original annotation, see *In re Smith*, (App. Cas. D. C. 1920) 262 Fed. 717; *J. H. Day Co. v. Mountain City Mill Co.*, (E. D. Tenn. 1918) 257 Fed. 561.

Combination producing new result.—While invention may exist, even though every element is old, provided the combination either produces a new result or effects an old result in a new and materially better way, yet all elements of the prior art have a bearing upon the question of invention, and it is unnecessary to a finding of lack of invention that every element be found in one embodiment. *Edwards v. Dayton Mfg. Co.*, (C. C. A. 6th Cir. 1918) 257 Fed. 980, 169 C. C. A. 130.

Double use.—To same effect as original annotation, see *J. H. Day Co. v. Mountain City Mill Co.*, (E. D. Tenn. 1918) 257 Fed. 561.

Reduction to practice.—To same effect as original annotation, see *Reichel v. Dorset*, (App. Cas. D. C. 1920) 262 Fed. 652, holding that the mere obtaining of hog cholera antitoxin without a test of its potency by immunizing a hog, did not amount to a reduction of practice.

The filing of an allowable application constitutes a reduction to practice. *Bonine v. Bliss*, (App. Cas. D. C. 1919) 259 Fed. 989.

Failure to appreciate the patentability of an invention is no excuse for failing to reduce it to practice.

Commercial success.—To same effect as original annotation, see *Smith v. Peck, etc., Co.*, (C. C. A. 2d Cir. 1919) 262 Fed. 415.

"If the question of invention be doubtful, the balance will be turned in favor of patentability by a showing of undoubted commercial success." *Meurer Steel Barrel Co. v. Draper Mfg. Co.*, (N. D. Ohio 1919) 260 Fed. 410.

General and extensive use.—A presumption of inventive novelty arises from general use by the public. *Dunn Wire-Cut Lug Brick Co. v. Toronto F. Clay Co.*, (C. C. A. 6th Cir. 1919) 259 Fed. 258, 170 C. C. A. 326.

VI. NOVELTY AND ANTICIPATION (p. 83)

Knowledge of inventor.—To same effect as original annotation, see *In re Smith*, (App. Cas. D. C. 1920) 262 Fed. 717.

Reduction to practice—Prior public use.—Proof of the prior public use of a pat-

ented article or process sufficient to defeat a patent must be such as to leave no reasonable doubt of the prior public use more than two years before making the application for the patent. Oral testimony of the date of the prior use should find corroboration in evidence of contemporaneous records or memoranda, or physical exhibits, before striking down a patent because of prior public use. *General Insulating Mfg. Co. v. Union Fibre Co.*, (C. C. A. 7th Cir. 1919) 261 Fed. 389.

Unsuccessful device.—To same effect as original annotation, see *Consolidated Window Glass Co. v. Window Glass Mach. Co.*, (C. C. A. 3d Cir. 1919) 261 Fed. 362.

Analogous arts producing same products.—Though two arts, producing the same products from the same source, are concededly related, yet differences in them, if fundamental, may validly prevent inventions in one from operating as anticipations of inventions in the other. *Otto Coking Co. v. Koppers Co.*, (C. C. A. 3d Cir. 1919) 258 Fed. 122, 169 C. C. A. 208.

Adaptability of prior device to performance of function covered by patent in suit.—It is not sufficient to constitute anticipation that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question. It must be designed by the maker and adapted for the performance of such function. *Smith v. Peck, etc., Co.*, (C. C. A. 2d Cir. 1919) 262 Fed. 415.

Publication—Device described in foreign printed publications.—Patentable novelty cannot be asserted for a device which has been described in foreign printed publications. *Bone v. Marion County*, (1919) 251 U. S. 134, 40 S. Ct. 96, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 7th Cir. 1917) 249 Fed. 211, 161 C. C. A. 247.

Sufficiency of published descriptions.—In *Vacuum Cleaner Co. v. Thompson Mfg. Co.*, (S. D. Ia. 1919) 258 Fed. 239, regarding the sufficiency of published descriptions alleged to be anticipating, the court said: "Any printing, writing, or illustration relied upon as part of the prior art must be such as to make disclosure, not to an inventor, but to the ordinary individual, skilled as a workman in the field involved. The documents relied upon must teach the art; must be such that the world has knowledge of the art; must be such that qualified persons, without the exercise of inventive genius, may produce the device from the disclosures. Of course, it is not necessary that the device involved shall be shown by any one publication; but the inventor, relying upon his patent, is presumed to have had before him all of the prior printed disclosures."

Disclosure of various elements of combination.—Where patents, publications, and actual structures have been proved, some of which disclose one, and others more, of the old elements of the plaintiff's combinations, the fact that one of these disclosed one, and

another another or more elements of the patented combination, while none of them discloses all of the elements thereof, does not necessarily establish the fact that any of them anticipates the combinations of the plaintiff. *Minneapolis, etc., R. Co. v. Barnett, etc., Co.*, (C. C. A. 8th Cir. 1919) 257 Fed. 302, 168 C. C. A. 386.

Burden of proving priority.—To same effect as second paragraph of original annotation, see *Smith v. Peck, etc., Co.*, (D. C. Conn. 1919) 258 Fed. 40.

Evidence of anticipation required.—To same effect as first paragraph of original annotation, see *Minneapolis, etc., R. Co. v. Barnett, etc., Co.*, (C. C. A. 8th Cir. 1919) 257 Fed. 302, 168 C. C. A. 386.

Anticipation should be established, not merely by testimony of witnesses relating to facts many years previous, but by concrete, visible, contemporaneous proofs, which speak for themselves. The proof must establish a clear conviction, and something more than oral testimony, even of the highest character, is required, where there has been considerable lapse of time. *Searchlight Horn Co. v. Victor Talking Mach. Co.*, (D. C. N. J. 1919) 261 Fed. 395.

VIII. ABANDONMENT (p. 127)

Experimental use.—To same effect as original annotation, see *Alvey-Ferguson Co. v. John F. Trommer Evergreen Brewery*, (E. D. N. Y. 1913) 260 Fed. 572, holding that unsuccessful experimental use at a world's fair was not an abandonment to the public so as to prevent an application for a patent more than two years later.

Disuse of patent.—To same effect as original annotation, see *Reed v. Hughes Tool Co.*, (C. C. A. 5th Cir. 1919) 261 Fed. 192.

Unreasonable delay in application.—In *Duncan v. Shelly*, (App. Cas. D. C. 1920) 263 Fed. 639, it was held that a two years' delay in making application for a patent, not caused by poverty, worked an abandonment as against a person applying for a patent during that time.

Vol. VII, p. 145, sec. 4888. [First ed., 1916 Supp., p. 185.]

II. Specifications and description.

1. In general.
3. Sufficiency.
5. Amendments.

III. Claims.

1. Object.
2. Construction.
3. Essentials and scope.
5. Effect of claim.
6. Amendment of claim.
8. Rejection of claim.

II. SPECIFICATIONS AND DESCRIPTION

1. In General (p. 146)

Description as measuring invention.—The claims measure the invention, and while

the inventor must describe the best mode of applying the principle of his invention the description does not necessarily measure the invention. *Independent Coal Tar Co. v. Cressy Contracting Co.*, (C. C. A. 1st Cir. 1919) 260 Fed. 463, 171 C. C. A. 289.

Description of "best mode."—Secrecy may not be maintained as to the "best mode" in view of this section. And this necessitates the giving of trade secrets. *Dow Chemical Co. v. American Bromine Co.*, (Mich. 1920) 177 N. W. 996.

3. Sufficiency (p. 148)

In general.—To same effect as original annotation, see *Schaum v. Copley-Plaza Operating Co.*, (D. C. Mass. 1919) 260 Fed. 197, wherein it was held that the specification was sufficient.

Essential features.—A practical and useful invention is not disclosed by a patent for an improvement in photographing and developing apparatus, where the short reciprocating movement of the film-carrying rack, without which the machine confessedly cannot be successfully operated, is not disclosed in the patent, as it must be under this section, in order to render it valid. *Beidler v. U. S.*, (1920) 253 U. S. 447, 40 S. Ct. 504, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 636.

Construction by those skilled in the art.—To same effect as original annotation, see *Searchlight Horn Co. v. Victor Talking Mach. Co.*, (D. C. N. J. 1919) 261 Fed. 395.

5. Amendments (p. 157)

Nature of amendments allowed.—To same effect as original annotation, see *Schaum v. Copley-Plaza Operating Co.*, (D. C. Mass. 1919) 260 Fed. 197, holding that such an amendment need not be verified.

III. CLAIMS

1. Object (p. 158)

To same effect as original annotation, see *United States Light, etc., Corp. v. Safety Car Heating, etc., Co.*, (C. C. A. 2d Cir. 1919) 261 Fed. 915.

2. Construction (p. 158)

In general.—"A patent is the creature of the statute. The terms and conditions upon which the grant is made are fixed by the statute. Section 9432, Compiled Statutes 1918, [this section] requires the inventor to set forth his claims in 'such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to make, construct, compound, and use the same.' What is not claimed distinctly in the invention, the public possesses. A patent is sustained, not for what the inventor may have done in effect, but what is pointed out clearly and distinctly in his open letter. . . .

"While we may give liberal construction to the language used to protect the inventor, we cannot rewrite the claim, or insert an

element or modify an element in the combination upon which alone validity depends. Words that describe a result may, of course, be adjective in character, that is, modifying in meaning, yet they must be definite and understandable." *Knight Soda Fountain Co. v. Walrus Mfg. Co.*, (C. C. A. 7th Cir. 1919) 258 Fed. 929, 170 C. C. A. 125.

Construed with specifications and description.—Whether the invention is large or small, primary or trivial, it remains true that, when a claim is clear and distinct, the patentee cannot go beyond the words thereof for the purpose of establishing infringement; the specification may be referred to for the purpose of limiting, but not of expanding, a claim, and the range of equivalents is measured by what is described and claimed. *Homer Brooke Glass Co. v. Hartford-Fairmont Co.*, (C. C. A. 2d Cir. 1919) 262 Fed. 427; *United States Light, etc., Corp. v. Safety Car Heating, etc., Co.*, (C. C. A. 2d Cir. 1919) 261 Fed. 915; *Bisight Co. v. Onepiece Bifocal Lens Co.*, (C. C. A. 4th Cir. 1919) 259 Fed. 275, 170 C. C. A. 343.

Where the language of a claim includes elements described in general terms, the court in construing it may look to the specifications. *I. T. S. Rubber Co. v. Panther Rubber Mfg. Co.*, (C. C. A. 1st Cir. 1919) 260 Fed. 934, 171 C. C. A. 576.

So where a term in the claims of a patent is susceptible of two meanings, it should be given that which the specifications show it was intended to have, if that meaning is not repugnant to the plain and clear terms used. *Petroleum Rectifying Co. v. Reward Oil Co.*, (C. C. A. 9th Cir. 1919) 260 Fed. 177, 171 C. C. A. 213, *reversing* (N. D. Cal. 1918) 260 Fed. 183.

Construction of claims for improvements.—To same effect as last paragraph of original annotation, see *Crystal Percolator Co. v. Landers*, (D. C. Conn. 1919) 258 Fed. 28.

The claims of a pioneer invention should receive a fairly liberal construction, one that will uphold rather than destroy. *Petroleum Rectifying Co. v. Reward Oil Co.*, (C. C. A. 9th Cir. 1919) 260 Fed. 177, 171 C. C. A. 213, *reversing* (N. D. Cal. 1919) 260 Fed. 183.

Claim defining element.—"Where the claim defines an element in terms of its form, material, location or function, thereby apparently creating an express limitation, where that limitation pertains to the inventive step rather than to its mere environment, and where it imports a substantial function which the patentee considered of importance to his invention, the court cannot be permitted to say that other forms, which the inventor thus declared not equivalent to what he claimed as his invention, are nevertheless to be treated as equivalent, even though the court may conclude that his actual invention was of a scope which would have permitted the broader equivalency." *D'Arcy Spring Co. v. Marshall Ventilated Mattress Co.*, (C. C. A. 6th Cir. 1919) 259 Fed. 236, 170 C. C. A. 304.

Value of contribution to art.—The claims of a patent application will be read not solely with an eye to the labor or inventive merit involved, but also with the value of its contribution to the general good in view. *Dayton Engineering Laboratories Co. v. Kent*, (E. D. Pa. 1919) 260 Fed. 187.

3. *Essentials and Scope* (p. 161)

Scope of claims generally.—To same effect as original annotation, see *Merrill v. W. Bickford Co.*, (D. C. Me. 1919) 260 Fed. 207.

Arguments made in the patent office by the applicant to the examiners are not to be taken as a measure of his patent, when not accompanied by any changes in the claims. *Crystal Percolator Co. v. Landers*, (D. C. Conn. 1919) 258 Fed. 28.

Claims for process patent.—It is not essential that the claims of a patent for a process should set forth the principle on which the process operates. *Petroleum Rectifying Co. v. Reward Oil Co.*, (C. C. A. 9th Cir. 1919) 260 Fed. 177, 171 C. C. A. 213, *reversing* (N. D. Cal. 1918) 260 Fed. 183.

Invention having reversible attributes.—Where there is a capacity of reversibility with the same instrumentality, the courts will not restrict the claim to one attribute to the exclusion of the reversible attribute. *Marconi Wireless Tel. Co. v. De Forest Radio, Telephone, etc., Co.*, (S. D. N. Y. 1919) 261 Fed. 393.

5. *Effect of Claim* (p. 170)

Rights determined by claim.—To same effect as original annotation, see *Crystal Percolator Co. v. Landers*, (D. C. Conn. 1919) 258 Fed. 28.

Extent of patentee's rights.—To same effect as original annotation, see *Minneapolis, etc., R. Co. v. Barnett, etc., Co.*, (C. C. A. 8th Cir. 1919) 257 Fed. 302, 168 C. C. A. 386.

6. *Amendment of Claim* (p. 173)

Amendments to meet objections of Patent Office.—Where an application is rejected by the Patent Office and the claims are thereafter amended and allowed, the patent is limited to the features set forth in the amended claims. *Schulte v. Colorado Tire, etc., Co.*, (C. C. A. 8th Cir. 1919) 259 Fed. 562, 170 C. C. A. 524.

8. *Rejection of Claim* (p. 175)

Estoppel by acquiescence in rejection.—To same effect as original annotation, see *Ward v. Finley Method Co.*, (S. D. Tex. 1919) 259 Fed. 869.

Vol. VII, p. 179, sec. 4893. [First ed., vol. V, p. 488.]

Doubt as to patentability.—To same effect as original annotation, see *Wilson's Application*, (App. Cas. D. C. 1919) 258 Fed. 976.

Vol. VII, p. 193, sec. 4904. [First ed., vol. V, p. 499.]

Presumption of inventorship.—He who files first is presumably the inventor, and that presumption remains with him until it has been overcome by proof. *Swinglehurst v. Ballard*, (App. Cas. D. C. 1919) 258 Fed. 973.

An amendment of an application so as to show a single inventor instead of two joint inventors relates back to the original filing and does not cut off the rights of the applicant in an interference proceeding. *In re Roberts*, (App. Cas. D. C. 1920) 263 Fed. 646.

Burden of proof.—To same effect as original annotation, see *Engle v. Manchester*, (App. Cas. D. C. 1920) 262 Fed. 646; *Bader v. Burroughs*, (App. Cas. D. C. 1919) 261 Fed. 1016; *Swinglehurst v. Ballard*, (App. Cas. D. C. 1919) 258 Fed. 973.

Proof of priority beyond reasonable doubt.—To same effect as original annotation, see *Braun v. Wiegand*, (App. Cas. D. C. 1920) 262 Fed. 647; *Leonard v. Young*, (App. Cas. D. C. 1919) 258 Fed. 985.

Awarding priority on record.—The Commissioner of Patents has authority in a proper case to award priority on the record to the senior applicant. *Lee v. Vreeland*, (App. Cas. D. C. 1920) 262 Fed. 654.

Review of decision.—In *Shenk v. Clark*, (App. Cas. D. C. 1920) 263 Fed. 645, it was said: "We have considered the very carefully prepared brief of appellant's counsel, but have not been convinced that any error was committed by the Patent Office, and therefore, without further discussion of the question involved, affirm the decision."

Vol. VII, p. 202, sec. 4914. [First ed., vol. V, p. 506.]

Decision of question of fact.—To same effect as original annotation, see *Greenawalt v. Dwight*, (App. Cas. D. C. 1919) 258 Fed. 982. See also *Erickson v. Dyson*, (App. Cas. D. C. 1919) 258 Fed. 986.

Vol. VII, p. 211, sec. 4916. [First ed., vol. V, p. 511.]

Object of the law.—"The obvious intent of the statute providing for reissues, where, through inadvertence, accident, or mistake, the full scope of the invention has not been claimed, is to secure to the inventor a monopoly of that which he has actually discovered or invented." *In re Otto*, (App. Cas. D. C. 1919) 259 Fed. 985.

Laches.—To same effect as original annotation, see *In re Otto*, (App. Cas. D. C. 1919) 259 Fed. 985.

Effect of delay—Supposition of abandonment.—To same effect as original annotation, see *Schneider's Application*, (App. Cas. D. C. 1920) 262 Fed. 718, holding that a reissuance of a patent with broader claims

would not be allowed after a delay of nearly three years, the patentee's sole excuse being that he had failed to examine his patent and discover the defect until shortly before making his application for a reissuance.

Vol. VII, p. 242, sec. 9. [First ed., vol. V, p. 502.]

Jurisdiction of appellate court.—To same effect as original annotation, see *In re Smith*, (App. Cas. D. C. 1920) 262 Fed. 643.

Decisions appealable—Order dissolving interference proceeding.—An order of the Commissioner of Patents dissolving an interference proceeding is not appealable. Such an order is not final. *Cowles v. Rody*, (App. Cas. D. C. 1919) 261 Fed. 1015; *Parker v. Craft*, (App. Cas. D. C. 1919) 258 Fed. 988.

Conclusiveness of decision of patent office.—To same effect as third paragraph of original annotation, see *Kennicott v. Cape*, (App. Cas. D. C. 1920) 262 Fed. 641; *Hopkins v. Riegger*, (App. Cas. D. C. 1920) 262 Fed. 642; *Bonine v. Bliss*, (App. Cas. D. C. 1919) 259 Fed. 989, holding that the question of whether or not an application is allowable and one upon which the issuance of a patent can be predicated, is primarily for the experts of the patent office and would not be inquired into on appeal except for manifest error.

Vol. VIII, p. 249, sec. 4898. [First ed., vol. V, p. 531.]

III. Assignments.

3. Form and requisites.
5. Nature and effect.

IV. Licenses.

1. Nature and requisites.
4. Construction.
5. Operation and effect.

III. ASSIGNMENTS

3. Form and Requisites (p. 259)

Assignment of unpatented invention.—There is no provision of law that prevents the assignment of an unpatented invention, but when a patent therefor is granted this section applies and requires the assignment, conveyance or grant of whatever interest therein, shall be in writing. *Ingle v. Landis Tool Co.*, (M. D. Pa. 1919) 262 Fed. 150.

5. Nature and Effect (p. 264)

Nature of assignee's title.—An assignee of a patentee acquires no better title to the patent than his assignor had at the time of the assignment, and may assert only such rights regarding it as his assignor could have asserted. *Ingle v. Landis Tool Co.*, (M. D. Pa. 1919) 262 Fed. 150.

Assignment of patent as including improvement.—An assignment of all the patents, drawings, patterns, etc., relating to

the manufacture and sale of a certain machine, includes improvements to the machine and drawings regarding them. *Ingle v. Landis Tool Co.*, (M. D. Pa. 1919) 262 Fed. 150.

IV. LICENSES

1. Nature and Requisites (p. 271)

Implied license.—Where the designing or creating of a machine or process involves invention and a patent is taken out, it is well established that the person for whose benefit such creating was done is entitled to an irrevocable license to the use of said patent to such extent as may be necessary to secure to him the beneficial rights intended. *McKinnon Chain Co. v. American Chain Co.*, (M. D. Pa. 1919) 259 Fed. 873.

Contracts with salesmen as license agreements.—Contracts by a company manufacturing a patented machine whereby agents are given the exclusive sale of such machines in a certain territory are not license agreements. This is especially true where the contracts contain no reference to the patent under which the machines are made and no reference to the machines as patented articles. *Standard Sewing Mach. Co. v. Jones*, (C. C. A. 3d Cir. 1. 9) 260 Fed. 170, 171 C. C. A. 206.

4. Construction (p. 275)

Waiver of delivery of formal licenses.—In *Okmulgee Window Glass Co. v. Frink*, (C. C. A. 8th Cir. 1919) 260 Fed. 159, 171 C. C. A. 195, it was held that under the evidence the parties to a license contract had waived a provision therein requiring the delivery by the licensor of formal licenses to the licensee.

5. Operation and Effect (p. 279)

Estoppel of licensee.—To same effect as original annotation, see *Bell, etc., Co. v. Bliss*, (C. C. A. 7th Cir. 1919) 262 Fed. 131; *Churchward International Steel Co. v. Bethlehem Steel Co.*, (E. D. Pa. 1919) 260 Fed. 962.

Priority over subsequent assignment.—“The decisions have for so long held that a license from a patentee prevails over a subsequent assignment that I do not feel free to disregard the rule so established. *Chambers v. Smith*, Fed. Cas. No. 2,582; 5 Fish. Pat. Cas. 14; *Farrington v. Gregory*, Fed. Cas. No. 4,688, 4 Fish. Pat. Cas. 221; *Hamilton v. Kingsbury*, Fed. Cas. No. 5,984, 17 Blatch. 264; *Jones v. Berger* (C. C.) 58 Fed. 1006. I have not found that this rule has been confirmed by any appellate court, and it seems to me open at least to some doubt whether agreements to license, so far as they operate in futuro, are more than executory contracts, which would under ordinary rules yield to the legal title of a bona fide purchaser. Under the statute (R. S. § 4898), an unrecorded earlier assignment is invalid, and a result is surely somewhat anomalous which leaves a licensee who

takes no interest in the property, in a stronger position than an assignee who has become the owner in whole or in part. Nevertheless, if the rule is to be changed, it must certainly be by an appellate court, and I accept it for the purposes of this case." *Keystone Type Foundry v. Fastpress Co.*, (S. D. N. Y. 1920) 263 Fed. 99, wherein the rule was applied to a license given while the application was pending.

Vol. VII, p. 283, sec. 4900. [First ed., vol. V, p. 547.]

Scope of section.—This section applies to all patentees, and is not limited to those who make and vend patented articles. *Churchward International Steel Co. v. Bethlehem Steel Co.*, (E. D. Pa. 1919) 262 Fed. 438.

Necessity of accounting for profits.—This section relieves infringers without notice from payment of damages, but not from accounting for profits. *Churchward International Steel Co. v. Bethlehem Steel Co.*, (E. D. Pa. 1919) 262 Fed. 438.

Vol. VII, p. 288, sec. 4919. [First ed., vol. V, p. 552.]

- I. Who may sue for infringement.
- II. Who liable for infringement.
- IV. Pleading.
- V. Recovery.

I. WHO MAY SUE FOR INFRINGEMENT (p. 289)

Assignment amounting to license.—See *infra* this title, p. 701.

II. WHO LIABLE FOR INFRINGEMENT (p. 296)

Liability of co-owner.—A part owner of a patent has no right to enjoin infringement of the patent by his co-owner, who, by virtue of the joint ownership, has a right to use the patent. *Bell, etc., Co. v. Bliss*, (C. C. A. 7th Cir. 1919) 262 Fed. 131.

Suits against officers of corporation.—To same effect as original annotation, see *Stromberg Motor Devices Co. v. Holley Bros. Co.*, (E. D. Mich. 1919) 260 Fed. 220; *Hitchcock v. American Plate Glass Co.*, (C. C. A. 3d Cir. 1919) 259 Fed. 948, 171 C. C. A. 24, wherein it was said:

"Where a director or manager of a corporation—who sustains to the corporation the relation of master or principal in the sense of being its dominating force—himself commands the commission of a tort by the corporation, though he does it as an officer and in the name of the corporation, he is individually liable. *National Cash Register Co. v. Leland*, 94 Fed. 502, 508, 37 C. C. A. 372. This is so, because in an action for infringement of letters patent, an individual, who has inspired a tort and has participated in its commission, is a joint tortfeasor, and must, on general principles of law and by analogy with other torts,

yield to the person whose rights he has invaded the profits of which he has gained thereby. When the joint tort is established, the individual joint tortfeasor cannot defend on the plea that the acts complained of were solely the acts of the corporation of which he was an officer, and that whatever was done by him was done only in that capacity. An executive officer of a corporation 'cannot shield himself behind an artificial and sometimes irresponsible creation from the consequences of his own acts, even though performed in the name of an artificial body.' *Peters v. Union Biscuit Co.* (C. C.) 120 Fed. 679; *Saxlehner v. Eisner* (C. C.) 140 Fed. 938. He cannot thus escape liability for a tort in which he actually participates. This doctrine has been sanctioned and enforced in *Goodyear v. Phelps*, 3 Blatchf. 91, Fed. Cas. No. 5581; *Poppenhusen v. Falke*, 4 Blatchf. 495, Fed. Cas. No. 11,279; *Iowa Barb Steel-Wire Co. v. Barbed Wire Co.* (C. C.) 30 Fed. 123; *National Cash Register Co. v. Leland*, 94 Fed. 502, 37 C. C. A. 372; *Smith v. Standard Laundry Machinery Co.* (C. C.) 19 Fed. 826. See, also, *Belknap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 658, 37 Atl. 599; *Prest-O-Lite Co. v. Acetylene Welding Co.*, *Leonard Lorentowitz, et al.*, 259 Fed. 940 (D. C. N. J. 1916). It is based on the rule stated in *Cahoone Barnet Mfg. Co. v. Rubber & Celluloid Harness Co.* (C. C.) 45 Fed. 582, 584:

"Every voluntary perpetrator of a wrongful act of manufacture, use, or sale of a patented article becomes ipso facto an infringer, and is legally responsible; and it therefore regards officers, directors, and agents employing or authorizing or assenting to the use of a patented invention as infringers, and personally responsible to the patentee."

"When a corporation infringes in obedience to the command of an officer with power to cause the corporation to commit or refrain from committing the infringing act, and when that officer participates in and contributes to the infringement, they are in the eye of the law joint tortfeasors and both are liable, in the same or in different measures according to the circumstances, for the injuries they have jointly inflicted upon the one whose rights they have jointly invaded."

Persons aiding in infringement.—An infringement is a tort, and any one who aids in it is answerable for it. *Walter S. Newhall Co. v. Baltimore, etc., R. Co.*, (D. C. Md. 1919) 258 Fed. 650.

IV. PLEADING (p. 300)

Allegations necessary.—In an action for infringement the plaintiff may set out in his complaint merely a *prima facie* case or he may anticipate a defense which he believes the defendant will set up. Hence, it is no ground for dismissal of such a complaint

that the plaintiff has failed to allege therein that the invention has not been abandoned to the public, since abandonment is one of the defenses which R. S. sec. 4920 (7 Fed. Stat. Ann. (2d ed.) 309) permits the defendant to make. *Jost v. Borden Stove Co.*, (E. D. Pa. 1920) 262 Fed. 163.

V. RECOVERY (p. 302)

Defendant's profits as measure of damages.

—The measure of an infringer's liability in a suit in equity for profits, as distinguished from an action at law for damages, is the profits of the infringement which he actually received. *Hitchcock v. American Plate Glass Co.*, (C. C. A. 3d Cir. 1919) 259 Fed. 948, 171 C. C. A. 24.

Losses incurred by defendant.—In computing the damages for an infringement, a loss incurred by the defendant in making the infringing machines is a legitimate credit upon the amount received by it from sales of the machines. *T. L. Smith Co. v. Cement Tile Machinery Co.*, (N. D. Ia. 1919) 258 Fed. 636.

Profits lost as element of damages.—To same effect as original annotation, see *Walter S. Newhall Co. v. Baltimore, etc., R. Co.*, (D. C. Md. 1919) 258 Fed. 650.

Infringement of patent for part of device.

—To same effect as original annotation, see *Southern Textile Machinery Co. v. Fay Stocking Co.*, (C. C. A. 6th Cir. 1919) 259 Fed. 243, 170 C. C. A. 311; *T. L. Smith Co. v. Cement Tile Machinery Co.*, (N. D. Ia. 1919) 258 Fed. 636.

Exemplary damages.—The question in an infringement suit of whether damages in excess of compensatory damages shall be awarded, as well as the amount thereof, must be determined by the District Court upon the accounting. *Pollock v. Martin Gauge Co.*, (C. C. A. 7th Cir. 1919) 261 Fed. 201.

Increase of damages for deliberate and wanton infringement.—To same effect as original annotation, see *T. L. Smith Co. v. Cement Tile Machinery Co.*, (N. D. Ia. 1919) 258 Fed. 636.

Contempt as increasing damages.—The fact that an infringer has been adjudged guilty of contempt in not obeying an injunction more promptly, does not entitle the plaintiff in an infringement suit to increased damages. *Cheatham Electric Switching Device Co. v. Transit Development Co.*, (C. C. A. 2d Cir. 1919) 261 Fed. 792.

Effect of assignment of infringing contract.—The fact that the designer of infringing apparatus assigns the contract for its construction and shares the profits from the infringement with the assignee, does not relieve him from liability to account for all the profits arising from the infringement. *Hitchcock v. American Plate Glass Co.*, (C. C. A. 3d Cir. 1919) 259 Fed. 948, 171 C. C. A. 24.

A bill of discovery in advance of trial will not be granted to allow the plaintiff

in an infringement suit to ascertain the amount of profits obtained by the defendant by reason of his alleged infringement. *Munger v. Firestone Tire, etc., Co.*, (C. C. A. 2d Cir. 1919) 261 Fed. 921.

Award of damages as binding in subsequent suit.—An award of damages in an infringement suit is not *res adjudicata* in a later infringement suit between the same parties. *Cheatham Electric, etc., Co. v. Transit Development Co.*, (C. C. A. 2d Cir. 1919) 261 Fed. 792, wherein it was said:

"It is now said that this quantum of damage became *res adjudicata* as between the parties hereto, and that the ruling of this court in 209 Fed. 229, 126 C. C. A. 207, is to that effect. We fail to discover that that decision in any way states such doctrine; indeed, it is beyond the power of any jury, or of any judgment resting on a jury's verdict, to set a standard of damage binding on every later trier of similar facts between the same parties. The jury referred to found that by defendant's use of the eight certain switches in certain places and at a certain time plaintiff suffered a certain damage per switch. But damages (when not punitive) are compensation for plaintiff's losses under a certain set of facts and circumstances; non constat that this plaintiff lost as much by not selling defendants a switch in the month of December as it did by a similar failure in June, and it certainly does not follow that, because plaintiff lost \$68.93 by defendant's use of a switch down to the date of lawsuit brought, plaintiff lost another \$68.93 by defendant's failure to remove that switch until some time later.

"An assessment of damages is not the fixing of a penalty, to be inflicted every time the same defendant injures the same plaintiff. It is a valuation of injury, which, while often the same in kind, can never be assumed to be the same in degree. The use of the record here by plaintiff does not rest upon reason, while on authority it is opposed to *Ecaubert v. Appleton*, 67 Fed. 917, 15 C. C. A. 73; approved in *Cheatham, etc., v. Brooklyn, etc., Co.*, 238 Fed. 172, 151 C. C. A. 248, and to the reasoning in *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195."

Vol. VII, p. 309, sec. 4920. [First ed., vol. V, p. 567.]

- I. Pleading and proof in general.
- II. Statutory defenses.

I. PLEADING AND PROOF IN GENERAL (p. 310)

The contents of the file wrapper of a patent may not be offered in evidence on the question of infringement. The only purpose for which the file wrapper can be examined is to ascertain whether estoppel has arisen through rejected claims. *Baltzley v. Spengler Loomis Mfg. Co.*, (C. C. A. 2d Cir. 1919) 262 Fed. 423.

II. STATUTORY DEFENSES (p. 317)

Evidence of the operation of a machine embodying a prior invention is admissible under the fourth clause of this section to show that the persons under whose patent the plaintiff claims, were not the original and first inventors of the thing patented, but that the person, under whose patent the defendant claims, was the original and first inventor. *J. H. Day Co. v. Mountain City Mill Co.*, (E. D. Tenn. 1918) 257 Fed. 561.

Vol. VII, p. 326, sec. 4921. [First ed., vol. V, p. 577.]

IV. Injunctions.

V. Decree and award.

VII. Limitation and laches.

IV. INJUNCTIONS (p. 340)

Patent near expiration.—If at the date of the filing of a bill charging infringement of a patent there is sufficient time, under the rules of practice of the court in which such bill has been filed, to obtain a temporary injunction thereon before the expiration of such patent, the court acquires the necessary jurisdiction to grant whatever equitable relief may be proper, and it may retain such jurisdiction even after the expiration of the patent, notwithstanding the fact that no temporary injunction has been actually issued or separately asked. *Stromberg Motor Devices Co. v. Holley Bros. Co.*, (E. D. Mich. 1919) 260 Fed. 220.

Violation of covenants in license agreement.—When a controversy touching the validity of a patent has been settled by judicial decision, and the defendant therein enters into a license agreement with the plaintiff wherein the validity of the patents in controversy is admitted, he should observe an attitude of good faith and loyalty towards the licensor, and if he fails to do so and violates the license agreement, he may be enjoined. *Thomson Spot Welder Co. v. National Electric Welder Co.*, (N. D. Ohio 1917) 260 Fed. 223.

Threatened or continued infringement.—An infringing device if complete and ready for use in violation of a patent, is the object of injunction, although no damages have resulted from its use for a different purpose. *Corrugated Fiber Co. v. Paper Working Machines Co.*, (E. D. N. Y. 1919) 259 Fed. 283.

Ceasing infringement and promises to abstain.—To same effect as original annotation, see *Stromberg Motor Devices Co. v. Holley Bros. Co.*, (E. D. Mich. 1919) 260 Fed. 220; *Walter S. Newhall Co. v. Baltimore, etc., R. Co.*, (D. C. Md. 1919) 258 Fed. 650, holding that where a structure, as originally planned and constructed, contained a device infringing the plaintiff's patent, which was removed prior to the infringement suit, an injunction would be granted to prohibit its replacement.

Effect of decree in prior litigation.—Where the validity of a patent has been sustained by many prior adjudications, it is proper for the court to grant a preliminary injunction to prevent infringement. *Imperial Mach. etc., Corp. v. Blakeslee*, (C. C. A. 2d Cir. 1919) 262 Fed. 419.

V. DECREE AND AWARD (p. 355)

Patent merely an improvement.—To same effect as original annotation, see *Farmers' Handy Wagon Co. v. Beaver Silo, etc., Mfg. Co.*, (C. C. A. 7th Cir. 1919) 259 Fed. 270, 170 C. C. A. 338.

Sales made by defendant.—The proof of sales by the defendant is not sufficient, if there is no proof that the plaintiff would probably have been able to make these sales out for the defendant's infringements, and that such sales, if made, would have been profitable. *Farmers' Handy Wagon Co. v. Beaver Silo, etc., Mfg. Co.*, (C. C. A. 7th Cir. 1919) 259 Fed. 270, 170 C. C. A. 338.

Binding power of decree on third persons.—A decree in an infringement suit adjudging one of a number of machines to be an infringement of a machine patent, is not binding on the owner of the machine in a subsequent infringement suit against him where he was not a party to the prior suit. *Dunkley Co. v. Pasadena Canning Co.*, (S. D. Cal. 1918) 261 Fed. 203.

VII. LIMITATION AND LACHES (p. 370)

Mere lapse of time alone is not sufficient to establish laches. *Searchlight Horn Co. v. Victor Talking Mach. Co.*, (D. C. N. J. 1919) 261 Fed. 395.

Delay amounting to acquiescence in infringement.—To same effect as original annotation, see *Wolf v. United States Slicing Mach. Co.*, (C. C. A. 7th Cir. 1919) 261 Fed. 195.

Delay during litigation concerning patent's validity.—Delay in prosecuting other infringers while the validity of the patent is in active litigation does not constitute laches. *Searchlight Horn Co. v. Victor Talking Mach. Co.*, (D. C. N. J. 1919) 261 Fed. 395.

Necessity of simultaneous suit on all infringed patents.—There is no rule of law that requires a patentee to sue infringers upon all the patents he owns at the same time, or that deprives him of equitable relief if he delays his suit for a period of four or five years after the defendant places his alleged infringing device on the market. *Aeolian Co. v. Schubert Piano Co.*, (C. C. A. 2d Cir. 1919) 261 Fed. 178.

Vol. VII, p. 375. [First ed., 1912 Supp., p. 286.]

"Owner."—The suit against the United States for the infringement of a patent, given to the "owner" of the infringed patent, may only be maintained by one who has at least such an interest in the patent as, without the statute, would support such

a suit against a defendant other than the United States. *E. W. Bliss Co. v. U. S.*, (1920) 253 U. S. 187, 40 S. Ct. 455, 64 U. S. (L. ed.) —, *affirming* (1917) 53 Ct. Cl. 47, 641.

Suit by licensee.—The licensee of a patent who has no such assignment, grant, or conveyance, either of the whole patent or of an undivided part of it, or of an exclusive right under it within and throughout a specified part of the United States as is necessary under R. S. sec. 4919 (see vol. VII, p. 288) in order to enable him to sue in his own name for infringement at law or in equity without joining the owner of the patent, may not maintain a suit against the United States for infringement under this act, which empowers the "owner" of an infringed patent to recover reasonable compensation in the Court of Claims, and reserves to the United States all defenses, general or special, which might be pleaded by a defendant in an action for infringement. *E. W. Bliss Co. v. U. S.*, (1920) 253 U. S. 187, 40 S. Ct. 455, 64 U. S. (L. ed.) —, *affirming* (1917) 53 Ct. Cl. 47, 641.

Sufficiency of pleading.—A cause of action *ex contractu*, based on the government use of a patented invention, is not presented by a petition, the allegations of which, taken together, not only do not show a contract of the parties, express or implied, to pay a royalty in any amount, but distinctly and in terms negative the making of any such contract as is necessary to give the Court of Claims jurisdiction. *E. W. Bliss Co. v. U. S.*, (1920) 253 U. S. 187, 40 S. Ct. 455, 64 U. S. (L. ed.) —, *affirming* (1917) 53 Ct. Cl. 47, 641.

Vol. VII, p. 377, sec. 4929. [First ed., vol. V, p. 600.]

Necessity of invention.—To same effect as original annotation, see *Crystal Percolator*

Co. v. Landers, (D. C. Conn. 1919) 258 Fed. 28. The court said:

"To entitle a party to the benefit of the act, in either case, there must be originality, and the exercise of the inventive faculty. In the one, there must be novelty and utility; in the other, originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful or beautiful they may be in their new rôle, is not invention. . . . The shape produced must be the result of industry, effort, genius, or expense, and new and original as applied to articles of manufacture. *Foster v. Crossin* [C. C.] 44 Fed. 62. The exercise of the inventive or origination faculty is required and a person cannot be permitted to select an existing form and simply put it to a new use any more than he can be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty and the result is in effect a new creation, the design may be patentable."

Amount of novelty.—To same effect as third paragraph of original annotation, see *Smith v. Peck, etc., Co.*, (D. C. Conn. 1919) 258 Fed. 40.

Aesthetic value.—"To successfully establish the validity of the design patent, and to entitle the inventor to protection, he must establish a result obtained, which indicates, not only that the design is new, but that it is beautiful and attractive. It must involve something more than mere mechanical skill." *Smith v. Peck, etc., Co.*, (C. C. A. 2d Cir. 1919) 262 Fed. 415.

New combinations of old forms in designs.—To same effect as first paragraph of original annotation, see *Zidell v. Dexter*, (C. C. A. 9th Cir. 1920) 262 Fed. 145.

PENAL LAWS

Vol. VII, p. 396, sec. 1. [First ed., 1909 Supp., p. 405.]

I. In general.

1. Constitutional provision.

b. Overt act and two witnesses.

II. "Owing allegiance."

IV. Adhering to enemy; giving aid and comfort.

VII. Procedure.

2. Order of proof on trial.

I. IN GENERAL

1. Constitutional Provision

b. Overt Act and Two Witnesses (p. 397)

The crime of treason cannot be committed unless there be an overt act and that overt

act must be proved by at least two witnesses. *U. S. v. Fricke*, (S. D. N. Y. 1919) 259 Fed. 673, wherein it was said: "Where the overt act is single, continuous, and composite, made up of, or proved by, several circumstances, and passing through several stages, it is not necessary, in order to satisfy the provisions of the Constitution requiring two witnesses to an overt act, that there should be two witnesses to each circumstance at each stage, as distinguished from the necessary proof of two witnesses to an act other than continuous and composite."

"That means this: If one of the overt acts, we will say, was as in this case the sending of a telephone message, and you have the testimony of the telephone operator who received the message for transmission, and

the testimony of the person to whom the message was transmitted, there are the stages of one transaction proved by two witnesses, as the one witness was at one end of the telephone and the other witness at another."

To same effect, see *U. S. v. Robinson*, (S. D. N. Y. 1919) 259 Fed. 685, holding that it is necessary to produce two direct witnesses to whole overt act, and that it may not be proved by one witness and circumstantial evidence.

II. "OWING ALLEGIANCE" (p. 400)

Allegiance due from citizens.—Every citizen of the United States, whether by birth or naturalization, as a matter of law, owes allegiance to the United States. Therefore, if a defendant in a prosecution for a violation of this section was a citizen of the United States during the period in which he is charged with committing the offense in the indictment, then by reason of that fact he owed allegiance to the United States. *U. S. v. Fricke*, (S. D. N. Y. 1919) 259 Fed. 673.

IV. ADHERING TO ENEMY; GIVING AID AND COMFORT (p. 412)

In general.—In defining adherence to the enemies of the United States within the meaning of this section the court said in *U. S. v. Fricke*, (S. D. N. Y. 1919) 259 Fed. 673: "There must be the adherence, there must be the giving of aid, and there must be the giving of comfort; and in general, when war exists, any act which, by fair construction, is directed in furtherance of the hostile designs of the enemies of the United States, and gives them aid and comfort, or if that is the natural effect of the act, it is treasonable in its character if an American citizen does an act which strengthens, or tends to strengthen, the enemies of the United States in the conduct of a war against the United States; that is, in law, giving aid and comfort to the enemies of the United States."

"If an American citizen commits an act which weakens, or tends to weaken, the power of the United States to resist or to attack the enemies of the United States, that is in law giving aid and comfort to the enemies of the United States."

"Enemies."—In *U. S. v. Fricke*, (S. D. N. Y. 1919) 259 Fed. 673, the court, in defining who were enemies of the United States within the meaning of this section during the late war with Germany, said: "On the breaking out of the war between the United States and the Imperial German Government, the subjects of the Emperor of Germany were enemies of the United States, and remained such enemies during the continuance of the war; all members of the military and naval forces of the Imperial German Government, and all persons engaged by or working for the Imperial German Government as agents or spies, to assist the Imperial German Government in the prosecution of its war, or to hamper the United States in the prosecution of its war against the Imperial German

Government, are enemies of the United States."

Intent.—The intent of the defendant in a prosecution for a violation of this section is a vital ingredient of the crime. If the jury is "not satisfied beyond a reasonable doubt that the defendant's intention and purpose in acting as he did was evil—that is, if not satisfied beyond a reasonable doubt that he intended to aid and comfort the enemies of the United States—and if not satisfied that that was his object, the defendant must be found not guilty." *U. S. v. Fricke*, (S. D. N. Y. 1919) 259 Fed. 673.

VII. PROCEDURE

2. Order of Proof on Trial (p. 418)

Proof of commission of treason.—In a prosecution under this section the jury must first determine whether on the evidence treason has been committed by the defendant beyond a reasonable doubt, and need not concern themselves with the subject of overt acts until it is shown that the defendant has committed treason. *U. S. v. Fricke*, (S. D. N. Y. 1919) 259 Fed. 673.

Vol. VII, p. 423, sec. 6. [First ed., 1909 Supp., p. 406.]

Joint resolution as a "law."—A joint resolution of Congress is a "law" within the meaning of this section, and a conspiracy to prevent, hinder and delay its execution violates the provisions of this section. *Wells v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 605, 168 C. C. A. 555, wherein it was said: "Article 1, § 7, of the Constitution, prescribes the requisites to be observed by which a bill introduced in either house of Congress shall become a law. It must pass both houses and be presented to the President. If he approves it, it becomes a law. If he returns it with his veto, it must be to the house in which it originated. The section then proceeds as follows:

"If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."

"Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United

States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.'

"While not passing upon the question directly, the Supreme Court has considered and treated joint resolutions as having the effect of law. For instance, the court, in considering a joint resolution suspending the operation of an act of Congress, says, in *United States ex rel. Levey v. Stockslager*, 125 U. S. 470, 475, 9 Sup. Ct. 382, 384 (32 L. Ed. 785):

"It [the joint resolution] had all the characteristics and effects of the act of March 2, 1867 [the act which the resolution suspended], which became a law by the approval of the President. Until Congress should further order, the operation of the act of March 2, 1867, was by the joint resolution effectually suspended.'

"So in *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 184, 22 Sup. Ct. 59, 62 (46 L. ed. 138), Mr. Justice Brown, in a concurring opinion with the Chief Justice who rendered the opinion of the court, speaking of the function of a joint resolution, says:

"While a joint resolution, when approved by the President, or, being disapproved, is passed by two-thirds of each house, has the effect of a law (Const. art. 1, § 7), no such effect can be given to a resolution of either house acting independently of the other.'

"The eminent Justice cites with approval 6 Op. Atty. Gen. 680, wherein Attorney General Cushing holds that:

"While 'joint resolutions of Congress are not distinguishable from bills, and . . . have all the effect of law, . . . separate resolutions of either house of Congress, except in matters appertaining to their own parliamentary rights, have no legal effect to constrain the action of the President or heads of departments.'

"The purpose of the resolution in question was weighty; it was designed to proclaim that a state of war existed between this government and Germany. It was designed to have, and by the intentment of Congress without question did have, the same effect and potency as if war had been declared by a regular act of Congress; otherwise, that body would, we may reasonably assume, have made the declaration by a regularly adopted act. We think that the resolution having the effect of law must be considered a law, within the meaning of section 6 of the Criminal Code."

Force is an essential element of the offense described in this section. Mere solicitation or entreaty, without a purpose of applying or using force to accomplish the ends sought to be attained, is without the intentment of this section. *Wells v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 805, 168 C. C. A. 555.

Motive of conspirators.—Under this sec-

tion, the motive of the conspirators does not necessarily determine the character of the conspiracy. Thus, their object may be to prevent the enforcement of a specific law; but if, to attain that object, they conspire to overthrow or destroy the government as a means to that end, the conspiracy is one to destroy or overthrow the government. *Bryant v. U. S.*, (C. C. A. 5th Cir. 1919) 257 Fed. 378, 168 C. C. A. 418.

Necessity of overt act.—An overt act is not an ingredient of an offense under this section. *Reeder v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 36; *Orear v. U. S.*, (C. C. A. 5th Cir. 1919) 261 Fed. 257.

Withdrawal from the conspiracy after its formation does not exculpate from guilt. *Orear v. U. S.*, (C. C. A. 5th Cir. 1919) 261 Fed. 257.

Indictment—Sufficiency in general.—In *Reeder v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 36, in holding an indictment under this section sufficient, the court said:

"The indictment designates the time and the place of the alleged offense definitely. It names the defendants, and alleges that they did then and there knowingly, willfully, unlawfully, and feloniously conspire, etc., with other persons named in the indictment to knowingly, willfully, unlawfully, and feloniously hinder and delay the execution of a certain law of the United States, designating it as the act of Congress approved May 18, 1917, giving the title of the act, and referring also to the proclamations of the President of the United States and regulations in aid of said act. The indictment further alleged that the defendants knowingly, willfully, unlawfully, and feloniously opposed by force the authority of the United States, its agents and officers, in the enforcement of said act, proclamation, and regulations in so far as their provisions applied to persons subject to military duty and service thereunder, and particularly in so far as the same applied to Wright, Ratcliffe, Blackwood, and others named in the indictment. It is further alleged that the defendants did conspire, combine, and agree together with persons named in the indictment by force to procure arms and ammunition, and to arm themselves with the same, and while armed to offer individual and combined resistance to the authority of the United States and to the enforcement and execution of said act of Congress, proclamation, and regulations, to the end that they would thereby hinder, delay and prevent the said persons from being drafted into and inducted into the military forces of the United States; alleging further that such persons and each of them were citizens of the United States within the state of Oklahoma, having registered in said state and not having been exempted from military service as provided in said act, and that they were then and there under the duty to submit to being drafted into the military service of the United States under the provisions of said act, etc.

"It will be noted that this count of the indictment with both clearness and certainty alleges the conspiracy of the defendants, entered into for the purpose of committing the offense therein specified, describing it in the words of the statute which creates it, and to these allegations is added the names of the persons with whom they conspired, and who, with others, were to be influenced by them, together with allegations of intent and purpose, and that they were armed and prepared to carry out the purpose of the conspiracy by force. The conspiracy in this count is the gist of the crime, and every ingredient of the offense is accurately stated, and apprises the accused of the crime with which they stand charged. Clearly the accused were furnished by the allegations of this count of the indictment with such a description of the charge against them as would enable them to make their defense and avail themselves of their conviction or acquittal for protection against a further prosecution for the same cause."

Duplicity.—An indictment under this section which charges in one count that the defendants conspired to overthrow and destroy the government and that they also conspired to levy war against it, is not defective as being duplicitious. *Bryant v. U. S.*, (C. C. A. 5th Cir. 1919) 257 Fed. 378, 168 C. C. A. 418.

In *Wells v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 605, 168 C. C. A. 555, it was held that the objection that an indictment under this section was bad for duplicity, was waived by going to trial, unless previously tested by demurrer, motion to quash, or motion that the prosecution be required to elect between the offenses charged.

Vol. VII, p. 430, sec. 10. [First ed., 1909 Supp., p. 407.]

"Retains."—One may be retained in the sense of this section as effectively by a verbal as by a written promise, by a prospect for payment in the future as by immediate payment of cash. *Gayon v. McCarthy*, (1920) 252 U. S. 171, 40 S. Ct. 244, 64 U. S. (L. ed.) —, wherein the court said: "The word 'retain' is used in the statute as an alternative to 'hire,' and means something different from the usual employment with payment in money. One may be retained, in the sense of engaged, to render a service as effectively by a verbal as by a written promise, by a prospect for advancement or payment in the future as by the immediate payment of cash. As stated long ago by a noted Attorney General, in an opinion dealing with this statute:

"A party may be retained by verbal promise or by invitation for a declared or known purpose. If such a statute could be evaded or set at naught by elaborate contrivances to engage without enlisting, to retain without hiring, to invite without recruiting. . . it would be idle to pass acts

of Congress for the punishment of this or any other offense." 7 Op. Atty.-Gen. 367, 378, 379."

Vol. VII, p. 484, sec. 19. [First ed., 1909 Supp., p. 410.]

VII. INDICTMENT (p. 490)

Overt act.—To same effect as original annotation, see *Montoya v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 759, holding that an indictment following the language of the section was sufficient.

Conspiracy against elective franchise.—The provisions of this section apply only to a definite, personal right, such as that of the individual to vote. Accordingly, an indictment under this section is defective where the conspiracy charged therein is against the right of the candidates and the voters in the state at large. *Morris v. U. S.*, (C. C. A. 7th Cir. 1919) 261 Fed. 175.

Vol. VII, p. 496, sec. 28. [First ed., 1909 Supp., p. 412.]

- I. Elements of offense.
 2. False statement in genuine instrument.
- II. Character of instrument.
 4. Affidavit.

I. ELEMENTS OF OFFENSE

2. False Statement in Genuine Instrument (p. 497)

This section embraces only forged or counterfeited instruments in the technical sense, and does not include instruments which are genuine but which contain statements which are not true in fact. Accordingly, it does not include a genuine affidavit which contains a false statement. *U. S. v. Smith*, (D. C. Ind. 1920) 262 Fed. 191.

II. CHARACTER OF INSTRUMENT

4. Affidavit (p. 499)

Insufficiency of affidavit as ground for objection to indictment.—The fact that an affidavit regarding the ownership of a newspaper, made pursuant to the Act of August 24, 1912, ch. 389, § 2, is taken before a notary public, who is not an officer authorized to administer an oath regarding the matters contained therein, does not render the indictment defective, as imperfectly describing the affidavit. *U. S. v. Smith*, (D. C. Ind. 1920) 262 Fed. 191. Regarding this objection, the court said:

"It is earnestly contended that, this being so, the affidavit is not an affidavit as alleged in the indictment, and that this defect appears upon the face of the indictment. If the defendant, as alleged in the indictment, presented these affidavits to the postmaster in Indianapolis as affidavits, he cannot now be heard to say that they are not affidavits.

"In *Ingraham v. United States*, 155 U. S. 434, 15 Sup. Ct. 146, 39 L. Ed. 213, the Supreme Court had before it this question. Ingraham was indicted for presenting to the Third Auditor of the Treasury an affidavit in support of a fraudulent scheme against the government, and upon his trial the objection was made that the affidavit, which had been sworn to before a justice of the peace, was not admissible in evidence without proof that the justice had been duly commissioned and qualified as a justice of the peace. The Supreme Court said, on page 437 of 155 U. S. (15 Sup. Ct. 149, 39 L. Ed. 213):

"Even if Remington [the justice of the peace] had not been properly commissioned, or had not qualified, so as to entitle him, in law, to discharge the functions of a justice of the peace, the paper presented by the defendant to the Third Auditor of the Treasury for the purpose of obtaining the payment or approval of his claim, being in the form of an affidavit, must, for all the purposes of this prosecution, be taken to be an affidavit. If he knew that the statement in that paper, described in the indictment, was fraudulent or fictitious, he was not the less guilty . . . because of the fact, if such was the fact, that Remington had not been duly commissioned as a justice of the peace, and was not, for that reason, entitled to administer the oath certified by him. . . . He is estopped to deny that the document or writing so used was not what it purports to be, namely, an affidavit."

"The several counts of the indictment are therefore not bad upon this ground."

Vol. VII, p. 516, sec. 32. [First ed., 1909 Supp., p. 414.]

II. Construction and application.

4. "Under the authority of the United States."

III. Prosecution for offense.

3. Indictment.
4. Evidence.

II. CONSTRUCTION AND APPLICATION

4. "Under the Authority of the United States" (p. 520)

To same effect as original annotation, see *Brafford v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 511, 171 C. C. A. 7.

III. PROSECUTION FOR OFFENSE

3. Indictment (p. 521)

Representations of defendant as to official capacity.—In *Brafford v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 511, 171 C. C. A. 7, it was contended that the mere impersonation of an officer of the United States government was not an offense under this section and that an indictment for a violation of this section was defective in failing to charge that the accused "took upon himself to act" as an officer and "while so

acting" obtained the property in question. In overruling a motion to quash the indictment on these grounds, the court said:

"It is not necessary to a violation of the second subdivision that the accused 'take upon himself to act as such' United States officer or employé; it is only necessary that the property be obtained by the accused 'in such pretended character.' *United States v. Barnow*, [239 U. S. 74]. We think the allegation that the accused did 'falsely and fraudulently obtain' the money and property 'by inducing' the automobile company to part with it, 'by falsely representing himself to be such officer and employé,' sufficiently charges that the money, etc., was fraudulently obtained 'in such pretended character.'"

4. Evidence (p. 522)

Variance.—In a prosecution under this section the fact that a company from whom the defendant is charged with having obtained property in violation of this section, is not alleged in the indictment to have been incorporated, while the proof shows that it is a corporation, does not constitute a variance. The same rule applies to an allegation that the defendant defrauded a company, which is shown to have been merely a trade-name under which a certain person carried on business. *Brafford v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 511, 171 C. C. A. 7.

Vol. VII, p. 523, sec. 35. [First ed., 1909 Supp., p. 414.]

II. Construction and application, in general.
10. Claim originally valid.

V. Indictment.

1. For making and presenting false claim.
d. Averments, in general.
e. Place of crime.
h. Authority of officer.
j. Falsity of claim.

VI. Trial.

2. Evidence and variance.
a. Evidence.

II. CONSTRUCTION AND APPLICATION, IN GENERAL

10. Claim Originally Valid (p. 526)

To same effect as original annotation, see *U. S. v. Downey*, (D. C. R. I. 1919) 257 Fed. 366.

V. INDICTMENT

1. *For Making and Presenting False Claim*
d. Averments, in General (p. 528)

Making of document or voucher.—In *U. S. v. Downey*, (D. C. R. I. 1919) 257 Fed. 366, regarding the necessity of allegations describing the making of the document on which the claim is based, the court said:

"It is argued that a necessary require-

ment of the regulations is the presentation on form 1021 of a certificate, and that without this a fraud could not have been consummated; but the making of the document or voucher is a separate thing from its presentation and it does not appear necessary that the indictment should state the circumstances surrounding its presentation, or the nature of any other document accompanying or supporting it."

Averments regarding dates and description of property.—An indictment under this section for unlawfully purchasing military stores from certain soldiers sufficiently specifies the dates and property where it alleges that the defendants during certain specified months purchased "approximately twenty-one sacks of oats" from certain named soldiers. *Eisenberg v. U. S.*, (C. C. A. 5th Cir. 1919) 261 Fed. 598. Regarding the sufficiency of the indictment, the court said: "It is conceded by the defendant that the offenses of purchasing and applying to his own use might be properly incorporated in one indictment in separate counts under the provisions of R. S. § 1024; but the point is made that the purchasing, etc., of each sack of oats, if done on different days, would constitute a separate offense. It is further contended that neither the dates nor the description of the property is specific enough to put the defendant on notice and to serve as a basis for a defense of former jeopardy in possible future indictments."

"We do not agree with any of these contentions. It is difficult to conceive how property of the character involved here could be better described than was done, and clearly each count of the indictment presents but one offense. It is necessary for the government to lay some date in the indictment, but it is elemental that, having alleged a specific date, the prosecution is not bound by it, and may prove any date prior to the return of the indictment within the statute of limitations, three years. We think the indictment was sufficiently specific, and the overruling of the demurrer and motion to quash was not error."

e. Place of Crime (p. 530)

An indictment under this section is defective where it fails to show that the offense for which the defendants were indicted occurred within the jurisdiction of the court. Accordingly, an indictment which alleges that the defendants, the president and secretary respectively of a corporation having its principal office in a certain district, presented a false voucher to a United States army officer, is defective as failing to allege that the offense occurred in the same district as that in which the corporate offices were located. *U. S. v. Christopherson*, (E. D. Mo. 1919) 261 Fed. 225.

h. Authority of Officer (p. 531)

To same effect as original annotation, see *U. S. v. Christopherson*, (E. D. Mo. 1919) 261 Fed. 225.

j. Falsity of Claim (p. 532)

A count in an indictment under this section is defective where it appears that the voucher alleged to have been false, and upon which such count is founded, contains no false statement, and that that upon the face of the voucher, which is set out in the count, and upon the face of the charges of falsity contained in the count, no such falsity exists. *U. S. v. Christopherson*, (E. D. Mo. 1919) 261 Fed. 225.

VI. TRIAL

2. Evidence and Variance

a. Evidence (p. 532)

Burden of proof.—In a prosecution under this section for presenting a false claim for a reward because of the apprehension of a person alleged to be a deserter under the Selective Service Act (9 Fed. Stat. Ann. (2d ed.) 1136), where the government alleges in the indictment that the person apprehended did not come within the description of a deserter for whose apprehension a reward was payable, it has the burden of proving such allegation. *U. S. v. Downey*, (D. C. R. I. 1919) 257 Fed. 366.

Vol. VII, p. 533, sec. 36. [First ed., 1909 Supp., p. 415.]

"All other property of the United States."

—The general words "all other property of the United States furnished or to be used for the military or naval service" used in this section includes cloth as being property similar to clothing. *Horowitz v. U. S.*, (C. C. A. 2d Cir. 1919) 262 Fed. 48.

Evidence.—In a prosecution under this section evidence by the accused as to statements made to him by a third party at the time the latter delivered to him the property he is charged with having stolen, such statements being explanatory of his possession of the property, is admissible, and its exclusion constitutes reversible error. *Grier v. U. S.*, (C. C. A. 5th Cir. 1919) 262 Fed. 407, wherein it was said: "It is apparent that the ruling of the court was error. The prosecution under the statute is identical to a case of receiving stolen goods. It is a well-known exception to the hearsay rule that a person so charged may repeat what was said to him by the person from whom he claims to have obtained the goods. The rule is clearly stated in Elliott on Evidence, par. 3119:

"It has been held competent for the defense to show by the accused, he being a witness in his own behalf, when, from whom, how, and under what circumstances he received the property, and what was done and said at the time in connection with the receipt of it by himself; such facts being part of the res gesta, to be submitted as evidence and weighed by the jury."

"To the same effect, see Underhill on Criminal Evidence (2d ed.) par. 301. In

justification of the possession of the articles, the defendant was entitled to repeat what the person from whom he had obtained them said to him regarding his own lawful possession. If the articles were in fact condemned, and a lieutenant in charge of their disposition had given them to Yank rather than destroy them, that fact was material to the defense."

Vol. VII, p. 534, sec. 37. [First ed., 1909 Supp., p. 415.]

II. Conspiracy to commit offense, 707.

1. In general, 707.

7. Particular offenses, 707.

i. Violation of Bankruptcy Act, 707.

III. Conspiracy to defraud, 707.

2. "In any manner," 707.

5. Impairing lawful function of governmental department, 707.

IV. Overt acts, 708.

5. Nature and quality of act, 708.

VII. Jurisdiction and venue, 708.

VIII. Indictment, 708.

1. In general, 708.

c. Requisites and sufficiency, in general, 708.

2. Charging the conspiracy, 708.

a. Sufficiency in general, 708.

b. Relation to charge of overt acts, 708.

c. Specific means agreed upon, 709.

3. Charging overt acts, 709.

4. For conspiracy to commit offense, 709.

a. Sufficiency in general, 709.

a. Description of offense contemplated, 709.

1. Violation of Bankruptcy Act, 709.

5. For conspiracy to defraud, 709.

b. Fraud in public contracts, 709.

IX. Evidence, 710.

3. Knowledge, motive, or intent, 710.

a. In general.

6. Acts and declarations of co-conspirators, 710.

8. Overt acts, 710.

10. Weight and sufficiency, 710.

X. Trial, acquittal or conviction, and punishment, 710.

5. Acquittal of some defendants, 710.

9. New trial [*New*], 711.

II. CONSPIRACY TO COMMIT OFFENSE

1. In General (p. 537)

To same effect as second paragraph of original annotation, see *Kelly v. U. S.*, (C. C. A. 6th Cir. 1919) 258 Fed. 392, 169 C. C. A. 408.

7. Particular Offenses

i. Violation of Bankruptcy Act (p. 543)

Insolvent debtors may properly be convicted of a conspiracy to conceal their as-

sets, so that their creditors cannot reach the assets through bankruptcy proceedings which the debtors are expecting to be instituted. *Meyer v. U. S.*, (C. C. A. 7th Cir. 1919) 258 Fed. 212, 169 C. C. A. 280.

III. CONSPIRACY TO DEFRAUD

2. "In Any Manner" (p. 546)

Defrauding United States on contracts.—In *Borman v. U. S.*, (C. C. A. 2d Cir. 1919) 262 Fed. 26, it appeared that a manufacturer contracted to manufacture leather jerkins for the United States government; under the terms of the contract the United States agreed to furnish leather linings for the jerkins. He obtained a greater amount of linings from the government than it was required to furnish, caused them to be sold by third parties, and converted the proceeds to his own use. In a prosecution of the manufacturer and his co-conspirators under section 36 and this section, they defended on the ground that at the time they appropriated the linings the title to them was not in the United States. It was held that the transaction constituted a bailment rather than sale, and that they were liable for a violation of section 36 and of this section.

5. Impairing Lawful Function of Government Department (p. 547)

Conspiracy to defraud Emergency Fleet Corporation.—Since the United States Shipping Board Emergency Fleet Corporation is an agency of the United States government, a conspiracy to defraud it is one to defraud the United States within the meaning of this section. *U. S. v. Carlin*, (E. D. Pa. 1917) 259 Fed. 904; *U. S. v. Union Timber Products Co.*, (W. D. Wash. 1919) 259 Fed. 907. In the latter case, the court said:

"The Shipping Board Emergency Fleet Corporation is constituted by law an agency of the United States for the purpose of construction of vessels and entering into contracts for the use of vessels. Pursuant to law, the corporation was created to carry out the purposes of the act, and in furtherance of the plan and scheme, upon authority conferred, the corporation had the power and authority to enter into contracts for the construction of vessels and making expenditures of the funds appropriated by the Congress.

"The Supreme Court in the matter of the petition of the United States of America, owner of the American steamship *Lake Monroe* for writ of prohibition, June 12, 1919, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962, said:

"But at the time of the emergency provision of June 15, 1917, the Shipping Board had been established as a public commission with broad administrative powers and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds."

"The Shipping Board Emergency Fleet Corporation being the agency designated by the President for carrying out the powers

conferred upon him in the construction of ships, a conspiracy to defraud such corporation, financed with the funds of the United States, would be a fraud upon the United States."

Right of United States to property appropriated.—In a prosecution under this section for conspiracy to defraud the United States by appropriating the proceeds from a sale of "astray freight" of railroads under federal control, it is no concern of the defendants whether or not the United States had the right to sell the freight, since it was at least a bailee of the freight and as such entitled to the possession of the proceeds of the sale. *U. S. v. United States Brokerage, etc., Co.*, (S. D. N. Y. 1919) 262 Fed. 459, wherein the court said:

"To appropriate those proceeds was either to impede the United States in its duty of discharging its liability to the consignees, if the sale was illegal (*Haas v. Henkel*, 216 U. S. 462, 479, 480, 30 Sup. Ct. 249, 54 L. Ed. 569, 17 Ann. Cas. 1112; *U. S. v. Plyler*, 222 U. S. 16, 32 Sup. Ct. 6, 56 L. Ed. 70), or, if the United States had the right to sell the goods, then it was a direct misappropriation of funds of the United States, because upon that hypothesis the proceeds could be truly described as a part of the operating profits of the railway; i. e., as 'railway operating income,' under section 1 of the federal control law."

IV. OVERT ACTS

5. Nature and Quality of Act (p. 552)

To same effect as fifth paragraph of original annotation, see *U. S. v. Downey*, (D. C. R. I. 1919) 257 Fed. 364.

VII. JURISDICTION AND VENUE (p. 556)

Venue of federal prosecution.—Substantial evidence before the United States commissioner and the court, tending to show that a penal statute of the United States had been violated, and that there was probable cause for believing the accused guilty of conspiracy to compass that violation within the district in which the indictment charging such conspiracy was returned, justifies an order for the removal of the accused to that district. *Gayon v. McCarthy*, (1920) 252 U. S. 171, 40 S. Ct. 244, 64 U. S. (L. ed.) —, which further held that the introduction in evidence of the indictment, together with the admission of the accused that he is the person named therein, establishes a *prima facie* case, in the absence of other evidence, for the removal of the accused to the district in which the indictment was returned.

VIII. INDICTMENT

1. In General

c. Requisites and Sufficiency, in General (p. 559)

Allegation of willfulness.—An indictment need not allege that the conspiracy was willful. *Howenstine v. U. S.*, (C. C. A. 9th Cir. 1920) 263 Fed. 1, wherein the court said:

"It is contended that the first count is fatally defective for the reason that the conspiracy and the overt acts set forth are not alleged to have been willful. To this it is sufficient to say that the definition of the offense of conspiracy under which the defendants were indicted does not contain the word 'willful,' or any provision to indicate that it was the intention of Congress to make willfulness an ingredient of the offense. The indictment in the first count does, however, charge that the conspiracy was entered into unlawfully and feloniously, and each of the overt acts is alleged to have been done in pursuance of said unlawful and felonious conspiracy, and it is charged that the conspiracy was to commit the offense of unlawfully, feloniously and willfully causing and attempting to cause insubordination, etc. It is the general rule that it is not necessary to charge that the offense was done willfully, unless the statute defining the same makes willfulness an element thereof; and it is also generally held that words which import an exercise of the will, such as 'feloniously' and 'unlawfully,' will supply the place of the word 'willfully.'"

2. Charging the Conspiracy

a. Sufficiency in General (p. 560)

Identification of offense.—An indictment under this section which alleges that the defendants conspired among themselves "to steal from a certain railroad freight car certain goods then and there moving as and constituting a part of an interstate shipment of freight, with the intent then and there to convert said goods to their own use," is defective as not sufficiently identifying the offense with which the defendants are charged. *Anderson v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 557, 171 C. C. A. 341; *Booker v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 561, 171 C. C. A. 345.

A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy, and the distinction in the rules of pleading is well settled. *U. S. v. Downey*, (D. C. R. I. 1919) 257 Fed. 364.

Description of indecent matter alleged to have been mailed.—An indictment under this section for a conspiracy to violate section 211 of the Penal Laws (7 Fed. Stat. Ann. (2d ed.) 788), by mailing indecent matter, need not set out what letters were referred to, and in what respect they were indecent, but is sufficient if it describes them as being of a character to incite murder and assassination. *U. S. v. Wells*, (W. D. Wash. 1917) 262 Fed. 833.

b. Relation to Charge of Overt Acts (p. 560)

To same effect as original annotation, see *Anderson v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 557, 171 C. C. A. 341.

Purpose of allegations of overt acts.—*"Though the allegations of overt acts may not be used to enlarge the scope of the con-*

spiracy, yet they practically meet many of the objections to the generality of the charge of conspiracy. They inform the defendants in much detail of the particular matters upon which proof will be offered, and thus give specifications of the completed acts done in pursuance of the conspiracy and during its continuance." *U. S. v. Downey*, (D. C. R. I. 1919) 257 Fed. 364.

c. Specific Means Agreed upon (p. 561)

Conspiracy to evade draft.—An indictment is sufficient which charges a conspiracy to cause an evasion of military duty "through and by means of soliciting persons too numerous to mention, who were subject to and might be subject to service in the military and naval forces of the United States, to go to an oculist and optician and be fitted with eyeglasses that would so impair their vision and physical condition that they would thereby be rejected and discharged from service in said military and naval forces, and by also advising said persons that the President of the United States was an Englishman, and that he and the United States were fighting England's battles." *Howenstine v. U. S.*, (C. C. A. 9th Cir. 1920) 263 Fed. 1.

3. Charging Overt Acts (p. 563)

How the overt act would tend to effectuate the purpose of the conspiracy need not be alleged. *Howenstine v. U. S.*, (C. C. A. 9th Cir. 1920) 263 Fed. 1.

4. For Conspiracy to Commit Offense

a. Sufficiency in General (p. 566)

Continuance of conspiracy formed before enactment of law.—An indictment under this section charging a conspiracy to violate the Selective Service Law (9 Fed. Stat. Ann. (2d ed.) 1136), is sufficient where it alleges that the conspiracy, although formed prior to the enactment of such law, was continued thereafter and overt acts performed after its passage. *U. S. v. Wells*, (W. D. Wash. 1917) 262 Fed. 833.

c. Description of Offense Contemplated (p. 567)

To same effect as original annotation, see *U. S. v. Downey*, (D. C. R. I. 1919) 257 Fed. 364.

1. Violation of Bankruptcy Act (p. 572)

In *Meyer v. U. S.*, (C. C. A. 7th Cir. 1919) 258 Fed. 212, 169 C. C. A. 280, the defendants were convicted of having conspired to conceal assets from their trustee in bankruptcy in violation of sec. 29 b (1) of the Bankruptcy Act (1 Fed. Stat. Ann. (2d ed.) 844). The indictment alleged that in pursuance of such conspiracy the defendants had turned over to a third person a certain check belonging to them. It was contended that the indictment did not show

that the overt act was done to effect the object of the conspiracy. Answering this contention, the court said:

"Invoking the rule that interferences are to be taken against the pleader, plaintiffs in error insist that we shall infer that they lawfully turned over the Morton Hill check to May Aserson. But the rule does not extend to imagining inferences that are contrary to the fair common-sense reading of the averments. The conspiracy is fully and clearly stated. It included the purpose to conceal the Morton Hill check, 'which should belong at the time of such concealment to the bankruptcy estate.' In charging the overt act the pleader averred that in furtherance of said conspiracy the plaintiffs in error turned over the Morton Hill check to May Aserson. This averment, taken in connection with the statement of the nature and scope of the conspiracy, makes it impossible to infer that the check was not the property of the bankrupts after it was turned over to May Aserson. And it is obvious that putting one's property in the possession of another may be an effective step towards concealing it from creditors. Many other overt acts are alleged, but the objection to them is precisely the same."

5. For Conspiracy to Defraud

h. Fraud in Public Contracts (p. 589)

An indictment which alleges that the defendants were employees of government contractors, working on a "cost plus" basis, and that they conspired to place the name of one of them on the contractor's payrolls at a higher rate than that to which he was entitled, sufficiently charges a conspiracy to defraud the United States. *Belvin v. U. S.*, (C. C. A. 4th Cir. 1919) 260 Fed. 455, 171 C. C. A. 281. The court said:

"It is insisted by counsel for defendant that the indictment sets out a conspiracy to defraud the Porter Bros., but that it does not set out a conspiracy to defraud the United States; also that the indictment is not full enough, and that the court will have to supply much and infer much in order to sustain it.

"It appears that the defendants Hoffman and Belvin were indicted for conspiracy to defraud the United States, and the overt act alleged is that they padded the pay roll of the Porter Bros. It appears that Porter Bros. had entered into a contract with the government to construct the quartermaster terminal or army base near Norfolk. The contract in question contained the following clause:

"Porter Bros. contract (extracts):

"Article 2. *Cost of the Work.*—The contractor shall be reimbursed in the manner hereinafter described for such of its actual net expenditures in the performance of said work as may be approved or ratified by the contracting officer and as are included in the following items:

"(a) All labor,' etc.

"Article 3. *Determination of Fee.*—As full compensation for the services of the contractor, . . . if the cost of the work is under \$100,000, a fee of ten per cent. (10%) of such cost. [Then follows a scale of compensation to the contractor, under varying amounts, to and including \$3,500,000.]

"The contract is signed:

"Porter Brothers, by R. S. Porter (a member of the copartnership). United States of America, by I. W. Littell, Brigadier-General, Quartermaster Corps, N. A., Contracting Officer."

"Any amounts paid out by Porter Bros. in excess of its 'net expenditures in the performance of said work,' in the absence of any knowledge on the part of the government, would have necessarily resulted in a loss to that extent to the United States. It is not necessary, in order to secure the conviction of one charged with conspiracy, to allege or prove that the object of conspiracy has been fully consummated. It is sufficient if there has been the common meeting of minds to the accomplishment of a certain object, and that some overt act shall have been done in pursuance of such conspiracy.

"The defendants sought by this conspiracy to do that which would necessarily result in defrauding the government. Porter Bros. could not in any view of the case lose a cent by virtue of this transaction. Their payrolls were only used as a means by which the defendants could make a false charge, the burden of which would fall, not upon Porter Bros., but upon the government."

IX. EVIDENCE

3. Knowledge, Motive, or Intent

a. In General (p. 593)

In a prosecution of druggists under this section for a conspiracy to violate section 2 of the Harrison Act (4 Fed. Stat. Ann. (2d ed.) 178), evidence of the quantities of narcotic drugs purchased and sold, and of the quantities of nonnarcotic drugs sold, by other druggists, is admissible to show the true nature and purposes of the defendants' business. *Friedman v. U. S.*, (C. C. A. 6th Cir. 1919) 260 Fed. 388, 171 C. C. A. 254.

6. Acts and Declarations of Co-conspirators (p. 596)

To same effect as fourth paragraph of original annotation, see *Samara v. U. S.*, (C. C. A. 2d Cir. 1920) 263 Fed. 12, wherein it was further held that proof of a confession by a co-conspirator was admissible, the court saying:

"Then it is said that error was committed in allowing the attorney for Antoon to testify that, after the latter had told the former as to his transactions with the Samaras, the attorney took Antoon to the United States attorney's office, which led to the indictment in this case. We are told that this

is a clear violation of the rule that what is said or done by one of the conspirators after the conspiracy is ended, in the absence of the defendants on trial, is totally inadmissible. The rule is admitted, but its application to the facts is denied. On his direct examination Antoon testified that he first went to his attorney and told his story, and that his attorney took him to the District Judge, to whom he confessed his crime. The attorney was permitted to testify that, after Antoon confessed to him, instead of taking Antoon first to the district attorney, he took him direct to the District Judge. This is simply a part of the history of the transaction, and as such the government was entitled to it. The objection at all events seems to us quite unimportant, and we fail to perceive any relation between this occurrence and the rule that the statement of a conspirator in the absence of his co-conspirators, after the conspiracy is ended, is not admissible."

Only those acts and declarations of a co-conspirator are admissible against his fellows "which are done and made while the conspiracy is pending and in furtherance of its object," and when it has come to an end "whether by success or by failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others." *Feder v. U. S.*, (C. C. A. 2d Cir. 1919) 257 Fed. 694, 168 C. C. A. 644, 5 A. L. R. 370.

8. Overt Acts (p. 599)

Evidence of the quantity of narcotic drugs purchased by druggists is admissible in a prosecution against them under this section for a conspiracy to violate section 2 of the Harrison Act (4 Fed. Stat. Ann. (2d ed.) 178), since even if the purchases proved exceed those so alleged, such excess purchases are provable as additional and similar overt acts, although not specifically set out in the indictment. *Friedman v. U. S.*, (C. C. A. 6th Cir. 1919) 260 Fed. 388, 171 C. C. A. 254.

10. Weight and Sufficiency (p. 598)

In *Belvin v. U. S.*, (C. C. A. 4th Cir. 1919) 260 Fed. 455, 171 C. C. A. 281, it was held that the evidence was sufficient to sustain a conviction for a conspiracy to defraud the United States.

In *Friedman v. U. S.*, (C. C. A. 6th Cir. 1919) 260 Fed. 388, 171 C. C. A. 254, the evidence was held sufficient to sustain a conviction for conspiracy to violate section 2 of the Harrison Act (4 Fed. Stat. Ann. (2d ed.) 178).

X. TRIAL, ACQUITTAL OR CONVICTION, AND PUNISHMENT

5. Acquittal of Some Defendants (p. 601)

To same effect as first paragraph of original annotation, see *Feder v. U. S.*, (C. C. A. 2d Cir. 1919) 257 Fed. 694, 168 C. C. A. 644, 5 A. L. R. 370.

9. *New Trial* [New]

Where only two persons are indicted for conspiracy and the crime is in every sense indivisible, its essence is the mental confederation not of any two of numerous persons, but of the two particular defendants, and if after conviction of both a new trial is granted to one of them, it must also be granted to the other. *Feder v. U. S.*, (C. C. A. 2d Cir. 1919) 257 Fed. 694, 168 C. C. A. 644, 5 A. L. R. 370.

Vol. VII, p. 602, sec. 39. [First ed., 1909 Supp., p. 416.]

I. CONSTRUCTION AND APPLICATION, IN GENERAL

4. "*Official Function*" (p. 604)

A baggage porter of a railroad under federal control acts in an "official function." *Krichman v. U. S.*, (C. C. A. 2d Cir. 1920) 263 Fed. 538, *affirming* (S. D. N. Y. 1919) 256 Fed. 974 in 1919 Supplement annotation.

Vol. VII, p. 608, sec. 42. [First ed., 1909 Supp., p. 417.]

"To conceal"—"To harbor."—"To conceal," as used in this section, means to hide, secrete, or keep out of sight. "To harbor," as used herein, means to lodge, to care for, after secreting the deserter. Accordingly, a person may not be convicted of concealing and harboring a deserter in violation of this section where it is not shown that he knew that the person whom he assisted was a deserter. *Firpo v. U. S.*, (C. C. A. 2d Cir. 1919) 261 Fed. 850.

Advice by attorney as assistance to deserter.—An attorney is not guilty of violating this section because he advises a client, a sixteen-year-old boy, who is enlisted in the army, to remain away from the military authorities, where it is not shown that he assisted him in any way or knew that he was a deserter, but on the contrary believed that he could secure his release from the army by reason of his age. *Firpo v. U. S.*, (C. C. A. 2d Cir. 1919) 261 Fed. 850. The court said:

"That there was sufficient to raise a jury question as to whether or not Shillace was a deserter we may assume, but we are of the opinion that upon this mere occurrence the plaintiff in error cannot be charged with assisting Shillace in continuing his desertion and avoiding apprehension and seizure by the military authorities. Plaintiff in error was lawfully engaged in the practice of his profession and was consulted by a client. It was not only lawful for him to advise with the soldier, but, indeed, it was his duty to give him his best professional advice as to his rights under the circumstances disclosed by the narration of the facts surrounding Shillace's position. For him to have closed the door against a

consultation would have been a breach of his professional obligations. Assuming that Shillace was a deserter, it was true that he was subject to arrest and incarceration by the military authorities. But in the consultation with his attorney he disclosed an apparent ground upon which to base a claim that he was entitled to his release from the army. He says he was 16 years of age when he voluntarily enlisted without his father's consent, and was but 16 years old when he left the service. His father first sought the lawyer for advice, and later brought his son to the lawyer's office. There may be a debatable question as to the professional obligations of the plaintiff in error to make known to the military authorities where the soldier was to be found; but can it say that the failure so to do constituted a criminal offense? We think not.

"Was it offensive to the statute above referred to for the plaintiff in error to advise his client to remain away from the authorities? It was the duty of the lawyer to his client to assist him in securing his release from the army. If there appeared to the plaintiff in error reasonable grounds for the expectation of success, it was not criminal for him to advise his client to remain away from the authorities. At least, such would be true in the absence of bad faith or criminal intent on the part of the plaintiff in error. There is testimony that a representation was made to the attorney that the soldier was home on sick leave and could not return to his duties. Indeed, the soldier testified that he only became a deserter from the time he visited the lawyer. Without knowledge of the fact of a desertion, there could not be said to be a criminal intent to assist Shillace.

"To assist, as used in the statute, implies guilty knowledge and felonious intent; knowledge of the wrongful purpose of the deserter. To assist, after such knowledge and intent, is serving the purpose of the deserter. It encourages him and aids him, and thus the offense may be committed. To assist, like to abet, involves some participation in the criminal act. *Hicks v. U. S.*, 150 U. S. 450, 14 Sup. Ct. 144, 37 L. Ed. 1137.

"To advise a client to commit an act which is a crime makes the lawyer an accomplice, and at common law he would be an accessory. We are not satisfied from this record that there was evidence to submit to the jury indicating a knowledge on the part of the plaintiff in error that Shillace was a deserter and was continuing in his desertion from the service of the army of the United States at the time when he was advised to remain away and go to Connecticut, where it was suggested that he had relatives. Indeed, the plaintiff in error's view seems to have been that Shillace was wrongly kept in the army and that he was entitled to discharge by reason of his age. We think the plaintiff in error was giving his best advice

and opinion to his client, without any intent of violating the law, and in doing so what he thought was within the realm of his professional obligations to his client."

Vol. VII, p. 612, sec. 47. [First ed., 1909 Supp., p. 418.]

Goods held by United States as bailee.—This section applies to goods in which the United States has a special property as bailee, as well as to such as it owns absolutely. *Kambeitz v. U. S.*, (C. C. A. 2d Cir. 1919) 262 Fed. 378.

Embezzlement by employee in mint.—A conviction for a violation of this section should be sustained where it appears that the defendant was a laborer in a mint and that he took certain coins which were in his custody by virtue of his employment. *Schell v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 593.

Sufficiency of indictment charging United States commissioner with embezzlement.—An indictment charging a United States commissioner with having received as commissioner divers sums of money from persons named, to be paid over to the receiver of the land office, and with embezzling the same, must be deemed to charge an offense against the United States in view of the provision of R. S. sec. 2294, as amended by the Act of March 4, 1904, that where applicants for the benefit of the Homestead and other Land Laws make the required affidavits before commissioners of the United States, the proof so made shall have the same effect as if made before the register and receiver "when transmitted to them with the fees and commissions allowed and required by law," and of the directions in circulars issued by the Land Office, containing suggestions to the United States commissioners that the proofs so taken shall be "transmitted to the register and receiver with the necessary fees and commissions," and that in "no case should the transmittal thereof be left to the claimant." *Stallings v. Splain*, (1920) 253 U. S. 339, 40 S. Ct. 537, 64 U. S. (L. ed.) —, *affirming* (1919) 49 App. Cas. (D. C.) 38.

Evidence—Admissibility.—In a prosecution under this section for embezzling the contents of certain pay envelopes made out to fictitious government employees, evidence that the payrolls did not contain signatures of such employees by a witness who compared the names on a list taken from the pay envelopes with the payrolls, is admissible. *Gurinsky v. U. S.*, (C. C. A. 5th Cir 1919) 259 Fed. 378, 170 C. C. A. 354. In overruling the objection that such evidence was secondary and that the payrolls should have been produced, the court said:

"The government had two propositions to establish: (1) the shortage; and (2) that defendant caused it. As to the fact of the shortage, the government did not rely

alone upon the fact that the payrolls were not receipted opposite the 56 names in question. Roberts testified that he had no men in his employ corresponding to the 56 names. His book showed no such names, and the absence of pages was accounted for and afforded no rational inference to the contrary. Inquiry failed to develop the presence of such employes in any of the camps within the paymaster's jurisdiction. The officer in charge was required to make good the shortage. The loss itself was established independently of Hopkins' evidence that the payrolls were not receipted. This testimony as to the condition of the payrolls did not reflect upon the question as to who caused the shortage, if there was one. If Hopkins had testified that there were signatures opposite the 56 names in defendant's handwriting, the case would have been presented differently. If the defendant contended that the rolls, if produced, would have shown 56 signatures on the payrolls opposite the 56 names in a handwriting other than his, then it was his duty to require production of the rolls by the government, and, failing to do so, he has no complaint based on their absence.

"It is also to be noted that Hopkins, in this respect, did not testify to what the payrolls contained, and his testimony did not infringe the letter of the rule against the allowance of secondary evidence of the contents of a written instrument. He merely stated that the column for signatures opposite the 56 names was blank. The rule is less stringent where the evidence is negative than where the attempt is to reproduce orally the written language of an instrument, especially one that creates or disposes of rights. The tendency of modern decisions and text-books is to relax the rule, and not to apply it to instruments only collaterally involved in the case. *Greenleaf on Evidence* (16th ed.) p. 169.

"Hopkins' evidence that the names from No. 575 to No. 635 on the service time book were put in alphabetical order on the payroll and the items were all \$60 items, was testified to in effect by the defendant himself. The defendant testified that he and another transferred the names from the service book to the payrolls, and the 60 names were shown to be on the service book. According to the course of business, all names appearing on the service book were transferred from it to the payrolls alphabetically. The important questions were whether the names were written on the service book by the defendant, and whether the pay envelopes had been prepared for them and were missing. Four of the 60 pay envelopes, for which there were no corresponding employes, were still in the basket at the time the loss of the others was discovered. The course of business was such that pay envelopes were prepared for all names that appeared on the service time book, and the

56 names involved did so appear. The evidence clearly shows that the course of business was followed on this occasion. We conclude that there was no reversible error in the District Court's ruling on the assignment based on Hopkins' evidence."

Vol. VII, p. 613, sec. 48. [First ed., 1909 Supp., p. 418.]

Indictment—Sufficiency.—An indictment for receiving stolen property in violation of this section which fails to allege that the defendant received the property "with intent to convert to his own use or gain," is fatally defective. *Cohn v. U. S.*, (C. C. A. 2d Cir. 1919) 258 Fed. 355, 169 C. C. A. 371. Regarding the necessity of such an averment, the court said:

"The trial judge apparently thought that, because there was no comma in the statute between the phrase 'in his possession' and the phrase 'with intent to convert,' the intent clause was intended to modify the verbs 'have' and 'retain' only. That construction of the statute does not conform to the construction which appears to have been placed upon it by the Supreme Court in *Kirby v. United States*, 174 U. S. 47, 53, 19 Sup. Ct. 574, 43 L. Ed. 890. In that case it was held incumbent upon the government to prove beyond a reasonable doubt: (1) that the property was in fact stolen from the United States; (2) that the defendant received or retained in his possession with intent to convert to his own use or gain; (3) that he received or retained it with knowledge that it had been stolen from the United States. And Mr. Justice Harlan, who wrote the opinion of the court, said that—

"The act of Congress upon which the present indictment rests makes the receiving of stolen property of the United States with the intent by the receiver to convert it to his own use or gain, he knowing it to have been stolen, a distinct, substantive felony."

"The indictment now under consideration charges: (1) that the property was stolen; (2) and that it was the property of the United States; (3) that the defendant unlawfully received it; (4) that defendant knew at the time he received it that it had been stolen. But the allegation that defendant received or retained the property with the intent to convert to his own use or gain is not to be found. And we are obliged to hold upon the authority of *Kirby v. United States*, *supra*, that the failure to allege that defendant received it 'with intent to convert to his own use' is a fatal defect."

Evidence.—In *Clark v. U. S.*, (C. C. A. 3d Cir. 1919) 258 Fed. 437, 169 C. C. A. 453, it was held that the evidence in a prosecution for a violation of this section was sufficient to show that the title to the stolen property was in the United States.

Vol. VII, p. 670, sec. 125. [First ed., 1909 Supp., p. 437.]

IV. "Competent tribunal, officer or person."

V. Oath "authorized" by "law."

VIII. Indictment.

IV. "COMPETENT TRIBUNAL, OFFICER OR PERSON" (p. 672)

Member of legal advisory board.—An affidavit in support of a claim for exemption and discharge from the selective service draft, may be made before an associate member of the legal advisory board of the county, and if false, the affiant may be prosecuted for perjury under this section. *Hardwick v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 505, 168 C. C. A. 509; *Whiteside v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 509, 168 C. C. A. 513.

V. OATH "AUTHORIZED" BY "LAW" (p. 674)

Application for passports.—A person may not be indicted under this section for perjury in making an affidavit relative to an application for passports because he swore falsely that he had known the applicant for a period of four years, where the rules governing the granting and issuing of passports, promulgated by the President, do not require such a statement to be made in any affidavit supporting the application. *U. S. v. Robertson*, (S. D. Cal. 1919) 257 Fed. 195.

Proceedings under Selective Service Act.—In *Hardwick v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 505, 168 C. C. A. 509, it was held that under section 10 of the Selective Service regulations an associate member of a legal advisory board was authorized to administer oaths to registrants, and that a registrant who made a false affidavit could be prosecuted for perjury under this section. To same effect, see *Whiteside v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 509, 168 C. C. A. 513.

VIII. INDICTMENT (p. 676)

The materiality of a perjured statement may be made to appear in an indictment either by an allegation of its materiality or by pleading facts which of themselves show its materiality. *Berry v. U. S.*, (C. C. A. 9th Cir. 1919) 259 Fed. 203, 170 C. C. A. 271.

Action upon false statement.—An indictment under this section for making a false affidavit concerning a desert land entry is not fatally defective because it contains no allegation that the affidavit was accepted and acted upon by the government. *Berry v. U. S.*, (C. C. A. 9th Cir. 1919) 259 Fed. 203, 170 C. C. A. 271.

Selective Service Law.—In *Hardwick v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 505, 168 C. C. A. 509, regarding the allegations in an indictment under this section for mak-

ing a false affidavit claiming exemption under the Selective Service Act (9 Fed. Stat. Ann. (2d ed.) 1136), the court said:

"Defendant urges that the averment that the defendant well knew that the woman named in the indictment 'was not at that time, nor at all, his wife, nor dependent upon his labor for her support,' was fatally defective, because of the omission of an averment that the wife was *mainly* dependent for support upon the labor of the accused. But as the charge is that defendant willfully falsely stated in the affidavit that he had a wife dependent upon his labor for support, whereas he well knew that the woman named was not then, or at all, his wife, and dependent upon his labor for her support, defendant was sufficiently informed and could not possibly have been misled or prejudiced. The materiality of the false statement and affidavit is too apparent to require comment."

In *Whiteside v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 509, 168 C. C. A. 513, in a similar prosecution under this section, the court said:

"It is said that it does not appear who subscribed to the affidavit taken by the defendant. But it is alleged that the affidavit was subscribed and sworn to, and that the associate member of the legal advisory board administered the oath to the defendant, and that in the affidavit hereinbefore referred to defendant, having taken the oath to testify to matters referred to in the affidavit, falsely and knowingly stated, in effect, that he had a wife who was dependent upon his labor for support. This makes it perfectly clear that the defendant was the person charged with having subscribed and taken the affidavit."

Vol. VII, p. 729, sec. 169. [First ed., 1909 Supp., p. 450.]

Indictment.—An indictment charging the defendant with a violation of this section in having in his possession certain dies for making counterfeit money, need not allege that he had possession of the dies with intent to defraud, or to use the same in making counterfeit coins. *Baender v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 832, 171 C. C. A. 558. The court said:

"Act Feb. 10, 1891, c. 127, § 1, 26 Stat. 742, which was in force prior to the enactment of the act of 1909, had denounced as unlawful the possession of the prohibited dies, etc., with intent to fraudulently or unlawfully use the same. In amending the law by the later act, the report of the committee on revision shows that the words 'with intent to fraudulently use the same' were 'intentionally dropped from the statute'; the committee believing that a person who has in his possession dies which may be used for counterfeiting any coin shall be required to show that his possession is lawful, and that the government should not be required to prove that he has

them in his possession with the intent to use them fraudulently and unlawfully for counterfeiting. Congress evidently intended that the unlawful possession of such dies should be sufficient evidence to warrant a conviction, unless the accused could explain the possession to the satisfaction of the jury.

"The statute here involved has analogy to Act Jan. 17, 1914, c. 9, 38 Stat. 275, amending Act Feb. 9, 1909, c. 100, 35 Stat. 614, and providing that possession of imported opium shall be deemed sufficient evidence to warrant conviction, unless the defendant shall explain the possession to the satisfaction of the jury. Under that statute convictions have been sustained on proof of possession; the courts ruling that the statute provides for a presumption of *prima facie* proof of the offense which, while sufficient to sustain a verdict of guilt, may or may not be sufficient to satisfy the jury of the guilt of the accused, applying the doctrine of *Luria v. United States*, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. Ed. 101, where it was held that the establishment of a presumption from certain facts prescribes a rule of evidence, and not one of substantive right, and that if the inference is reasonable, and opportunity is given to controvert the presumption, it is not a denial of due process of law. *United States v. Yee Fing* (D. C.) 222 Fed. 154; *United States v. Ah Hung* (D. C. 243 Fed. 762; *Gee Woe v. United States*, 250 Fed. 428, 162 C. C. A. 498.

"It is true that in all cases in which a specific intent is made part of the offense by the statute creating it, it must be alleged, but in cases where the act includes the intent it is sufficient to charge the offense in the language of the statute, and the intent will be inferred. . . .

"In enacting the statute under which this indictment is brought, Congress intended that it should express all the elements of the crime, and that the prosecution, having shown the unlawful possession by the accused, should not be required to prove what was in the latter's mind as to future use of the things so possessed, and that a criminal intent is to be inferred from the unlawful possession.

"It is well settled that under the section of the statute which makes unlawful the forging of coins it is unnecessary to allege an intent. *United States v. Otey* (C. C.) 31 Fed. 68; *United States v. Russell* (C. C.) 22 Fed. 390; *United States v. Peters*, 2 Abb. (U. S.) 494, Fed. Cas. No. 16,035. But counsel for the plaintiff in error attempts to distinguish the present case by asserting that the offense which is here charged is not an act of the accused, so that intention may be imputed to it. To this we cannot agree. To have possession is to maintain in physical control, and it implies both will and action on the part of the possessor. *Kaye v. United States*, 177 Fed. 147, 100 C. C. A.

567, is not in point. That case arose under the statute of February 10, 1891.

"The plaintiff in error admitted by his plea in the court below the truth of the indictment. We hold that the indictment is sufficient to sustain the judgment."

Vol. VII, p. 788, sec. 211. [First ed., 1909 Supp., p. 462.]

II. MAILING OBSCENE MATTER

2. Test of Obscenity (p. 791)

Test of offense—Writing innocent on its face.—It is not sufficient to constitute a violation of this section that a letter or publication be offensive to the feelings or to the pride of those into whose hands it may come. The evil character of the letter or publication must be reasonably apparent or discernible on its face. *Sales v. U. S.*, (C. C. A. 8th Cir. 1919) 258 Fed. 597, 169 C. C. A. 537. In commenting on this element of the offense, the court said:

"It need not be in particular words, but may appear in the structure of the sentences, and either directly or indirectly by innuendo or suggestion, or in the thought conveyed. *Dunlop v. United States*, 165 U. S. 196, 17 Sup. Ct. 375, 41 L. Ed. 799, involved newspaper publications of the latter character. Instances of suggestive letters held to offend the statute may be found in *Parish v. United States*, 159 C. C. A. 258, 247 Fed. 40, and *United States v. Moore* (D. C.) 129 Fed. 159. We approve of those decisions. But we know of no case under this clause of the statute in which it has been held that, if the letter or publication in itself is not objectionable, an undisclosed motive or intent of the writer may be found to convict him. In *Knowles v. United States*, 95 C. C. A. 579, 170 Fed. 409, we held that a good motive was no defense to an evil publication. The converse is measurably true. If an undisclosed evil motive or intent can bring within the statute a letter or publication that is innocent and mailable upon its face, convictions could be sustained in cases of simple newspaper 'want ads,' upon proof of an evil 'ultimate purpose, motive, or intent' in the mind of an advertiser or publisher who employed the mails. Doubtless that would be a proper field for legislation, but we do not think the statute before us goes so far.

"Cases like *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, and *De Gignac v. United States*, 52 C. C. A. 71, 113 Fed. 197, are not in point. They arose under the clause of the statute making nonmailable any written or printed card, letter, circular, etc., giving information directly or indirectly where, how, or from whom certain articles might be obtained. There a letter may have a perfectly clean face, and yet its mailing be a violation of the law."

Vol. VII, p. 812, sec. 215. [First ed., 1909 Supp., p. 464.]

III. Essentials.

3. Scheme or artifice to defraud.

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2. Indictment.

a. In general.

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f. Repugnancy and duplicity.

4. Trial.

b. Evidence and instructions.

III. ESSENTIALS

3. Scheme or Artifice to Defraud

a. What Constitutes (p. 816)

Necessity of pecuniary loss.—"This section of the statute does not make damage or loss to the victims of a scheme to defraud, or to obtain money or property by false pretenses, representations or promises, a sine qua non of its violation, and such damage or loss is not indispensable to the commission of an offense under it." Thus, it was held that there was a violation of this section where the defendant induced certain persons to agree to pay \$30,000 for 1,760 acres of land and the assignment of a lease of 480 acres of school land in such a way that the defendant could obtain 1,560 acres of other like land from the same owners for nothing, although the land purchased by the victims of the scheme was really worth the amount they agreed to pay for it. *Wine v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 911.

Schemes not enumerated are within the act if they fall within the general words "scheme or artifice to defraud." *MacKnight v. U. S.*, (C. C. A. 1st Cir. 1920) 263 Fed. 832.

Selling land without title.—A scheme whereby a purchaser of land is induced by false representations of title is within the statute. *MacKnight v. U. S.*, (C. C. A. 1st Cir. 1920) 263 Fed. 832.

IV. PROCEDURE

2. Indictment

a. In General (p. 828)

An indictment charging a violation of this section is sufficient where it alleges a scheme by the defendant to defraud people by means of misrepresentations fully set forth, that the representations were false and known to be false, that the supernatural powers which the defendant claimed to be able to exercise were not possessed by him and that his acts and pretenses were fraudulently conceived, and were done with the purpose of defrauding. *Crane v. U. S.*, (C. C. A. 9th Cir. 1919) 259 Fed. 490, 170 C. C. A. 466.

In *Lewis v. U. S.*, (C. C. A. 5th Cir. 1919) 259 Fed. 221, 170 C. C. A. 289, the plaintiff in error was charged with violating this section by using the mails to induce shipments of produce to him with the intent to convert the proceeds. In holding the indictment sufficient, the court said: "The indict-

ment is good. The case relied upon by plaintiff in error (*Faulkner v. United States*, 157 Fed. 840, 85 C. C. A. 204) holds that the fact that a circular sent out by a commission merchant contained exaggerations, and that he failed to settle with some of his patrons, would not sustain a conviction on an indictment under Revised Statutes, § 5480. With reference to fraudulent intent, the allegations in the instant case are more comprehensive than the proof in the *Faulkner Case*. Besides, the *Faulkner Case* was decided prior to the amendment effected by the adoption of the Criminal Code (Act March 4, 1909, c. 321, § 215, 35 Stat. 1130). The cases of *Bettman v. U. S.*, 224 Fed. 819, 140 C. C. A. 265, and *Tucker v. U. S.*, 224 Fed. 833, 140 C. C. A. 279, are conclusive against plaintiff in error's contention.

"It is insisted that the letter set forth in the first count negatives the intent to defraud. The letter contains the following with reference to shipment of peas:

"You can ship them B. L. attached, if you want to, or I will send you check as soon as they come in."

"If it were necessary that the 'writing' . . . sent by the post office establishment, as an element of the crime, disclose a fraud, that which would make it illegal would render it innocuous. It was not the purpose of the law to punish merely the incompetent in crime. Efficiency in fraud should not insure immunity. The letter may have been well conceived to establish the relations necessary to the success of the scheme charged. Certainly the contrary could not be said, in the absence of a statement of facts."

c. Use of Mails (p. 833)

Scheme to be effected through use of mails.—To same effect as first paragraph of original annotation, see *Robins v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 126.

f. Repugnancy and Duplicity (p. 836)

Repugnancy.—An indictment under this section which charges that the defendants represented that, by reason of their pretended services, applications to purchase public lands under the Timber and Stone Act of June 3, 1878, ch. 151 (9 Fed. Stat. Ann. (2d ed.) 606) would be accepted and allowed by the Land Office and that they also represented that they could, by reason of their knowledge of the public land laws, cause a reversal and change of certain rules and regulations of the United States and authorities and the Department of the Interior, and in that way secure title to the lands, is not defective for repugnancy. *Byron v. U. S.*, (C. C. A. 9th Cir. 1919) 259 Fed. 371, 170 C. C. A. 347.

4. Trial

b. Evidence and Instructions (p. 838)

Intent—Similar schemes.—To same effect as original annotation, see *Byron v. U. S.*,

(C. C. A. 9th Cir. (1919) 259 Fed. 371, 170 C. C. A. 347.

Representations made by defendant.—In a prosecution under this section for using the mails to promote frauds in connection with entries on public lands of the United States, evidence that the defendant advised persons wishing to make entries that it would not be necessary for them to personally inspect the land before filing entries but that he could make such entries for them, is admissible, where it appears that such representations were false, that they were made with a view of having the applicants pay him the moneys which he obtained from them, and that they were acted upon by the applicants. *Byron v. U. S.*, (C. C. A. 9th Cir. 1919) 259 Fed. 371, 170 C. C. A. 347.

Sufficiency.—In *Crane v. U. S.*, (C. C. A. 9th Cir. 1919) 259 Fed. 480, 170 C. C. A. 456, it was held that the evidence was sufficient to sustain a conviction for a violation of this section.

Vol. VII, p. 859, sec. 233. [First ed., 1909 Supp., p. 471.]

Standard of care.—Neither this section nor the regulations formulated thereunder attempt to fix the entire measure or degree of care to be exercised by a common carrier in the care and custody of high explosives. *Howell v. Lehigh Valley R. Co.*, (N. J. 1920) 109 Atl. 309.

Vol. VII, p. 890, sec. 272. [First ed., 1909 Supp., p. 481.]

III. THIRD PARAGRAPH

1. Lands Reserved or Acquired

a. In General (p. 896)

Allegation of character of public use.—Where, in a prosecution for murder, jurisdiction is claimed by the government under the third paragraph of this section, the indictment is not defective because it fails to allege the character of the public use for which the parcel of land was acquired and used by the government, where it identifies the tract by metes and bounds and alleges the date of the cession of jurisdiction by the state to the United States. Thus, the averment that "on the 21st day of September, A. D. 1915, constitutional and exclusive jurisdiction over the site of said lot, tract and parcel of land was ceded to the United States of America by the said state of Texas in the manner provided by law," is a sufficient averment of a cession for one of the purposes enumerated in the third subdivision of this section, and which authorize the United States to accept such a cession, upon the principle that public acts of public officials are presumed to be rightly executed. *Brown v. U. S.*, (C. C. A. 5th Cir. 1919) 257 Fed. 46, 168 C. C. A. 268. The court said:

"It may be conceded that the third subdivision of section 272 of the Penal Code confers no right on the United States to accept a cession of jurisdiction from a state for other than the purposes set out in section 272. For the purposes of this case, the use must have been for a 'needful building.' Exclusive jurisdiction of a tract used for a purpose other than one of the named statutory purposes would be unauthorized. The site was, in fact, acquired for a post office, but the indictment avers only that it was acquired for public purposes. It is contended that this is a fatal defect, because the locality of the offense was jurisdictional, and the indictment must show jurisdiction on its face. The indictment does identify the tract on which the crime is alleged to have been committed by describing it by metes and bounds, and also by alleging the date of the cession of jurisdiction by the state of Texas to the United States. The defendant was fully informed as to the locus of the alleged offense and the claim of exclusive federal jurisdiction arising from it, and it is difficult to see how he could have been prejudiced by the imperfect averment, if there was one, and why it should not, therefore, within the terms of section 1025, R. S., be deemed sufficient."

Vol. VII, p. 983, sec. 330. [First ed., 1909 Supp., p. 494.]

Qualified verdict as changing degree of murder.—A conviction for murder as charged in the indictment, which embraced the elements constituting murder in the first degree, is not rendered less than one for first degree murder merely because the jury exercised its right, under this section, to mitigate the punishment to imprisonment for life. *Stroud v. U. S.*, (1919) 261 U. S. 16, 380, 40 S. Ct. 50, 176, 64 U. S. (L. ed.) —.

Vol. VII, p. 984, sec. 332. [First ed., 1909 Supp., p. 495.]

Offenses against internal revenue.—In *Mayer v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 216, 170 C. C. A. 284, the plaintiffs in error were convicted of engaging in the retail liquor business without having paid the tax required by the Act of Feb. 8, 1876, ch. 36, § 16 (3 Fed. Stat. Ann. (2d ed.) 1053). It was held that one of the plaintiffs

in error, though employed only as a clerk, might be convicted as a principal through the effect of this section.

Aiding and abetting corporation.—To same effect as original annotation, see *Kelly v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 392, 169 C. C. A. 408.

Failure to take exceptions.—Where, in a prosecution of an employer and employee for a violation of R. S. sec. 3244 (3 Fed. Stat. Ann. (2d ed.) 1045), the particular claims made on behalf of the latter, that he was only an employee, are not brought to the attention of the court during the trial or saved by exceptions, they will not be considered in view of the provisions of this section making aiders and abettors principals. *Turner v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 103, 170 C. C. A. 171.

Vol. VII, p. 987, sec. 335. [First ed., 1909 Supp., p. 495.]

Misdemeanor.—Where the maximum punishment prescribed by a statute was imprisonment for not more than 12 months or a fine of not more than \$1,000, or both, the offense was only a misdemeanor, although a failure to pay the fine, in the event the defendant was ordered to stand committed until it was paid, would result in 30 days' imprisonment in addition to the 12 months, if the maximum imprisonment was imposed; for such additional imprisonment would be no part of the original punishment and it would be uncertain, at the time the sentence was imposed, whether the additional 30 days would ever be served. *Pollard v. U. S.*, (C. C. A. 5th Cir. 1919) 261 Fed. 336, holding that violation of the Selective Service Act of May 18, 1917, sec. 13, 9 Fed. Stat. Ann. (2d ed.) 1163, by keeping a house of ill fame was not an offense involving moral turpitude, nor a crimen falsi, nor punishable by a penitentiary or hard labor sentence, and so was not an infamous crime triable under the Constitution only by indictment.

Vol. VII, p. 997, sec. 343. [First ed., 1909 Supp., p. 503.]

This section does not operate to supersede R. S. sec. 13 (9 Fed. Stat. Ann. (2d ed.) 393). *Goubin v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 5, 171 C. C. A. 601.

PENSIONS

Vol. VII, p. 1026, sec. 4715. [First ed., vol. V, p. 641.]

Allowances under R. S. secs. 4756 and 4757 (see vol. VII, pp. 1045, 1046) do not fall within the prohibition of this section, and may therefore be paid in addition to a pension under the general prison laws. (1918) 21 Op. Atty.-Gen. 268.

Vol. VII, p. 1041, sec. 4747. [First ed., vol. V, p. 667.]

"Pension" as including retired soldier's pay.—The pay of a retired soldier has never been treated as a pension under the statutes of the United States or of the statutes of the various states exempting the same from seizure under legal process. *Szymanaki v. Szymanaki*, (Ia. 1920) 176 N. W. 806, wherein the court said:

"The word 'pensioner,' as used in our statute, must be given its usual and ordinary meaning, and has application to individuals formerly in the military service of the United States who, either on account of disability or by act of Congress, receive annually a fixed sum, payable ordinarily in quarterly installments. A retired soldier receiving pay cannot, under the United States statutes, receive a pension. The theory upon which pensions are allowed is entirely different from that upon which a soldier's monthly pay is continued after his retirement from the army."

Vol. VII, p. 1045, sec. 4756. [First ed., vol. V, p. 670.]

Nature of pension.—The money benefits provided for in this section are "pensions" within the purview of R. S. sec. 4813 (see vol. III, p. 572) and the pertinent provision of the Act of June 30, 1914, 38 Stat. L. 398 (see vol. III, p. 573) and such money benefits inure to the grantees concurrently with maintenance in the Naval Home. (1918) 31 Op. Atty.-Gen. 268.

Exclusive jurisdiction of secretary.—The Secretary of the Navy has exclusive jurisdiction to determine who are entitled to the money benefits granted by this section, and after that official has issued a certificate allowing same, the Commissioner of Pensions, in making payment of said money benefits acts only in a ministerial capacity.

(1917) 31 Op. Atty.-Gen. 127. Regarding the nature of such payments, the Attorney-General said: "The question propounded by the Secretary of the Interior as to whether the payments provided for under this section are within the purview of the term 'pensions' as used in the Act of June 30, 1914 [see vol. III, p. 574], pertains rather to the administration of the Navy Department than of the Department of the Interior, and as the Secretary of the Navy has not requested an opinion with respect to this question, the Attorney-General is precluded by the settled rule of his Department from expressing an opinion in regard to it."

Effect of sec. 312 of War Risk Insurance Act.—A sergeant in the Marine Corps who, prior to the enactment of the War Risk Insurance Act of October 6, 1917 (see vol. IX, p. 1322) had served in the corps for more than 21 years and who had become "disabled from sea service" by a wound received in action in June, 1916, but who, though entitled to honorable discharge from the service upon October 6, 1917, did not actually receive his discharge until November 5, 1917, is entitled both to the benefits of this section and also to whatever allowance he may be otherwise entitled to under the provisions of the War Risk Insurance Act. (1918) 31 Op. Atty.-Gen. 296.

Inmates of St. Elizabeth's Hospital.—Allowances under this and the following section which accrue to inmates of St. Elizabeth's Hospital should be paid to the superintendent of the hospital, notwithstanding such inmates are represented by a legal guardian or committee. 31 Op. Atty.-Gen. 354.

Vol. VII, p. 1097. [Act of March 2, 1895.] [First ed., vol. V, p. 643.]

Payment of pension to guardian of insane pensioner.—Where a pension is paid to the guardian of an insane pensioner who dies while the pension money is still in the hands of the guardian it becomes no part of the deceased's estate and his creditors have no standing in court to require its subjection to the payment of their claims. The guardian in such a case is an agent of the government. *Tama County v. Kepler*, (Ia. 1919) 173 N. W. 912.

PHILIPPINE ISLANDS

Vol. VII, p. 1140, sec. 5. [First ed., vol. V, p. 719.]

Due process of law - Statute requiring licensed vessels in coastwise trade to carry mail free.—Neither the guaranty of the Philippine Bill of Rights of due process of law nor its prohibition against the taking of private property for public use without compensation can be said to have been violated by a Philippine law which imposed upon vessels engaged in the coastwise trade, for the privilege of so engaging, the duty to carry the mails free to and from their ports of touch, in view of the plenary power which the Philippine government had always possessed and exercised, and which was recognized in the Act of Congress of April 16, 1904, to limit the right to engage in the coastwise trade to those who agree to carry the mails free. *Public Utility Com'rs v. Ynchausti*, (1920) 251 U. S. 401, 40 S. Ct. 277, 64 U. S. (L. ed.) —.

Vol. VII, p. 1182, sec. 6. [First ed., vol. X, p. 262.]

Certificates of indebtedness in the sum of \$10,000,000 par value which the government

of the Philippine Islands proposes to issue to maintain the required parity between the silver and the gold peso and to meet an emergent exchange situation, as provided by this Act, and also by an act of the Philippine legislature of May 6, 1918, will, if and when issued in the form and under the conditions herein stated, be the valid obligations of the Philippine government. (1919) 31 Op. Atty.-Gen. 426.

1918 Supp., p. 596, sec. 11.

Bond issues by municipalities.—The proposed issue of \$250,000 bonds by the municipality of Iloilo, P. I., under the authority of the act of March 9, 1917, of the Philippine legislature (assuming that the issue is necessary to anticipate taxes and is within the debt limit provisions of this act, will be, when made in accordance with the provisions of said act of the Philippine legislature, a valid and binding obligation. (1917) 31 Op. Atty.-Gen. 131.

PORTO RICO

Vol. VII, p. 1276, sec. 38. [First ed., vol. V, p. 775.]

Bonds.—The proposed issue by Porto Rico of \$300,000 insular loan refunding bonds, under authority of act No. 120, approved July 26, 1913, of the legislative assembly of Porto Rico, not being in excess of the debt limit provision of this section, will, provided the requirements of said act No. 120 are complied with, when duly sold, delivered, and paid for, constitute the valid obligation of the people of Porto Rico. (1917) 31 Op. Atty.-Gen. 106.

1918 Supp., p. 610, sec. 3.

Validity of bond issue.—The proposed issue of bonds by Porto Rico to the amount of \$200,000 for the improvement of the irrigation system, as authorized by act No. 23 of the legislature of Porto Rico of November 22, 1917, not being in excess of 7 per centum of the aggregate tax valuation of the property of Porto Rico, as required by this section, the bonds will, if issued under the conditions prescribed by the said act of

Porto Rico of November 22, 1917, be valid and binding obligations upon the people of Porto Rico. 31 Op. Atty.-Gen. 373.

Validity of bond issue.—The proposed issue of bonds by Porto Rico to the amount of \$500,000 for the construction of roads and bridges, as provided by act No. 71 of the legislative assembly of Porto Rico of April 13, 1916, not being in excess of the limit of indebtedness imposed by this section, and the form of the proposed bonds complying with the conditions prescribed by the regulation of the executive council of Porto Rico of April 2, 1918, said bonds will be the valid and binding obligations of the people of Porto Rico. 31 Op. Atty.-Gen. 342, wherein it was said:

"In an opinion rendered Aug. 11, 1916. I had occasion to pass upon an issue of \$500,000 of the bonds authorized to the total amount of \$2,000,000 by said act No. 71 of April 13, 1916, of which the present is a further issue. I pointed out that the general power of the people of Porto Rico to issue bonds under the provisions of section 38 of the organic act approved April 12, 1900,

had been fully considered by my predecessors (Op. 27, 104; 28 ib. 246; 29 ib. 468), and held that the issue there in question was legal.

"The act of April 12, 1900, has been superseded by the Act of Congress approved March 2, 1917 (39 Stat. 951), entitled 'An act to provide civil government for Porto Rico, and for other purposes.' Section 3, which reads in part as follows: 'and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Porto Rico or any municipal government therein as may be provided by law, and to protect the public credit: Provided, however, That no public indebtedness of Porto Rico or of any subdivision or municipality thereof shall be authorized or allowed in excess of seven per centum of the aggregate tax valuation of its property,' is identical with the provision on the same subject in the act of April 12, 1900.

"My opinion of August 11, 1916, is therefore applicable to the present issue, since the circumstances under which it is to be made and the law authorizing it are not different from those existing when that opinion was written."

1918 Supp., p. 626, sec. 41.

Jurisdiction of alien domiciled in Porto Rico.—Jurisdiction of the federal District Court for Porto Rico of a suit to which an alien domiciled in Porto Rico is a party is denied by the provision of this section, which gives said court jurisdiction of controversies "where all of the parties on either side of the controversy are citizens or subjects of a foreign state or states, or citizens of a state, territory, or district of the United States not domiciled in Porto Rico." The restriction of jurisdiction to cases where all the parties on either side of the controversy are "not domiciled in Porto Rico" applies to aliens as well as to American citizens. *Porto Rico Ry., etc., Co. v. Mor*, (1920) 253 U. S. 345, 40 S. Ct. 516, 64 U. S. (L. ed.) —.

1918 Supp., p. 629, sec. 52.

Continuance in office under original appointments.—This section did not have the effect of reappointing the present attorney general, commissioner of education, and auditor of Porto Rico to a new term of office, but these officials are continued in office under their original appointments. 31 Op. Atty.-Gen. 381.

POSTAL SERVICE

Vol. VIII, p. 74. [*Enlisted men, etc.*]

[First ed., 1909 Supp., p. 525.]

Authority of Secretary of Navy to fix compensation.—Under the provisions of this act, which authorize the selection and designation of enlisted men of the navy as navy mail clerks and provide for additional compensation for such services, the Secretary of the Navy has the power, with uncontrolled discretion, to fix the compensation of navy mail clerks within the prescribed maximum. (1918) 31 Op. Atty.-Gen. 320.

Vol. VIII, p. 82, sec. 3868. [First ed., vol. V, p. 821.]

Authority of Postmaster General in matter of determining character and quality of letter boxes.—The power to determine the character and quality of letter boxes for the entire postal system is vested in the Postmaster General, and the Art Commission of New York has no right to control the design of letter boxes to be erected in that city. (1916) 31 Op. Atty.-Gen. 73.

Vol. VIII, p. 163, sec. 3962. [First ed., vol. V, p. 893.]

Long continued failure of Postmaster General to impose fines as waiver of power to fine.—The long-continued failure of the Post-

master General to impose fines for delays of less than twenty-four hours in transporting the mails cannot be asserted as the equivalent of a departmental declaration that no such power existed in behalf of a railway company which had notice before it contracted to carry the mail that failure to maintain train schedules was regarded by Congress and by the Post Office Department as a violation of mail-carrying contracts, justifying the imposition of fines or deductions, and that both believed that there was authority under the customary contracts and the law to impose such deductions. *Kansas City Southern R. Co. v. U. S.*, (1920) 252 U. S. 147, 40 S. Ct. 257, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 630.

Vol. VIII, p. 194, sec. 4001. [First ed., vol. V, p. 917.]

Burden of carrying mails at price fixed by Congress when attaching.—The burden of a land-aided railroad, under the Act of June 3, 1856, § 5, to carry the mails at a price to be fixed by Congress, attached upon the acceptance of any aid whatever, no matter how disproportionate to the cost of constructing the portion of the road so aided. *Grand Trunk Western R. Co. v. U. S.*, (1920) 252 U. S. 112, 40 S. Ct. 309, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 473.

Right of government to have mails carried

at price fixed by Congress and affected by illegal act of state in issuing patent.—The right to have the mails carried at a price to be fixed by Congress, which was acquired by the federal government by way of charge upon a railroad under the Act of June 3, 1856, through the railroad company's acceptance of a tract of public land therein granted to the state in aid of railroad construction, could not be invalidated by any illegal act of the authorities of the state in issuing a patent for a wholly different tract. *Grand Trunk Western R. Co. v. U. S.*, (1920) 252 U. S. 112, 40 S. Ct. 309, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 473.

Recovery of overpayments to railway companies transporting mail.—The balances due to a railway company for carrying the mails, although arising under successive quadrennial contracts, are regarded as running accounts, and moneys paid in violation of law upon balances certified by the government accounting officers may be recovered by means of a later debit in these accounts. It does not matter how long a time elapsed before the overpayment was discovered, or how long the attempt to recover it was deferred. *Grand Trunk Western R. Co. v. U. S.*, (1920) 252 U. S. 112, 40 S. Ct. 309, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 473.

The Postmaster General, having satisfied himself that overpayments had been made to a railway company for carrying the mails, might, without establishing the illegality by suit, deduct the amount of such overpayments from the moneys otherwise payable to the railway company to which the overpayments had been made. *Grand Trunk Western R. Co. v. U. S.*, (1920) 252 U. S. 112, 40 S. Ct. 309, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 473.

Vol. VIII, p. 195, sec. 4002. [First ed., vol. V, p. 919.]

Pay for carrying mails—Ascertainment of weights as of what time.—Payments to a railway company for carrying the mails during each four-year term upon the basis of weights taken immediately prior to the beginning of such term instead of annually must be deemed to satisfy the requirement of this section, that payment of specified sums per mile be made per annum according to weights, since such action accords with prior practice followed many years, and was permitted by the letter of the statute, the carrier having submitted with full knowledge. *New York, etc., R. Co. v. U. S.*, (1919) 251 U. S. 123, 40 S. Ct. 67, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 222.

Greater compensation than amount fixed by contract.—A railway company which voluntarily accepts and performs mail transportation service, with knowledge of what the United States intends to pay, cannot recover any greater compensation, even though it might have been driven to perform the

service for an inadequate compensation by the fear that a refusal would incur the hostility of persons living along its line, since this does not amount to compulsion by the United States, and cannot constitute the basis of a justiciable claim against it for taking property for public use under an implied contract to make adequate compensation. *New York, etc., R. Co. v. U. S.*, (1919) 251 U. S. 123, 40 S. Ct. 67, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 222.

Readjustment order changing practice with reference to compensation for carrying mails and calculation of average weight.—Railway companies carrying the mails after the Postmaster General had, by a readjustment order, directed that compensation be based upon a calculation of average weight, made by taking the whole number of days included in the weighing period as a divisor for obtaining the average weight per day, instead of the number of working or week days, as was the former practice, are bound by such order, either because the Postmaster General had the discretionary power to make the order, as is held by four justices, or because, as is held by two justices, the railway companies by their conduct in fact accepted the terms offered by the Postmaster General by transporting the mails and accepting the stated compensation. *The Mail Divisor Cases*, (1920) 251 U. S. 326, 40 S. Ct. 162, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 258.

Vol. VIII, p. 199, sec. 13. [First ed., vol. V, p. 918.]

Application of section to every carrier using railroad.—The obligation of a land-aided railroad, under this section, to carry the mails at 80 per cent of the rates otherwise payable, affects every carrier which may thereafter use the railroad, whatever the nature of the tenure, and it is immaterial that the railroad company which later carries the mail over such road received none of the land and obtained no benefit from the grant. *Grand Trunk Western R. Co. v. U. S.*, (1920) 252 U. S. 112, 40 S. Ct. 309, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 473.

Railroad construction when land aided.—Railroad construction cannot be said not to have been land aided, within the meaning of this section, governing rates for mail transportation, because in fact it may have been completed without the aid either of funds or of credits derived from public lands, where, before the road had been fully completed, the railroad company asked that certain lands be granted to it in aid of construction, and accepted from the state a patent for the lands which recited that such was the purpose of the conveyance, and expressly assented to the terms and conditions of the grant which Congress imposed, and thereafter proceeded to dispose of the lands.

Grand Trunk Western R. Co. v. U. S., (1920) 252 U. S. 112, 40 S. Ct. 309, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 473.

Effect of departmental construction.—The long-continued practice of the Post Office Department to pay the full mail transportation rates to a certain railroad company, instead of the 80 per cent payable if the construction of the railroad was land-aided, will not be given effect by the courts under the rule of long-continued executive construction, where such practice was not due to any construction of the statute which the Department later sought to abandon, but to what is alleged to be a mistake of fact,—due, perhaps, to an oversight. *Grand Trunk Western R. Co. v. U. S.*, (1920) 252 U. S. 112, 40 S. Ct. 309, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 473.

Illegal acts of land grant railroad as invalidating charge with reference to compensation.—The charge upon a railroad with reference to compensation for carrying the mails imposed by acceptance of a land grant with its terms and conditions may not be invalidated by any illegal act of the railroad under a mortgage foreclosure, although the mortgage was executed before the railroad company had applied for the grant, and it does not appear that the mortgage purported specifically to cover public lands, where the trustee under the mortgage classed these lands as after-acquired property, and the company's interest in them was, by special proceeding, made subject to the foreclosure proceedings. *Grand Trunk Western R. Co. v. U. S.*, (1920) 252 U. S. 112, 40 S. Ct. 309, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 473.

Vol. VIII, p. 206. [*Weighing of mails, etc.*]

Power of Congress to authorize withdrawal of empty mail bags from mails.—There is nothing to prevent Congress, when fixing compensation for the carriage of the mails, from directing that the empty mail bags shall be withdrawn from the mails and be transported by freight or express, the effect of which is to reduce the compensation for carrying the mails by excluding the weight of the empty bags in determining the average weight of the mails as the basis of fixing compensation. *St. Louis, etc., R. Co. v. U. S.*, (1920) 251 U. S. 198, 40 S. Ct. 120, 64 U. S. (L. ed.) — (*affirming* (1917) 53 Ct. Cl. 45), which further held that Congress, by directing that empty mail bags be withdrawn from the mails and be transported by freight or express, thereby brought such bags when carried by freight on a land-grant-aided railway within the provision of the Land-Grant Acts that all property and troops of the United States shall be transported at the railway company's expense, although by a wholly separate provision is was declared that the mails should be transported over the railway company's

lines at such prices as Congress might direct, and the price was later fixed by Congress at 80 per cent of the compensation that would otherwise have been received.

1918 Supp., p. 634, sec. 2.

Accepting security from Alaskan banks.—The board of trustees of the Postal Savings System may properly accept from banks organized under the laws of the Territory of Alaska security to insure the safety and prompt payment of postal deposits. (1916) 31 Op. Atty.-Gen. 41.

1918 Supp., p. 639, sec. 2.

Rural post roads.—In (1917) 31 Op. Atty.-Gen. 109, four classes of roads there specified were considered to be "rural post roads." The opinion read in part as follows:

"The questions submitted for opinion are as to whether certain specified kinds of roads fall within the scope of this definition so that funds appropriated by the act may properly be expended thereon by the Secretary of Agriculture in the manner therein provided.

"The classes of such roads are as follows:

"(1) An existing road, being used in substantial part only for transporting the mails, but in respect to which the facts warrant a finding by the Secretary of Agriculture that, if the aid requested be granted, there is a reasonable prospect that, throughout its entire length, it will be used for transporting the mails immediately, or within a reasonable time after being reconstructed or improved.

"(2) An existing road no part of which is being used for transporting the mails, but in respect to which the facts warrant a finding by the Secretary of Agriculture that, if the aid requested be granted, there is a reasonable prospect that, throughout its entire length, it will be used for transporting the mails immediately, or within a reasonable time, after being reconstructed or improved.

"(3) An entirely new road in respect to which the facts warrant a finding by the Secretary of Agriculture that, if the aid requested be granted, there is a reasonable prospect that, throughout its entire length, it will be used for transporting the mails immediately, or within a reasonable time after construction.

"(4) An existing road different sections of which, constituting substantially the whole road, are being used for the transportation of the mails, but which is not used for that purpose throughout its entire length, and in respect to which the facts do not warrant a finding by the Secretary of Agriculture that the unused portions, constituting an unsubstantial part of the whole, will be used for transporting the mails in the near future, but in respect to which the facts warrant a finding by the Secretary of Agriculture that it would be uneconomical to construct the parts used for carrying the mails without

at the same time constructing the parts not so used.

"In my opinion all four of these classes of roads are rural post roads within the intent of section 2 of the act of July 11, 1916, and therefore funds appropriated by that act may properly be expended upon any of them."

1918 Supp., p. 641, sec. 6.

Power of state to issue bonds.—In *Benson v. Olcott*, (1920) 95 Ore. 249, 187 Pac. 843, it was held that under the local statutes the state highway commission had no authority to sell bonds to enable the state to meet the offer made by the Shackelford Act.

1918 Supp., p. 648, sec. 5.

Duty of railroads to carry mails.—Prior to the Act of July 28, 1916, railroads—with the exception of certain roads aided by land grants—were not required by law to carry the mails. *New York, etc., R. Co. v. U. S.*, (1919) 251 U. S. 123, 40 S. Ct. 67, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 222.

1919 Supp., p. 299, sec. 6.

Power of state to issue bonds, see annotation under 1918 Supp., p. 641, sec. 6, *supra*, this page.

PUBLIC CONTRACTS

Vol. VIII, p. 365, sec. 3745. [First ed., vol. VI, p. 135.]

Signing oath of disinterestedness and filing return.—In making the return of a contract on behalf of the government, as provided for in the preceding and this section, if the officer who personally makes the contract himself makes the oath of disinterestedness and files the return in the Returns Office of the Department of the Interior (assuming that the officer manually signing the contract is the officer who makes it in the sense of being responsible for its terms) the letter and spirit of the law are satisfied. (1918) 31 Op. Atty-Gen. 336, wherein it was said: "You state that because of the large volume of business transacted by his office, the Chief of Ordnance, by an order dated June 5, 1918, has designated certain officers of the Procurement Division as persons authorized to sign contracts in the name of the head of that division, adding (after the word 'by') their individual signatures. It is assumed that these officers are the persons who actually negotiate the contracts, and on the part of the government are responsible for their terms. You state that the Ordnance Department has taken the position that the oath of disinterestedness required by section 3745, above quoted, is to be made by the officer who in fact signs the contract, and that it is he who should file the copy of the contract in the Returns Office of the Department of the Interior. You transmit to me a memorandum prepared by the Judge Advocate General, in which this position is approved by him, and you ask my opinion with respect thereto. It appears that the Returns Office of the Interior Department objects to this practice upon the ground that as the head of the Procurement Division is named in the contract as the contracting officer, he also should execute an

oath of disinterestedness, although in fact he took no part in the making of the contract.

"Answering only the limited question thus presented and answering it only upon the assumption that the officer manually signing the contract is the officer who makes it in the sense of being responsible for its terms, I concur in the opinion of the Judge Advocate General. The oath of disinterestedness should be made by the officer actually concerned in and responsible for the making of the contract, and I do not think the situation is affected by the circumstance that technically the contract is made in the name of the head of the Procurement Division. The form of the oath required by the statute is that the copy sent to the Returns Office is a copy of a contract made by the affiant 'personally.' If the officer who personally makes the contract himself makes the oath and files the return the letter and spirit of the law, it seems to me, are satisfied."

Vol. VIII, p. 374. [Bonds of contractors, etc.] [First ed., vol. VI, p. 125.]

I. Construction.

2. Persons included.

II. Form and effect of bond.

IV. Assignability of claim.

VI. Action on bond.

I. CONSTRUCTION

2. Persons Included (p. 377)

Protection to subcontractors.—Approving *U. S. v. Jack*, (1900) 124 Mich. 210, 82 N. W. 1049, cited in the original annotation, it was held in *Chicago Bonding, etc., Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 281 Fed. 266, that subcontractors are within the benefits of the statute, and that "this is shown in

many cases, notably in *Illinois Surety Co. v. U. S.*, (1916) 240 U. S. 214, 60 U. S. (L. ed.) 609, 36 S. Ct. 321."

II. FORM AND EFFECT OF BOND (p. 381)

Purpose of bond.—To same effect as original annotation, see *Salysers v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 255, 168 C. C. A. 339.

IV. ASSIGNABILITY OF CLAIM (p. 382)

Assignment of claims.—To same effect as original annotation, see *Salysers v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 255, 168 C. C. A. 339.

VI. ACTION ON BOND (p. 384)

Action at law.—An action upon the bond, in the name of the United States, should be at law and not in equity. *Illinois Surety Co. v. U. S.*, (1916) 240 U. S. 214, 36 S. Ct. 321, 60 U. S. (L. ed.) 609, the court saying: "We see no ground upon which the conclusion can be justified that the liability of the surety on its bond is to be determined in equity. The contrary has been the generally accepted, and we think the correct, practice."

But where an action of debt on the bond was brought, and upon the plaintiff's motion the cause was transferred to the chancery side without objection, and after the defendant surety had answered the bill and intervening petitions without raising objection to a trial in chancery, counsel for plaintiff moved to transfer the cause back to the law side, which motion was denied upon objection of the defendant, who also filed a written consent to the cause remaining on the chancery side, and without moving for a transfer to the law side, defendant participated in the trial before the master and then objected to the report on the ground that plaintiff had an adequate remedy at law, defendant's assignment of error based on the overruling of that objection was unavailable on appeal from a judgment against it. *Chicago Bonding, etc., Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 261 Fed. 266, pointing out that "the district court, on one side or the other, had jurisdiction of the subject-matter, and the parties were before it."

Venue of suit by United States in behalf of subcontractor's receiver.—Although in federal jurisprudence a chancery receiver's authority is confined to the jurisdiction in which he was appointed (*Booth v. Clark*, (1855) 17 How. 322, 15 U. S. (L. ed.) 164) a suit by the United States against the surety on a contractor's bond was maintainable in a federal court in Illinois for the use of a receiver of a subcontractor appointed in Pennsylvania. *Chicago Bonding, etc., Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 261 Fed. 266.

Parties—Necessity of claimants joining in one action.—Under the provisions of this section, as amended by the Act of February 24, 1905, ch. 778, all claimants against a public contractor must join in one action

against him and his sureties. *Miller v. American Bonding Co.*, (C. C. A. 3d Cir. 1920) 262 Fed. 103. Regarding the effect of such amendatory act, the court said:

"It is clear from this amendment that Congress did not change the liability of sureties or withdraw from claimants their remedy on bonds for the construction of public works, previously provided by the Act of 1894; but changed simply the manner, and also the time, in which their remedy against sureties should be asserted. To overcome the inequalities and infirmities of the original statute, Congress intended, after the claims of the United States had been satisfied, to unite all claimants in a single proceeding. *A. Bryant Co. v. N. Y. Steam Fitting Co.*, 235 U. S. 327, 337, 35 Sup. Ct. 108, 59 L. Ed. 253, to the end that all matters in controversy between all claimants and the surety, as well as between the claimants themselves, arising out of the obligations of the bond, should be litigated in one action, resulting in one recovery, in which, on the bond proving inadequate, distribution should be pro rata of the amount recovered.

"This was, without doubt, the general intent of Congress. Whether there is any exception to it, we are not called upon to decide, because, in this case, none was claimed. If Miller was entitled to a separate trial by a jury of his own selection, or if he had a right to decline to submit his claim for trial with his co-interveners, it could only have been because of some matter or circumstance addressed to the judgment or discretion of the trial judge, taking him out of the general provisions of the statute and placing him within some exception of the statute. No such matter or circumstance was claimed by Miller. He did not even move for a continuance of the case. As shown in the opinion of the learned trial judge, what Miller did was this;—being represented by counsel in court 'when the case was called for trial, after issue joined and the usual publication of the list, [he] refused and neglected to submit his claim for adjudication without apparent reason or excuse.'

"Miller's action against this surety is not based on any right of action involving a common law right of trial by jury. It is based solely on the new right of action created by the statute 'upon the terms named.' *Texas Cement Co. v. McCord*, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893; *Illinois Surety Co. v. Peeler*, 240 U. S. 214, 217, 36 Sup. Ct. 321, 60 L. Ed. 609. These terms provide for one action for all claimants, after the United States has been satisfied, and one recovery for all, under which distribution is made on the claims proved according as the security is adequate or inadequate. In this scheme of the statute, the necessary implication is, that there shall be one trial of the 'one action.' By refusing to submit his claim to trial in the manner and at the time afforded by the statute, without offering to the trial judge any reason or excuse which

might have removed him beyond its general terms—as to the possibility of which we express no opinion—Miller waived the right of action which the statute gave him.”

Contractor's trustee in bankruptcy as party.—In a suit by the United States against the surety on a contractor's bond, the objection cannot be first made on appeal that the contractor's trustee in bankruptcy was not made a party. *Chicago Bonding, etc., Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 261 Fed. 266.

Time of bringing suit on bond.—To same effect as original annotation, see *Salysers v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 255, 168 C. C. A. 339.

Pleading—Allegations in complaint.—An allegation in a petition that work on a building was completed and the building accepted by the United States on or about a certain date, is a sufficient allegation of the fact that there had been final settlement between the United States and the contractor as required by this section, especially where the defendant in answer to an intervening petition admitted that settlement was made on the date alleged. *Salysers v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 255, 168 C. C. A. 339.

Evidence.—In *Chicago Bonding, etc., Co. v. U. S.*, (C. C. A. 7th Cir. 1919) 261 Fed. 266, the court, in affirming judgment against the surety on a contractor's bond in a suit by the United States for the benefit of sub-contractor claimants, said: “Appellant's final urge for reversal is that plaintiff introduced no evidence of the fair cash market value of the labor and materials furnished by the claimants. But Shields had covered the matter of price by contracts. *Prima facie* the contract price was the fair cash market value. *Foster v. Swaback*, 58 Ill. App. 581. Appellant made no attempt to show that Shields and the claimants had

collusively or otherwise agreed upon more than the true market value.”

Recovery—Pro-rating interest on judgments.—Where materialmen recover judgments against the sureties on the bond of a public contractor, interest collected by them on such judgments should not be regarded as part of the trust fund, in the event of an equitable pro-rating of the amount of the recoveries on their claims and on a claim held by the United States. *U. S. v. Morris*, (D. C. Colo. 1918) 262 Fed. 514.

1919 Supp., p. 304, sec. 1.

Contracts containing no authority for allowance for overproduction.—Claims arising under contracts which contain no authority for allowance for overproduction, and which therefore cannot be allowed under such contracts, must be dealt with under this Act, providing relief in cases of contracts connected with the prosecution of the war. (1919) 31 Op. Atty-Gen. 537.

1919 Supp., p. 306, sec. 5.

Claim for adjustment based upon general appeal or solicitation as entitled to recognition.—The provision in this section which authorizes the adjustment of losses incurred in “producing or preparing to produce either manganese, chrome, pyrites, or tungsten in compliance with the request or demand” of certain designated governmental agencies, does not authorize the recognition of a claim based upon a general solicitation or appeal, but to come within the purview of this provision the claimant must have been asked specifically by one of these governmental agencies to produce or prepare to produce one or more of the named minerals. The words “request or demand” as used in the section are synonymous with the word “ask.” (1919) 31 Op. Atty-Gen. 496.

PUBLIC DEBT

1918 Supp., p. 677, sec. 6.

Exemption from taxation of corporation.—A corporation owning liberty bonds issued under this act is not to that extent exempt from excise taxes, franchise taxes, and other corporation taxes of the federal and state governments when such taxes are laid upon the value of the exercise of corporate privileges. (1917) 31 Op. Atty-Gen. 125, wherein the Attorney General said:

“I assume that in speaking of ‘excise taxes, franchise taxes, and other corporation taxes’ you refer to those taxes which are laid, not upon the property of a corporation by reason of possession or ownership, but upon the value of the exercise of corporate privileges—a value which may be measured by the size of its annual income, the

amount of its capital stock, or such other standard of measurement as the taxing power may select.

“Such a tax, for instance, was the special excise tax upon corporations under the act of August 5, 1909, 36 Stat. 11, 112, discussed by the Supreme Court of the United States in the case of *Flint v. Stone Tracy Company*, 220 U. S. 107, in which the court said:

“It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable.

Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed" (p. 185).

"The special excise tax levied upon corporations by the act of September 8, 1916, 39 Stat. 756, 789, and measured by the fair value of their capital stock, is a tax of the same general character, imposed with respect to the carrying on or doing business by such corporations, and the rule laid down in the case of *Flint v. Stone Tracy Company* applies equally to it."

Exemption from taxation of stockholder.—In (1917) 31 Op. Atty.-Gen. 125, it was decided that liberty loan bonds, issued under this act, were subject to income tax when received by a stockholder of a corporation in payment of a corporate dividend. The reasoning of the Attorney General was as follows: "Like every exemption from taxation, this provision must be literally construed and cannot be extended beyond its precise terms. It protects an owner of these bonds from any tax of whatever character, except estate or inheritance taxes levied upon them by reason of his possession and

ownership; but a tax levied upon one's net income or annual gain cannot be evaded because the income or gain happens to be liquidated by the delivery of a certain number of these bonds or other non-taxable securities. Such a tax is upon the income itself as an entirety and not upon the specific articles into which this income is finally transmuted. When these bonds, therefore, are used as a medium of payment, whether in the discharge of a private debt or a corporate dividend, the profit or gain to the recipient is nevertheless subject to income tax."

1918 Supp., p. 685, sec. 9.

Authority of Postmaster General.—In (1918) 31 Op. Atty.-Gen. 234, the Attorney General declined compliance with the request of the Postmaster General for an opinion as to the validity of articles 9 and 10 of the Treasury Regulations, relating to the redemption of war saving certificates and stamps of deceased owners, because the question was not one arising in the administration of the Post Office Department. It was said that the payment or redemption of these certificates and stamps by postmasters or employees of the Post Office Department, if arranged by comity, must be in accordance with the regulations prescribed by the Secretary of the Treasury.

PUBLIC LANDS

Vol. VIII, p. 491, sec. 453. [First ed., vol. VI, p. 212.]

III. Conclusiveness of decision of land department.

IV. Supervisory authority of Secretary of Interior.

III. CONCLUSIVENESS OF DECISION OF LAND DEPARTMENT (p. 493)

In general.—To same effect as original annotation, see *Williams v. Newman*, (D. C. Ore. 1919) 257 Fed. 353; *Ragan v. Sheffield*, (D. C. Ore. 1919) 257 Fed. 358.

Extent of judicial review.—"The rule is well settled that the courts cannot exercise direct jurisdiction over the rulings of the officers of the Land Department of the United States, nor are the courts authorized to reverse or correct such rulings in collateral proceedings between private parties, but that the decisions of the Land Department are subject to review by the courts only where it appears that the Land Department has committed an error of law and denied to the parties the rights to which they are entitled under the Constitution and the laws of the United States. Under such circum-

stances the courts can in a proper proceeding interfere and refuse to give effect to the action of the Land Department." *McLaren v. Fleischer*, (Cal. 1919) 185 Pac. 967.

IV. SUPERVISORY AUTHORITY OF SECRETARY OF INTERIOR (p. 494)

Suspension of action in Land Department proceedings.—Under this section and R. S. secs. 441 (3 Fed. Stat. Ann. (2d ed.) 947) and 2478 (8 Fed. Stat. Ann. (2d ed.) 862), the Secretary of the Interior has authority to suspend action in proceedings before the Land Department, in the interest of a just administration of the public lands, with a view to inquiring into any question of fraud attending the acquirement of such lands by private persons. *Williams v. Newman*, (D. C. Ore. 1919) 257 Fed. 353.

Vol. VIII, p. 527, sec. 1. [First ed., 1909 Supp., p. 549.]

"Fraud" as including what.—The prior execution and delivery by a coal land entryman to a third party of a warranty deed for an undivided one-half interest in the land for which he filed an application to purchase

under the statutes applicable to coal lands on the public domain, when not disclosed by the entryman's application, constitutes a fraud within the meaning of this act, and a recovery of the purchase price cannot be maintained either under this act or the act of June 16, 1880, 21 Stat. 287 (see vol. VIII, p. 602). *Frackelton v. U. S.*, (1919) 54 Ct. Cl. 152.

Vol. VIII, p. 535, sec. 4. [First ed., vol. VI, p. 278.]

SEC. 2262. [Oath of pre-emptionist, where filed, penalty.]

This section has been construed in the following case: *U. S. v. Valley Land, etc., Co.*, (C. C. A. 8th Cir. 1919) 258 Fed. 93, 169 C. C. A. 179.

Vol. VIII, p. 543, sec. 2289. [First ed., vol. VI, p. 285.]

- III. Lands subject to homestead entry.
- 2. Lands not open to entry.
- V. Rights of entryman.

III. LANDS SUBJECT TO HOMESTEAD ENTRY

2. Lands Not Open to Entry (p. 549)

Lands withdrawn.—Application for leave to enter made at a time when the land is withdrawn from entry gives no preferential right to the land after a revocation of the withdrawal. *Donley v. West*, (Cal. App. 1920) 189 Pac. 1052.

V. RIGHTS OF ENTRYMAN (p. 551)

Right to fence.—An entryman may, as against an adjoining owner, fence the land though it is not surveyed. *Callison v. Ronstadt*, (Ariz. 1920) 188 Pac. 266.

Vol. VIII, p. 555, sec. 2290. [First ed., vol. VI, p. 290.]

Rights acquired by compliance with section.—"The applicant has put himself in privity with the government when he has done all he could do in the matter. He is then in a position to compel the officials to do their duty toward him, and to assert his right against others claiming a similar right from the government." *McLaren v. Fleischer*, (Cal. 1919) 185 Pac. 967.

Validity of contract—Pleading.—The contention that an agreement by an entryman to devise the property to another is void under this section is waived by failure to plead it, an averment that the contract was "against public policy and wholly illegal and void" being insufficient. *Osborn v. Hoyt*, (Cal. 1919) 184 Pac. 854, wherein it did not appear that the patent subsequently obtained by the promisor was issued under the homestead law.

Vol. VIII, p. 557, sec. 2291. [First ed., 1914 Supp., p. 336.]

VI. Patent.

VII. Decease of entryman.

VI. PATENT (p. 566)

Conclusiveness of departmental ruling.—

An ex parte ruling of the Land Department that a patent should issue to the heir of a deceased homestead entryman is not binding on a court of equity which may decree title to be in the devisee of the entryman. *Mortgage, etc., Co. v. Rhodes*, (1919) 75 Okla. 298, 183 Pac. 481.

VII. DECEASE OF ENTRYMAN (p. 568)

Heirs.—Where a deceased entryman has died before final proof, and one of his heirs, claiming as a sole devisee of the land, has made final proof in behalf of the heirs, and a United States patent has issued to the heirs of the deceased entryman, such heirs take title to the land under the patent as cotenants, and as special purchasers or donees, and not by reason of any right or interest in the estate of the deceased. *Stoll v. Gottbreht*, (N. D. 1920) 176 N. W. 932.

Right to devise homestead.—Where a homestead entryman complies fully with the homestead laws of the United States, but dies before making final proof, he is entitled to dispose of his homestead by will. *Mortgage, etc., Co. v. Rhodes*, (1919) 75 Okla. 298, 183 Pac. 481.

Vol. VIII, p. 575, sec. 2296. [First ed., vol. VI, p. 307.]

Scope of section.—This section is applicable to the enlarged homestead allowed by the Act of Feb. 19, 1909 (8 Fed. St. Ann. [2d ed.] p. 613). *Shelby First State Bank v. Bottineau County Bank*, (1919) 56 Mont. 363, 185 Pac. 162, 8 A. L. R. 631.

Nature of right granted.—"Section 2296, United States Revised Statutes, is not, strictly speaking, an exemption statute. It was not enacted pursuant to the police powers of the government, but in virtue of the power conferred upon the Congress to dispose of the public lands. The non-liability declared by that section is one of the conditions attached to the grant as an additional inducement to secure settlement of the public domain." *Shelby First State Bank v. Bottineau County Bank*, (1919) 56 Mont. 363, 185 Pac. 162, 8 A. L. R. 631.

Exempt in hands of transferee.—Property acquired under the homestead law and transferred by the patentee to his wife is, while so held by her, exempt from execution on a judgment for a debt incurred by the husband before the issuance of the patent. *Turner v. Talmadge*, (Cal. App. 1919) 187 Pac. 969, wherein the court said:

"The debt out of which the execution and sale arose was a debt of the husband, Essie

Turner. It was admittedly a debt for necessities furnished to him and for which he, and not his wife, was liable. Section 171, Civil Code, relied upon by appellants, recognizes such debt as the debt of the husband, and does not make the wife personally liable therefor, but merely provides that, when the husband's property has been transferred to the wife without consideration, this property may be regarded as the property of the husband for the purpose of satisfying any debts of his incurred for necessities furnished to both the husband and wife while living together. The effect of this section is to regard such property as though it had not been transferred. In the present case, if the property is so regarded, it is not liable for the husband's debt contracted before patent issued to the land. *Barnard v. Boller*, 105 Cal. 214, 38 Pac. 728; *Miller v. Little*, 47 Cal. 348. Such land is also protected in the hands of a purchaser from execution upon debts of the patentee which could not have been enforced against it while the title remained in the patentee."

Vol. VIII, p. 591, sec. 2307. [First ed., vol. VI, p. 327.]

Persons entitled to benefits of Act.—"Under section 2307, Revised Statutes of United States, only the 'minor orphan children' of the soldier, acting 'by a guardian duly appointed and officially accredited at the Department of the Interior,' were entitled to the benefit of the chapter. As was well said by Hon. Clay Tillman, in Circular No. 528 from the Department of the Interior, of date February 15, 1917:

"It was never in the mind of Congress that these rights should pass beyond the limits indicated in the sections. Out of gratitude to the soldier, Congress desired to confer upon him personally a material benefit; if he died before gaining that benefit, upon those dependent upon him—his widow, or his minor children; not upon adult children, not upon collateral heirs, and certainly not, in the absence of any heir, upon some state or foreign government.'" *Hensen v. Merton*, (Mont. 1920) 187 Pac. 1017.

What must be shown to claim homestead.—A person suing to compel the granting of an application for a homestead under this Act must allege and show that the soldier by reason of whose service the claim is made was in all respects within the provisions of section 2306 and that the persons claiming are entitled to take by reason of his service. *Hensen v. Merton*, (Mont. 1920) 187 Pac. 1017.

One who claims rights under this section as a surviving minor child of a soldier must establish his identity. *Conklin v. Lane*, (App. Cas. D. C. 1919) 258 Fed. 522.

Effect of departmental decisions.—In *Conklin v. Lane*, (App. Cas. D. C. 1919) 258 Fed. 522, it appeared that the plaintiff claimed to be entitled to a patent as a grantee, through mesne conveyances, of a child

of a soldier, alleging that the relationship of his grantor to the soldier was shown by the records of the Interior Department. It further appeared that such allegation was based upon a decision of the department in the case denying that any rights accrued under this section because no application for a patent was made until thirty years after the soldier's death, at which time he could have had no minor children. The Secretary of the Interior denied the allegations of the plaintiff's bill, stating in his answer that the records of the department were not sufficient to establish the essential facts. It was held that the plaintiff, by relying solely upon what was before the Department, was left with unsupported allegations, traversed by the Secretary's answer, and that since he had failed to establish the material facts, his bill should be dismissed.

Vol. VIII, p. 597, sec. 1. [*Relinquishment of claim, etc.*] [First ed., vol. VI, p. 300.]

Who may relinquish.—The grantee of an entryman has the same right of relinquishment as his grantor. *Neis v. Ebbe*, (Ore. 1920) 189 Pac. 417.

Effect of relinquishment.—One who has, as grantee of an entryman, relinquished the entry, has no standing to question the refusal of the Land Department to permit an entry by another person. *Neis v. Ebbe*, (Ore. 1920) 189 Pac. 417.

Vol. VIII, p. 598, sec. 2. [First ed., vol. VI, p. 300.]

Right acquired by contestant.—A successful contestant acquires under this section only the preferential right to enter within thirty days. He gets no vested right in the land itself. Accordingly, the General Land Office may between the date of contest and the date of entry change the rules relating to the manner of acquiring government lands or increase the price to be paid. *Brown v. Baker*, (1919) 108 Wash. 161, 183 Pac. 89.

When thirty days begins to run.—The thirty days during which a successful contestant has a preferential right of entry does not begin to run against him until the time of the restoration of the land to public entry. *McLaren v. Fleischer*, (Cal. 1919) 185 Pac. 967. See to the same effect *Culpepper v. Ocheltree*, (Cal. 1919) 185 Pac. 971.

Vol. VIII, p. 611, sec. 1. [First ed., vol. X, p. 360.]

Dummy entries.—In *Eldred v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 58, 168 C. C. A. 270, it was held that entries made by old soldiers under the provisions of this Act would be cancelled, where it appeared that they were dummy entries, made at the instance of a nearby landowner who paid the

expenses of the entrymen and purchased their homesteads from them as soon as they received their patents.

Vol. VIII, p. 613, sec. 1. [First ed., 1914 Supp., p. 337.]

Relation to previous acts.—The act is not independent but is to be construed as a part of the original homestead laws. "If the Enlarged Homestead Act was intended as an amendment to the prior homestead laws, then the acts are to be construed as one—as originally in the amended form. The history of this act is fairly conclusive that it was never intended to be construed otherwise than as a part of the original homestead law as it was then in force. Without quoting from the committee reports or the debates in the Congress, we think it is apparent from them that it was the intention of the lawmakers by this act to supplement the existing statutes—to improve the homestead laws and encourage the settlement of the vast areas of public lands in the semiarid regions, by increasing the amount of land subject to entry, so that the homesteader in 1909, and thereafter, might acquire land approaching in value that of the more fortunate entryman who secured land which could be irrigated at reasonable cost, or land which could be cultivated successfully without irrigation, and which would produce a crop every year." *Shelby First State Bank v. Bottineau County Bank*, (1919) 56 Mont. 363, 185 Pac. 162, 8 A. L. R. 631.

Exemption.—The enlarged homestead allowed by the act is exempt from liability for debts contracted prior to the date of the patent. *Shelby First State Bank v. Bottineau County Bank*, (1919) 56 Mont. 363, 185 Pac. 162, 8 A. L. R. 631.

Vol. VIII, p. 657, sec. 1. [First ed., 1912 Supp., p. 321.]

Withdrawal for inclusion in national forest.—A temporary withdrawal from entry of certain public lands in order to include them within a national forest, is within the general purposes contemplated by the statute. *Byron v. U. S.*, (C. C. A. 9th Cir. 1919) 259 Fed. 371, 170 C. C. A. 347.

Vol. VIII, p. 657, sec. 2. [First ed., 1914 Supp., p. 340.]

Purpose and construction generally.—In *U. S. v. Rock Oil Co.*, (S. D. Cal. 1919) 257 Fed. 331, it was said:

"This law is the first legislative recognition by Congress of a statutory right in an occupant of public oil lands prior to discovery. It was manifestly intended to and does expressly give to those coming within its provisions a legal status and a right to continue work of discovery with the attendant consequences. It is a remedial statute

and should be liberally construed to effect its purpose (*Consol. Mut. Oil Co. v. U. S.*, 245 Fed. 521, 157 C. C. A. 633), which was to protect bona fide occupants of public oil or gas lands who in good faith were, at the date of a withdrawal, engaged in work leading to discovery, by giving them the right to continue their work to a discovery, and thereafter to extract and market the oil, and to acquire title notwithstanding the withdrawal; and in my judgment it is of no consequence from whom such occupants obtained possession, if, as appears in this case, they were at the date of withdrawal claiming in their own right no more land than they would be entitled to take under the mining laws, and were acting in good faith and with an honest purpose to comply with the law."

Rights of locators of mineral lands.—"The so-called locator of mineral lands has no legal status or right to the property against the government, prior to discovery, except such as is given by the Pickett Act. His right, if any, is a mere possessory one, protected and recognized, it is true, against forcible or clandestine entry by a third person, while he is in good faith making a discovery, although open to the entry of others by legal means for the purpose of location. . . . When, however, he relinquishes or transfers his possession to another before discovery, the land thereupon becomes subject to location by that other, if he is qualified to make a location." *U. S. v. Rock Oil Co.*, (S. D. Cal. 1919) 257 Fed. 331.

Withdrawals in aid of pending legislation.—Withdrawals of public lands may be made in aid of pending legislation looking to the inclusion of such lands within existing national forests in those states in which there is a prohibition against the creation of national forests or making additions to existing national forests, except by act of Congress. (1916) 31 Op. Atty-Gen. 53.

Vol. VIII, p. 692, sec. 1. [First ed., vol. VI, p. 392.]

Water rights as between settler and appropriator.—"Under the Desert Land Act, Congress has divorced the water from the public domain through which it flows, and as to all surplus water over and above what the settler may divert upon his land, for a useful purpose within the purview of the statute, has declared that it 'shall remain and be free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.' The conclusion suggested is that as to all land claimed by settler after the passage of the Desert Land Act he takes it thus separated from the waters flowing thereon, so that any one thereafter who first appropriates the water will take it independent of his rights thereto, beyond his mere domestic use. This, however, does not give any one a right to go upon the lands of the settler without

his permission, to divert the waters flowing through the same. Although the water is subject to appropriation, the right to appropriate must be exercised without trespass upon the land of another. The water may be running on its natural course and subject to appropriation, but no one can enjoin this bounty of the government unless he can get to the water. He may avail himself of the permission of the government to approach the stream on its land. He may secure by purchase or gift the consent of private owners to gain access over their lands, and by adverse possession for the statutory prescriptive period he may maintain his appropriation as against private owners over whose lands he has conducted the waters." *Allen v. Magill*, (Ore. 1920) 189 Pac. 986.

Contest—*Sufficiency of affidavit.*—The insufficiency of the affidavit in support of a contest does not invalidate an order of the Land Department in favor of the contestant. *Sanders v. Dutcher*, (Cal. App. 1920) 187 Pac. 51.

Conclusiveness of decision of Land Department.—A decision of the Land Department on a question of fact in determining the right of any person with respect to lands claimed under the Desert Lands Act is conclusive in all other tribunals in the absence of fraud, mistake or imposition. *Sanders v. Dutcher*, (Cal. App. 1920) 187 Pac. 51.

Vol. VIII, p. 699, sec. 4. [*Patents for reclaimed lands, etc.*] [First ed., vol. VI, p. 397.]

Purpose of Act.—"The primary purpose of the Carey Act was, not to enable the government to divest itself of title to its desert lands, but to secure their irrigation and reclamation; reclamation is the only consideration for the donation or grant, and is a condition precedent to the exercise of the power to grant. The authority conferred upon the Secretary of the Interior to convey is expressly limited to desert lands, which the state shall have caused to be 'irrigated, reclaimed, occupied, and not less than twenty acres of each hundred and sixty acre tract cultivated by actual settlers . . . as thoroughly as is required of citizens who may enter under the [said] desert land law.'" *Twin Falls Salmon River Land, etc., Co. v. Alexander*, (D. C. Idaho 1919) 260 Fed. 270.

Suit to restrain cancellation of irrigation agreement—Jurisdiction of federal courts.—A suit by an irrigation company against certain state officers, constituting the state board land commissioners, to compel them to accept an irrigation system, constructed pursuant to a contract with the company under this Act, and to enjoin them from cancelling the contract or impairing the company's lien on the lands embraced in the project, is one against a state within the meaning of Const. Amend. 11 and not within

the jurisdiction of a federal court. *Twin Falls Salmon River Land, etc., Co. v. Alexander*, (D. C. Idaho 1919) 260 Fed. 270.

Vol. VIII, p. 700, sec. 1. [First ed., vol. VI, p. 398.]

Extent of lien.—Under the Idaho law enacted by authority of this section the lien for materials furnished to construct an irrigation system "is not on moneys to be derived from the sale of water rights, but is on such right, title, claim, and interest in the system as the irrigation company had at the time the lien attached." *Pacific Coast Pipe Co. v. Blaine County Irrigation Co.*, (1920) 32 Idaho 705, 187 Pac. 940.

Vol. VIII, p. 708, sec. 2479. [First ed., vol. VI, p. 399.]

III. LANDS SUBJECT TO GRANT (p. 712)

Beds of navigable streams, lakes, etc., within the tidewaters of the sea do not come within the operation of the Swamp Land Acts. *State v. Capdeville*, (1919) 146 La. 94, 83 So. 421.

Vol. VIII, p. 732. [*Note.*] [First ed., vol. VI, p. 456.]

Selection of lieu lands optional.—A person who by mistake settles on an odd numbered section, to which the Northern Pacific Railroad Company is entitled under the Act of July 2, 1864 (13 Stat. 365, c. 217) is not entitled to compel the company to select lieu lands, the right thereto given by the Northern Pacific Adjustment Act of July 1, 1898 (30 Stat. L. 620, c. 546) being optional with the company. *Northern Pac. R. Co. v. Mueller*, (1919) 108 Wash. 684, 185 Pac. 630.

Vol. VIII, p. 765, sec. 2275. [First ed., vol. VI, p. 462.]

When title vests.—The title to land selected under this statute does not vest in a state by a mere selection of the land. Such selection is ineffectual until approved by the Commissioner of the General Land Office. Accordingly, where a state, after selecting land, leases it to a private person, and before approval by the commissioner it is withdrawn from entry as being oil land, the state acquires no estate therein as against the government, and the latter may maintain an action against the lessee for trespass. *U. S. v. Ridgely*, (C. C. A. 8th Cir. 1920) 262 Fed. 675.

Lieu lands—*Departmental interpretation of Act.*—"Since the passage of the act of 1891, so amending sections 2275 and 2276 of the Revised Statutes, the officials of the General Land Office and the Department of the Interior of the federal government, having in charge the administration and disposition of its public lands, have at all times uniformly ruled and held that the states, in-

cluding the state of Washington, having school land grants of sections 16 and 36, in the several townships therein, were not vested with the title to such sections embraced within the boundaries of reservations, including forest reservations, established prior to the survey of such sections; but that as to such sections the state's rights consisted of nothing more than the right to select from public lands subject to disposition lands in lieu thereof, or await the extinguishment of such reservations, and the survey of such sections within their boundaries. The officials of the General Land Office and Department of the Interior of the federal government have also, since the passage of the act of 1891, uniformly ruled and held to the same effect with reference to the rights of pre-emption and homestead claimants making settlement upon unsurveyed sections 16 and 36. Among numerous decisions of these departments of the federal government so ruling and holding, we note the following: *State of Washington v. Kuhn*, 24 L. D. 12; *State of South Dakota v. Riley*, 34 L. D. 657; *State of South Dakota v. Thomas*, 35 L. D. 171; *In re State of Montana*, 38 L. D. 247." *Thompson v. Savidge*, (Wash. 1920) 188 Pac. 397, upholding the doctrine thus laid down by the Land Department.

Authority of state to relinquish school lands.—The state of Oregon has power to relinquish school lands previously granted to it by Congress and accept lieu lands under this Act, the title to the school lands not having vested in present. *Thompson v. Savidge*, (Wash. 1920) 188 Pac. 397.

Vol. VIII, p. 768, sec. 2276. [First ed., vol. VI, p. 464.]

School lands included in forest reservation.—Where a state files a lieu land selection because of the inclusion of school lands, previously granted to it, in a forest reservation, such selection constitutes a waiver under R. S. sec. 2275 (8 Fed. Stat. Ann. (2d ed.) 765) of its title to the base land. The rights of the parties thereupon become fixed and the Interior Department has no authority to withhold its approval of the selection because of the fact that subsequent to the filing of the lieu land selection, the boundaries of the national forest reservation were changed so that the base land in question was not embraced therein. *Lane v. New Mexico*, (App. Cas. D. C. 1919) 258 Fed. 980.

Vol. VIII, p. 789, sec. 1. [First ed., vol. VI, p. 501.]

Lands subject to grant under Act of July 1, 1862.—Congress could and did, by the Act of July 1, 1862, granting a railway right of way over the public lands, include lands forming a part of the Pottawatomie Indian Reservation not actually allotted in severalty when the grant took effect, notwithstanding

the agreement on the part of the United States in the Treaty of June 5 and 17, 1846, to grant to such Indians possession and title to a specified district, and to guarantee full and complete possession thereof as their land and home forever, and of the stipulation in the Treaty of November 5, 1861, that land within the reservation designated in the earlier treaty should be allotted thereafter in severalty to tribe members. *Nadeau v. Union Pac. R. Co.*, (1920) 253 U. S. 442, 40 S. Ct. 570, 64 U. S. (L. ed.) —.

Vol. VIII, p. 803, sec. 18. [First ed., vol. VI, p. 508.]

Scope of section.—This section does not confer a right independently of the provisions of section 19 of this Act. The two sections are obviously to be construed together. *Union Land, etc., Co. v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 635, 168 C. C. A. 585.

Vol. VIII, p. 805, sec. 20. [First ed., vol. VI, p. 510.]

Forfeiture for noncompletion.—In *Union Land, etc., Co. v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 635, 168 C. C. A. 585, the United States brought a suit in equity to declare forfeited a right of way and easement for the storage of water previously granted to the defendant under this Act. In affirming a decree in favor of the United States, the court said regarding the forfeiture clause of this section:

"It is not to be supposed, we think, that Congress intended that the United States should have no remedy for the failure of an applicant to complete his canal, ditch, or reservoir within the time limited, unless Congress intervened and by a special act either declared the right forfeited or gave express authority to institute a suit to recover the land.

"In *United States v. Whitney* (C. C.) 176 Fed. 593, Judge Dietrich, in construing the law which is involved here, held that a failure to comply with the requirements of the statute of itself operated to divest the grantee of title and revert it in the government, and that a declaration of forfeiture might be either by act of Congress or by an appropriate judicial proceeding. With that view we agree, and although, aside from the two cases cited, we find no decision directly involving the question here presented, we think the decisions of the Supreme Court, as reviewed in *Spokane, etc., Ry. v. Wash. & Gt. Nor. Ry.*, 219 U. S. 166, 174, 31 Sup. Ct. 182, 184, (55 L. Ed. 159), which establish the doctrine that, where the conditions of the grant are subsequent, 'the title cannot be forfeited, except upon proper proceedings by the government, judicial in their character, or an act of Congress competent for that purpose,' are sufficient in their scope to justify the suit here brought at the instance of the Attorney General, which is a proper

proceeding by the government, judicial in its character, and appropriate for the purpose of declaring a forfeiture."

Vol. VIII, p. 867, sec. 7. [First ed., vol. VI, p. 525.]

"Pending contest or protest."—A proceeding instituted by the Secretary of the Interior to investigate charges of fraud in making an entry and to cancel the entry if the charges are sustained, is sufficient to prevent the issuance of a patent to the grantee of the entryman. *Neis v. Ebee*, (Ore. 1920) 189 Pac. 417.

What constitutes "contest" within proviso.—"Just what constitutes a 'pending contest or protest' has been the subject of considerable controversy in the Interior Department. In the case of *Jacob A. Harris*, 42 L. D. 611, the Secretary, reviewing at length the departmental decisions bearing upon the above proviso, defined its object as follows:

"Upon mature consideration, the department is convinced that a contest or protest, to defeat the confirmatory effect of the proviso, must be a proceeding sufficient in itself to place the entryman on his defense or to require of him a showing of material fact when served with notice thereof."

"This language was quoted with approval in *Hoglund v. Lane*, 44 App. D. C. 310, 314, and on appeal in *Lane v. Hoglund*, 244 U. S. 174, 180, 37 Sup. Ct. 558, 61 L. Ed. 1066.

"Applying this rule to the present case, we find that at the expiration of two years from the issuance of the final receipt—Sep-

tember 1, 1909—there was pending one protest and two contests which had been reduced to four specific charges. It is not important that the case thus formulated had resolved itself into a protest by the government, rather than a contest or protest between individual claimants, or that the case was not brought to trial until more than two months after the expiration of the two-year limitation, since the case upon which the government relied, and to which McDonald finally responded by answer and defense, was in fact pending at the expiration of the two-year period. Not only did McDonald have notice of the protest and contests, but he had appeared and sought their dismissal. He also had notice of the proceedings which resulted in the reduction of the protest and contests into a concrete case, which, as we have observed, was pending at the expiration of the two-year period, and which was tried shortly thereafter. In these proceedings the limitation of the statute was not invoked by the contestee. Clearly the bar of the statute has no application to the present case." *U. S. v. Lane*, (App. Cas. D. C. 1920) 263 Fed. 630.

The issuance of a receiver's receipt upon final entry is a condition precedent to the application of the proviso of this section. *Williams v. Newman*, (D. C. Ore. 1919) 257 Fed. 353.

Vol. VIII, p. 869, sec. 8. [First ed., vol. VI, p. 526.]

Effect of fraud on running of bar.—To same effect as original annotation, see *U. S. v. Woolley*, (D. C. Ore. 1920) 262 Fed. 518.

PUBLIC OFFICERS AND EMPLOYEES

Vol. VIII, p. 953. [*Suits against public officers.*] [First ed., vol. VI, p. 614.]

Mandamus proceedings against the Secretary of the Treasury abated when, that officer having resigned his office, his successor was not substituted as defendant within twelve months, which is the limit for substitution afforded by this Act, and the fact that the District of Columbia Code, § 1278, allows the petitioner to recover damages in the same proceeding does not justify the retention of the petition to charge the Secretary personally, since the damages are only incident to the allowance of the writ. *Le Crone v. McAdoo*, (1920) 253 U. S. 217, 40 S. Ct. 510, 64 U. S. (L. ed.) —, *dismissing writ of error to review* (1918) 48 App. Cas. (D. C.) 181.

1918 Supp., p. 720, sec. 1.

Appointment of field representative of Geological Survey at salary of one dollar a

year held a violation of this section, it appearing that he was secretary of the Southwest Coal Bureau, a salaried office. (1919) 31 Op. Atty-Gen. 470.

1919 Supp., p. 323, sec. 1.

Employees within section.—This section is not limited to former employees of the War Department, but applies alike to former employees in any department of the government. It applies to former employees who entered the naval service or the marine corps as well as to those who entered the army. It includes all who were either drafted or who enlisted as privates, although they may have subsequently been commissioned as officers, and it also includes those who enlisted for the purpose of entering the officers' training camps and who were afterward commissioned, but it does not include those who were commissioned from civil life and without having previously enlisted for any purpose. It applies only to those who were

drafted while in the employ of the government or who left government employment for the purpose of enlisting. (1919) 31 Op. Atty.-Gen. 452.

This section does not apply to persons who were commissioned from civil life, without having previously enlisted for any purpose. It requires the restoration of every former government employee to the civil service status he occupied before he entered the military service, but if the position the employee left was only a temporary one and has actually ceased to exist, his right to reinstatement is lost. It requires that a former government employee be reinstated in his former position if it exists, and this requirement is not satisfied by reinstating in a non-statutory position one who vacated a statutory position, although the rate of pay and civil service designation are the same in both. It does not require that a former government employee be reinstated if services of the character he is able to perform are no longer needed, but if such services are required he must be reinstated, although they are already being satisfactorily performed by another employee. (1919) 31 Op. Atty.-Gen. 454.

Employees holding temporary appointments and having no permanent civil service status are included in this section and upon reinstatement they will occupy the same civil service status that they occupied at the time of entering the military service. (1919) 31 Op. Atty.-Gen. 449.

Two members of family in classified service as bar to reinstatement.—Under this section, a government employee, who was inducted into the military service and who thereafter was honorably discharged from such service, is entitled to be reinstated if he is qualified to perform the duties of his former position, and he is not deprived of his right to reinstatement by the fact that two members of his family are already in the classified service. (1919) 31 Op. Atty.-Gen. 449, where it was said: "The second question arises under the following circumstances:

Lester H. Reese was appointed to the position of messenger boy at \$400 per annum in the Pension Office, on August 7, 1908, and was subsequently promoted to the position of messenger at \$840 per annum. On August 31, 1918, he was dropped from the rolls of the Department, having been inducted into the military service, and now seeks to be reinstated in his former position. His right to reinstatement under the act of February 25, 1919, would be clear were it not for the fact that his father is now employed as a skilled laborer in the Bureau of Engraving and Printing, and his brother is employed as a letter carrier in the Washington, D. C., post office.

"The question arises whether, under these circumstances, his reinstatement would be in violation of section 9 of the Act of January 16, 1883 (22 Stat. 406), which provides that:

"Whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades."

"This question must be answered in the negative. Section 9 of the Act of January 16, 1883, applies only to an original appointment, not to the reinstatement of a former employee. The appointment of Reese was legal at the time it was made. The Act of February 25, 1919, restored to him the status he occupied in the civil service at the time he entered the armed forces of the United States. That status cannot be affected by the fact that while he was in the military service he became ineligible for an original appointment. He is not deprived of his right to be reinstated in his former position by the fact that two members of his family are already in the public service. Thus construed there is no inconsistency between the Act of January 16, 1883, and the Act of February 25, 1919; but if there were, the former would have to be regarded as repealed to the extent that it conflicts with the latter."

PUBLIC PARKS

Vol. VIII, p. 1017, sec. 2. [First ed., 1909 Supp., p. 53.]

The Grand Canyon of the Colorado could be created as a monument reserve by the President under the power conferred upon him by this act to establish reserves embracing objects of historic or scientific interest. *Cameron v. U. S.*, (1920) 252 U. S. 450, 40 S. Ct. 410, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1918) 250 Fed. 943, 163 C. C. A. 193.

To bring a lode mining claim within the saving clause in the withdrawal of public lands for a monument reserve, under this act,

in respect of any "valid" mining claim theretofore acquired, the discovery must have preceded the creation of that reserve. *Cameron v. U. S.*, (1920) 252 U. S. 450, 40 S. Ct. 410, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1918) 250 Fed. 943, 163 C. C. A. 193.

To make a lode mining claim valid, or to invest the locator with a right to possession, it is essential that the lands be mineral in character, and that there be an adequate mineral discovery within the limits of the claim as located. *Cameron v. U. S.*, (1920) 252 U. S. 450, 40 S. Ct. 410, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1918) 250 Fed. 943, 163 C. C. A. 193.

To support a lode mining location the discovery should be such as would justify a person of ordinary prudence in the further expenditure of his time and means in an effort to develop a paying mine. *Cameron v. U. S.*, (1920) 252 U. S. 450, 40 S. Ct. 410, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1918) 250 Fed. 943, 163 C. C. A. 193.

Whether a part of a public reserve covered by an unpatented lode mining claim was mineral, and whether there had been the requisite discovery, were questions of fact the decision of which by the Secretary of the Interior was conclusive on the courts, in the absence of fraud or imposition. *Cameron v. U. S.*, (1920) 252 U. S. 450, 40 S. Ct. 410,

64 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1918) 250 Fed. 943, 163 C. C. A. 193.

The Secretary of the Interior, by virtue of the general powers conferred by U. S. Rev. Stat. §§ 441, 453, 2478, (see vol. 3, p. 947; vol. 8, pp. 491, 862) may determine, after proper notice and upon adequate hearing, whether an asserted lode mining location which has not gone to patent, under which the locator is occupying and using a part of the public reserves, is a valid claim, and, if found to be invalid, may declare it void and recognize the rights of the public. *Cameron v. U. S.*, (1920) 252 U. S. 450, 40 S. Ct. 410, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1918) 250 Fed. 943, 163 C. C. A. 193.

PUBLIC PROPERTY, BUILDINGS AND GROUNDS

Vol. VIII, p. 1073, sec. 1799. [First ed., vol. VI, p. 678.]

Validity of appointment of landscape architect by Secretary of War.—The appointment of a landscape architect in the Office of Public Buildings and Grounds by the Secretary of War instead of by the Chief of Engineers must be deemed to have been unauthorized, in view of this section, which excludes positions in such office from the operation of the general provisions of § 169, (see vol. 2, p. 148) conferring the power of appointment upon the heads of departments. *Burnap v. U. S.*, (1920) 252 U. S. 512, 40 S. Ct. 374, 64 U. S. (L. ed.) —, *affirming* (1918) 53 Ct. Cl. 605. It was further held, however, that the defect in the appointment of the landscape architect, because made by the Secretary of War instead of by the Chief of Engineers, was cured by the acquiescence of the latter throughout five years, so that the appointee's status was better than that of a mere de facto officer, but it was not superior to what it would have been if he had been regularly appointed by the Chief of Engineers.

Power of Chief Engineer to remove landscape architect appointed by Secretary of War.—The power to remove an official is, in the absence of statutory provision to the contrary, an incident of the power to appoint, and the power of suspension is an incident of the power of removal. *Burnap v. U. S.*, (1920) 252 U. S. 512, 40 S. Ct. 374, 64 U. S. (L. ed.) — (*affirming* (1918) 53 Ct. Cl. 605), wherein it was held that the fact that a landscape architect in the Office of Public Buildings and Grounds was, by inadvertence, appointed by the Secretary of War instead of by the Chief of Engineers, did not preclude the latter from exercising in respect to such employee the general power to re-

move employees in his office, conferred by implication in this section. It was further held that if the regulations governing suspension and discharge in the classified civil service, as applied to the Engineer Department at large, approved by the Civil Service Commission and the Secretary of War, do not apply to the position of landscape architect in the Office of Public Buildings and Grounds, the exercise of the right of removal which rests in the Chief of Engineers is governed by the provisions of the Act of August 24, 1912, § 6, (see vol. VIII, p. 956) and Civil Service Rule 12, since no applicable regulations have been prescribed by the President through the War Department, under the authority reserved in R. S. sec. 1797, as amended (see vol. VIII, p. 1072).

Vol. VIII, p. 1105, sec. 355. [First ed., vol. VI, p. 395.]

Nature of state consent necessary.—A state law reserving to the state concurrent jurisdiction over sites therein acquired by the federal government for public buildings is incompatible with the consent required by this section. (1918) 31 Op. Atty.-Gen. 260, wherein it was said: "In 1891 one of my predecessors, having under consideration an act of Congress appropriating money for a public building in Kansas but forbidding its expenditure until 'the state of Kansas shall have ceded to the United States exclusive jurisdiction' with certain exceptions, held that the provision of the Kansas statute 'that the United States shall have the right of exclusive legislation and concurrent jurisdiction together with the state of Kansas,' was not in compliance with the requirements of the act of Congress. (20 Op. 242; cf. 20 Op. 298.) My attention, however, is called to a later opinion (24 Op. 617) dealing with

an act of the legislature of Louisiana, the first section of which is nearly identical with the first section of the Kansas act (*supra*). The second section of the Louisiana statute reads 'that the United States may enter upon and occupy any land which may have been or may be purchased or condemned or otherwise acquired, and shall have the right of exclusive jurisdiction over the property so acquired during the time that the United States shall be or remain the owner thereof for all purposes except the administration of the criminal laws of the state . . .

"It will be observed that the Kansas legislature seeks to qualify the cession by a reservation of 'concurrent jurisdiction.' The Louisiana act reserves to the state 'the administration' of her 'criminal laws.'

"It has been settled that unequivocal 'consent' by the state to the purchase of lands by the United States for purposes within paragraph 17 has the constitutional consequence of transferring 'exclusive jurisdiction.' (Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 533.) Construing the Louisiana act, Attorney General Knox thought that by the first section consent to purchase or condemnation of lands was plainly and unequivocally given; that there was nothing in the second section or elsewhere to indicate that the reservation of jurisdiction which it contained was made an express condition of the consent. He was therefore of opinion that exclusive jurisdiction over the site in question within the requirements of section 355 had passed to the United States freed from the unacceptable reservation contained in section 2. It was also his opinion that the precedents leading to a contrary conclusion found in 20 Op. 613, 298, 242; 8 Op. 418, 102, should be distinguished.

"I am not disposed to follow this opinion, however; and therefore hold in accordance with the opinion of Attorney General Miller, 20 Op. 242, referred to above, that the reservation by the state in the Kansas law of concurrent jurisdiction over sites within the state acquired by the Federal Government for public buildings is incompatible with the consent required by section 355, Revised Statutes."

In (1918) 31 Op. Atty.-Gen. 263, it was the opinion of the Attorney General following the opinion in the preceding paragraph, that the reservation of the right to punish offenses against state laws committed on lands acquired for federal building sites embraced in a cession act of Minnesota was incompatible with the exercise of the exclusive jurisdiction contemplated by this section. See further (1918) 31 Op. Atty.-Gen. 265, wherein the opinion was expressed that the reservation by the state of Illinois of the right to administer its criminal laws upon the lands acquired by the United States for federal building sites did not comply with the requirements of this section. But that the reservation of the right to serve and execute state process on territory ceded to the United States was permissible and not inconsistent with the exclusive federal authority required by this section. See still further on this subject (1918) 31 Op. Atty.-Gen. 282; (1918) 31 Op. Atty.-Gen. 294.

Vol. VIII, p. 1116. [*Condemnation of sites, etc.*] [First ed., vol. VI, p. 704.]

Application of act, see *Turner v. Woodard*, (C. C. A. 1st Cir. (1919) 259 Fed. 737, 170 C. C. A. 537.

Vol. VIII, p. 1133. [*Secretary of War may lease public property not required.*] [First ed., vol. VI, p. 712.]

Caterpillar tractors, dies and gauges.—In (1919) 31 Op. Atty.-Gen. 457, it was the opinion of the Attorney General that as part of the consideration for the purchase of certain war material acquired by the government since April 6, 1917, the Secretary of War was authorized, when in his discretion it would be for the public good, to lease for commercial purposes, for a period not exceeding five years and revocable at any time, caterpillar tractors, dies, and gauges belonging to the United States, under the provisions of this act.

RAILROADS

Vol. VIII, p. 1155. sec. 1. [*Act of March 2, 1893.*] [First ed., vol. VI, p. 752.]

I. Introductory.

4. State laws.

VIII. Action by injured employee.

I. INTRODUCTORY

4. State Laws (p. 1157)

To same effect as first paragraph of original annotation, see *Ross v. Schooley*, (C. C. A. 7th Cir. 1919) 257 Fed. 290, 168 C. C. A. 374.

Where the United States has exercised its exclusive power over interstate commerce so far as to take possession of the field, the states no more can supplement its requirements than they can annul them. It follows that regulations of the Interstate Commerce Commission prescribing requisites for cabooses cars without platforms, and of the Post-Office Department respecting the equipment of mail cars when used as end cars, amount to such an assumption of control by the United States over the subject-matter as to invalidate a state statute in so far as it requires that a mail car, when used as the last car in an interstate train, be equipped at its rear end with a platform 30 inches in width, and with guard rails and steps. *Pennsylvania R. Co. v. Public Service Commission*, (1919) 250 U. S. 566, 40 S. Ct. 36, 64 U. S. (L. ed.) —, reversing (1917) 67 Pa. Super. Ct. 575.

VIII. ACTION BY INJURED EMPLOYEE
(p. 1160)

In general.—To same effect as original annotation, see *Ross v. Schooley*, (C. C. A. 7th Cir. 1919) 257 Fed. 290, 168 C. C. A. 374, wherein it was said: "Liability to private suit for resulting injury or death is expressly declared in the Employers' Liability Act. In the Safety Appliance Act it is implied from the known frightful loss of lives and limbs due to the old link-and-pin couplings and defective automatic couplers; from the purpose stated in the title 'to promote the safety of employes and travelers'; from the effect of the payment of damages as a spur to observance; from the direction to courts contained in section 8 of the act of 1893 that an injured employe 'shall not be deemed to have assumed the risk'; from the proviso in section 4 of the supplemental act of 1910 in relation to 'liability in any remedial action for the death or injury of any railroad employe'; and especially from the premise that the legislators had in mind the immemorial rule that every person for whose protection a statute sets up a particular standard of conduct is entitled to compensa-

tion for damages suffered through violation of that statute.

"Under the Employers' Liability Act there is no need to count upon any state statute creating a liability for wrongful death, because that liability was expressly stated by the Congress. Inasmuch as the same legislative intent respecting liability is found in the Safety Appliance Act, the same result follows."

Vol. VIII, p. 1161, sec. 2. [First ed., vol. VI, p. 753.]

VII. Automatic coupling and uncoupling apparatus.

VIII. Duty to "equip" and maintain equipment as absolute.

IX. To whom duty to equip owed.

XI. Civil action arising out of violation of section.

VII. AUTOMATIC COUPLING AND UNCOUPLING APPARATUS (p. 1164)

In general.—To the same effect as the original annotation, see *Chesapeake, etc., R. Co. v. Arrington*, (Va. 1919) 101 S. E. 415.

VIII. DUTY TO "EQUIP" AND MAINTAIN EQUIPMENT AS ABSOLUTE (p. 1166)

In general.—To same effect as first paragraph of original annotation, see *Southern Pac. Co. v. Thomas*, (Ariz. 1920) 188 Pac. 268.

To same effect as second paragraph of original annotation, see *Southern Pac. Co. v. Thomas*, (Ariz. 1920) 188 Pac. 268.

Duty to keep in repair.—The equipment required by this statute must be kept at all times, while cars are in use, in proper repair. *Jackson v. Pirtle*, (Ind. App. 1920) 127 N. E. 305.

IX. TO WHOM DUTY TO EQUIP OWED
(p. 1169)

To the same effect as the first paragraph of the original annotation and following the *Conarty* Case there cited, see *Lang v. New York Cent. R. Co.*, (1920) 227 N. Y. 507, 125 N. E. 681, wherein the court said: "In *St. Louis & San Francisco Railroad Co. v. Conarty*, 238 U. S. 243, 36 Sup. Ct. 785, 59 L. Ed. 1290, a switch engine collided with a freight car having no coupler or drawbar. The switch engine was not to handle this car, but was on its way to a point some distance beyond it. Conarty, standing on the footboard of the engine, was killed by the collision. There was evidence that had the coupler and drawbar been present the engine and the car would have been held so far apart as to have prevented the injury.

"The Supreme Court said that section 2

of the act was intended to provide against the risk of coupling and uncoupling and to obviate the necessity of men going between the ends of the cars. It was not intended to provide a place of safety between colliding cars. Therefore, when a collision was not the proximate result of the violation of these regulations, where there was no endeavor to couple or uncouple a car or to handle it in any way, there can be no recovery under the act. The absence of a coupler and drawbar was not a breach of duty toward a servant in that situation. . . . In the case before us the defendant was engaged in interstate commerce. A car without drawbar or coupler was standing on the siding. The plaintiff's intestate was a brakeman, and was riding on a second car kicked upon the same siding. A collision occurred, and the deceased was crushed between the car upon which he was riding and the defective car. As in the Conarty Case, it was plain that had the coupler and drawbar been present the two cars would have been held so far apart that he would have escaped uninjured. There was no attempt to couple on to the defective car or to handle it in any way.

"Under these circumstances Mr. Lang was not one of the persons for whose benefit the Safety Appliance Act was passed. The collision was not the proximate result of the absence of the coupler and drawbar. Their presence was not required so that they might act as bumpers.

"It is said that had the car not been defective the work on hand would have been done in a different way. Assuming that this is so, still the collision was not the proximate result of the defect."

XI. CIVIL ACTION ARISING OUT OF VIOLATION OF SECTION (p. 1170)

Contributory negligence.—To same effect as original annotation, see *Southern Pac. Co. v. Thomas*, (Ariz. 1920) 188 Pac. 268.

Proximate cause.—The failure of a brakeman to signal the engineer before going between two cars to make a coupling is not such an independent cause as to break the chain of causation between a defect in the coupler and an injury to the brakeman while making the coupling. *Southern Pac. Co. v. Thomas*, (Ariz. 1920) 188 Pac. 268.

Where it appears that the injured employee would not have assumed the position between the cars which resulted in the injury if they had been equipped with automatic couplers, proximate cause is for the jurv. *McAdoo v. McCoy*, (Tex. Civ. App. 1919) 215 S. W. 870.

Sufficiency of evidence.—To same effect as second paragraph of original annotation, see *Philadelphia, etc., R. Co. v. McKibbin* (C. C. A. 3d Cir. 1919) 259 Fed. 476, 170 C. C. A. 452, wherein the court said: "We do not wish to be understood, however, as holding what seems to have been conceded in *Chicago, R. I. & Pac. Ry. Co. v. Brown*, 229 U. S. 317,

320, 33 Sup. Ct. 840, 57 L. Ed. 1204; and what the court in *San Antonio Ry. v. Wagner*, 241 U. S. 476, 484, 36 Sup. Ct. 626, 629 (60 L. Ed. 1110), expressly found it unnecessary to determine, 'that the failure of a coupler to work at any time sustains a charge that the [Safety Appliance] act has been violated'; nor do we wish to be understood as intimating any opinion upon that question. We merely decide that the failure of the coupler to work under the circumstances above detailed is some evidence, the weight of which is for the jury under all the circumstances of a given case, that the coupler was not in the condition required by the act, when the plaintiff was injured."

Vol. VIII, p. 1174, sec. 4. [First ed., vol. VI, p. 755.]

II. "Handholds in ends." VI. Evidence.

II. "HANDHOLDS IN ENDS" (p. 1174)

Handholds at two diagonal corners of car.—Handholds or grab irons on all four outside corners of freight cars are not required by this section, making unlawful the use of any car in interstate commerce unless such car is provided with secure grab irons or handholds in the ends and sides for greater security to men in coupling and uncoupling cars. The commands of the statute are met by secure and adequate handholds at two diagonal corners of the car. *Boehmer v. Pennsylvania R. Co.*, (1920) 252 U. S. 496, 40 S. Ct. 409, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 2d Cir. 1918) 252 Fed. 553, 165 C. C. A. 3.

VI. EVIDENCE (p. 1176)

When evidence sufficient to go to jury.—Evidence of obvious defect in grab irons by pulling out of which injury was caused held sufficient to take case to jury. *Ferris v. Holiman*, (1920) 78 Okla. 251, 190 Pac. 409.

Vol. VIII, p. 1182, sec. 8. [First ed., vol. VI, p. 756.]

Effect of section.—To same effect as original annotation, see *Southern Pac. Co. v. Thomas*, (Ariz. 1920) 188 Pac. 268.

Vol. VIII, p. 1183, sec. 1. [First ed., vol. X, p. 375.]

VI. INTRASTATE CARS (p. 1186)

To the same effect as the original annotation, see *Jackson v. Pirtle*, (Ind. App. 1920) 127 N. E. 306.

Vol. VIII, p. 1190, sec. 2. [First ed., 1912 Supp., p. 336.]

Duty as absolute.—The duty imposed by this section to equip with efficient hand brakes is absolute. *Thayer v. Denver, etc., R. Co.*, (1919) 25 N. M. 559, 185 Pac. 542.

"Efficient" defined.—The word "defective" is not the antonym of "efficient," and, where the federal Safety Appliance Act requires all cars to be equipped with efficient hand brakes, a finding by the jury, in answer to a special interrogatory, that the hand brake rigging on the car in question was not in any manner defective, is not equivalent to a finding that the car was equipped with an efficient hand brake. *Thayer v. Denver, etc., R. Co.*, (1919) 25 N. M. 559, 185 Pac. 542.

Vol. VIII, p. 1192, sec. 4. [First ed., 1912 Supp., p. 336.]

VIII. "REMEDIAL ACTION" (p. 1197)

Attaching a freight car, having no draw-bar or coupler at its rear end, in the rear of the caboose in an interstate freight train and using it to haul interstate freight, is a violation of this section, and renders the carrier liable for an injury thereby caused to an employee. *Erie R. Co. v. Schleenbaker*, (C. C. A. 6th Cir. 1919) 257 Fed. 667, 168 C. C. A. 617.

Vol. VIII, p. 1201, sec. 2. [First ed., 1912 Supp., p. 339.]

Imposition of absolute duty.—In *Thorn-ton v. Minneapolis, etc., R. Co.*, (Ia. 1919) 175 N. W. 71, the court said: "It will be noted that, by section 2 of the Locomotive Boiler Act, it is made unlawful for a common carrier to use for interstate traffic a locomotive engine unless its boiler and its appurtenances are in proper condition and safe to operate in the service to which it is put. The question whether this provision of this statute imposes upon the carrier an absolute duty, or only a duty to use care, is not open to us. The Supreme Court of the United States has construed the Safety Appliance Acts as imposing upon the carrier an absolute duty as distinguished from the qualified duty at common law to use due care."

Vol. VIII, p. 1205, sec. 1. [First ed., 1916 Supp., p. 215.]

Wear on flange of locomotive wheel.—The Interstate Commerce Commission having approved rules and regulations prescribing with particularity the extent of wear on the flange of a locomotive wheel which renders it defective, conformity with those rules is the test of the duty of a railroad company and the question of "ordinary care" is eliminated. *Lancaster v. Allen*, (Tex. 1920) 217 S. W. 1032.

Vol. VIII, p. 1208, sec. 1. [First ed., 1909 Supp., p. 584.]

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I. INTRODUCTORY

2. Construction and Operation

a. In General (p. 1213)

Purpose of Act.—"The purpose of Congress, through the Employers' Liability Act and the Safety Appliance Acts, considered together, is not alone to make the defendant's duty absolute, but also, where, as here, the injury is in part occasioned by the failure of the carrier to comply with the acts mentioned, to excuse the employees from the effect alike of the rules of contributory negligence and assumption of risk." *Erie R. Co. v. Schleenbaker*, (C. C. A. 6th Cir. 1919) 257 Fed. 667, 168 C. C. A. 617.

d. Construction Controlled by Federal Decisions (p. 1214)

To same effect as original annotation, see *Werner v. Southern R. Co.*, (Cal. App. 1920) 185 Pac. 1016.

Federal decisions are controlling as to the construction of the act. *McDougall v. Atchison, etc., R. Co.*, (Kan. 1920) 186 Pac. 1028; *Saxton v. El Paso, etc., R. Co.*, (Ariz. 1920) 188 Pac. 257.

"Questions of either plaintiff's or defendant's negligence in connection with the injury are controlled by the principles declared by the federal courts rather than those of the state courts." *Kalashian v. Hines*, (Wis. 1920) 177 N. W. 602.

4. Paramount to State Laws

b. State Common Law (p. 1219)

In general.—To same effect as original annotation, see *Frazier v. Hines*, (E. D. S. C. 1919) 260 Fed. 874.

c. State Statutes, in General (p. 1219)

Relief associations.—In the federal Employers' Liability Act, Congress covered the responsibility of interstate carriers by railroad to their employees injured in such commerce, and that act supersedes the statutes of the states on the subject; but Congress has not, in that act or otherwise, given authority for the creation and operation of relief associations which employees of carriers engaged in interstate commerce are compelled to join, nor for such association to withhold any part of the wages of an employee against his consent to pay dues therein, nor to require either as a condition to securing employment or being employed. *Baltimore, etc., R. Co. v. Bailey*, (1919) 99 Ohio St. 312, 124 N. E. 195.

d. State Workmen's Compensation Acts (p. 1220)

Burden of showing application of state law.—In an action under a state Workmen's Compensation Act the burden is upon the plaintiff to prove a case within the statute; that is, to show, affirmatively, that the decedent was engaged at the time of the accident in a service which was not regulated by the federal Employers' Liability Act. *Carberry v. Delaware, etc., R. Co.*, (1919) 93 N. J. L. 414, 108 Atl. 364.

e. State Employers' Liability or Death Statutes (p. 1222)

In general.—To same effect as original annotation, see *Saxton v. El Paso, etc., R. Co.*, (Ariz. 1920) 188 Pac. 257.

f. State Laws Relating to Procedure (p. 1222)

The *lex fori* governs.—To the same effect as the original annotation, see *Pittsburgh, etc., R. Co. v. Ireton*, (Ind. App. 1920) 126 N. E. 431.

III. EMPLOYEE ENGAGED IN INTERSTATE COMMERCE

1. Relation of Employer and Employee

e. Employee Serving Two Railroads (p. 1232)

A brakeman in the general employ of an interstate railway company, which had a contract arrangement with a connecting railway company for through freight service without change of crews, was not in the employ of the latter company within the meaning of the federal Employers' Liability Act while his train was on that company's line, where, under such contract, each company retained control of its own train crews; what they did upon the line of the other railroad was done as a part of their duty to the general employer, and so far as they were subject, while upon the tracks of the other company, to its rules, regulations, discipline, and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. *Hull v. Philadelphia, etc., R. Co.*, (1920) 252 U. S. 475, 40 S. Ct. 358, 84 U. S. (L. ed.) —, *affirming* (1918) 132 Md. 540, 104 Atl. 274, wherein the court said: "We hardly need repeat the statement made in *Robinson v. Balt. & Ohio R. R.*, 237 U. S. 84, 94, 35 Sup. Ct. 491, 59 L. Ed. 849, that in the Employers' Liability Act Congress used the words 'employé' and 'employed' in their natural sense, and intended to describe the conventional relation of employer and employee. The simple question is whether, under the facts as recited and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that

of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—certainly for the purposes of the act—an employé of the Western Maryland Company only. It is clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, this was for the purpose of coördinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. See *Standard Oil Co. v. Anderson*, 212 U. S. 216, 226, 29 Sup. Ct. 252, 53 L. Ed. 480.

"*North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C 159, is cited, but is not in point, since in that case the relation of the parties was controlled by a dominant rule of local law, to which the agreement here operative has no analogy."

2. Employed in Interstate Commerce

a. General Rule and Tests (p. 1236)

It is essential to a case under the statutes.

—To same effect as second paragraph of original annotation, see *Saxton v. El Paso, etc., R. Co.*, (Ariz. 1920) 188 Pac. 257.

The true test as to whether one is engaged in interstate commerce.—"The character of the commerce the employee was engaged in is to be determined by the work he was actually doing when injured." *Knorr v. New Jersey Cent. R. Co.*, (Pa. 1920) 110 Atl. 797.

If an employee at the time of his injury is engaged in interstate commerce, the fact that at the particular instant of his injury he was bent on or actually engaged in handling an intrastate shipment, will not necessarily characterize his employment as intrastate, if the discharge of his duty in that behalf also pertains to the operation of a train in interstate commerce. *Keathley v. Chesapeake, etc., R. Co.*, (W. Va. 1920) 102 S. E. 244.

A railway employee charged with the duty of sanding the locomotives of a railway company engaged both in intrastate and interstate commerce is engaged in interstate commerce within the meaning of the federal Employers' Liability Act when, having sanded the last locomotive and carried the ashes from the drying stove in the sand house to the ash pit across the tracks, he was struck by a passing locomotive on his

way to get the ash pail, which he had left at the pit while he went for a drink of water, and it is immaterial in what kind of commerce the last locomotive sanded was engaged. *Erie R. Co. v. Szary*, (1920) 253 U. S. 86, 40 S. Ct. 454, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 2d Cir. 1919) 259 Fed. 178, 170 C. C. A. 246.

An employee moving from a train to the baggage room on a truck a number of trunks which had just arrived, some of which came from points outside the state, is within the act. *Hines v. Wicks*, (Tex. Civ. App. 1920) 220 S. W. 581.

b. Employee Operating Train (p. 1244)

Employees within the statute—*Trainmen*.

—A member of a train crew operating a train of loaded coal cars from colliery to freight yard, both within the state, is, although his duties never took him outside of the state, employed in interstate commerce within the meaning of the federal Employers' Liability Act so as to exclude the operation of a state Workmen's Compensation Law, where the ultimate destination of some of the cars was a point outside the state, as appears from instruction cards or memoranda delivered to the conductor by the shipping clerk of the mine, each of which referred to a particular car by number, and contained certain code letters indicating that such car with its load would move beyond the state, the course followed being to haul the cars to the yard and place them upon appropriate tracks, when the duties of the train crew ended, then, having gathered them into a train, to move them with another crew some 10 miles to a place still within the state, where they were inspected, weighed, and billed to specifically designated consignees in another state, passing in due time to their final destinations over proper lines, freight charges being at through rates and paid for the entire distance, beginning at the mine. *Philadelphia, etc., R. Co. v. Hancock*, (1920) 253 U. S. 284, 40 S. Ct. 512, 64 U. S. (L. ed.) —, *reversing* (1919) 264 Pa. St. 220, 107 Atl. 735.

Conductor.—A conductor of an interstate train who has left his train at the end of the run and is killed while on his way to the yardmaster's office to deliver train records, is employed in interstate commerce at the time of his death. *Anderson v. Director General of Railroads*, (N. J. 1920) 110 Atl. 829, wherein the court said: "The first ground upon which a reversal is sought is that there was no proof in the case to support the conclusion that plaintiff's decedent came to his death while employed by the defendant in interstate commerce. The testimony showed the following situation: The decedent was conductor upon a freight train which was carrying articles of interstate commerce over the Camden & Atlantic Railroad. When the train reached the freight yard in Camden, his control over

it ceased; but his work in connection with it was not terminated until he had delivered certain train records, which he had kept, to the yardmaster. For the purpose of performing this duty he got down from his train and jumped upon the step of a passing locomotive to save time in reaching the yardmaster's office. As this engine was proceeding on its way, the engine of another train collided with it at a switch point with such force as to throw it from the track. Anderson's death resulted from the collision. Although it is conceded that Anderson, while in charge of the train, was employed by the defendant in interstate commerce, the contention is that he ceased to be so employed as soon as he left it. But this suggestion is without merit, for his duty with relation to the subject-matter of the transportation was not ended until he had turned over his records to the yardmaster; and the mere fact that he had left the train in the performance of that duty did not at all change the character of his employment."

c. Employees Coupling, Uncoupling or Switching Cars (p. 1248)

Employees within the statute—Coupling or uncoupling.—An employee engaged in coupling certain "special service cars" used exclusively in particular interstate shipments, preparatory to their being taken to a station whence they were to be sent out of the state, is engaged in interstate commerce. *McAdoo v. McCoy*, (Tex. Civ. App. 1919) 215 S. W. 870.

Switching.—A switch tender, injured by an engine leaving a switch, cannot be held to have been injured in interstate commerce where there is no evidence to show that the engine was being used in interstate commerce. *Missouri Pac. R. Co. v. Mette*, (C. C. A. 8th Cir. 1919) 261 Fed. 755.

d. Employee Engaged in Construction or Repairs (p. 1254)

Employees within the statute—Roadbed and tracks.—To same effect as original annotation, see *Frazier v. Hines*, (E. D. S. C. 1919) 260 Fed. 874.

A section hand proceeding to a handcar for the purpose of going with the rest of the crew to repair a transfer track, so called, used in interstate commerce was held within the scope of this section in the case of *Kalashian v. Hines*, (Wis. 1920) 177 N. W. 602.

In *Lammers v. Chicago Great Western R. Co.*, (Ia. 1919) 175 N. W. 311, wherein it appeared that a section hand was injured while unloading rails on the main line of an interstate railroad for use in repairing the same, the court said: "If at the time of the accident, the rails were being unloaded to be used in repairing a track used by defendant for the movement of interstate trains, he was employed in interstate commerce, whether the particular train from which the

rails were being unloaded had in fact come from another state into Iowa or not."

Bridges.—To same effect as original annotation, see *Kansas City Southern R. Co. v. Martin*, (C. C. A. 5th Cir. 1920) 262 Fed. 241, wherein it was said: "The plaintiff was a member of a bridge gang employed in maintaining and repairing bridges constituting part of lines of railway in use by the defendant in interstate commerce. When he was injured, he, as a member of such gang, was assisting in unloading timbers and cross-ties from a car at a point near a bridge on the defendant's line of railway over the Calcasieu river, near Lake Charles, La.; the purpose being to use the timbers and ties so placed in the reconstruction or repair of that bridge as soon as the required material could be assembled, without causing an interruption of the use of the bridge in interstate commerce. It is settled that the repair of bridges or other structures constituting part of a railway in use as an instrumentality of interstate commerce is so closely related to such commerce as to be in legal contemplation a part of it, that a railway employee engaged in such work is to be regarded as engaged in interstate commerce, and that preparatory steps taken with the purpose of furthering the actual work of repair or reconstruction constitute a part of such commerce within the meaning of the act. *Pederson v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; *Southern Railway Co. v. Puckett*, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69; *Louisville & Nashville R. R. Co. v. Parker*, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. 119; *Philadelphia, Baltimore & Washington R. R. Co. v. Smith*, 250 U. S. 101, 39 Sup. Ct. 396, 63 L. Ed. —.

"The work in which the plaintiff was engaged when he was hurt was not more remote from the actual making of the repairs being prepared for than the work which was held to be a part of interstate commerce in the cases of *Pederson v. Delaware, Lackawanna & Western R. R. Co.*, *supra*, and *Philadelphia, Baltimore & Washington R. R. Co. v. Smith*, *supra*. We are of opinion that the doing of that work is to be considered as a part of what was required to effect the repair of the bridge near which it was being done, and that the plaintiff in taking part in that work was engaged in interstate commerce."

An employee engaged in unloading from a flat car old timbers taken from a bridge used in interstate commerce as a result of the repair thereof is within the Act. *Manes v. St. Louis-San Francisco R. Co.*, (Mo. App. 1920) 220 S. W. 14.

Engine or car.—A car repairer injured while carrying bolts to repair a car used in interstate commerce is engaged in interstate commerce at the time of his injury. *Central R. Co. v. Sharkey*, (C. C. A. 2d Cir. 1919) 259 Fed. 144, 170 C. C. A. 212.

Loading rails.—An employee engaged in loading on a flat car rails to be used in a railroad yard which was used for both interstate and intrastate traffic is within the act. *Coons v. Louisville, etc., R. Co.*, (1919) 185 Ky. 741, 215 S. W. 946.

Erecting block signal system on a line of track used for both interstate and intrastate traffic is within the act. *Saxton v. El Paso, etc., R. Co.*, (Ariz. 1920) 188 Pac. 257.

Painting poles carrying electric wires.—Where an employee of defendant was engaged in his employment of painting a pole used by defendant in its electric railroad operation, in interstate commerce, between Manhattan Transfer and the city of New York, and was injured by the negligent act of a coemployee, the case falls within the provisions of the federal Employers' Liability Act, which eliminates the negligence of a fellow employee as a defense to an action under the act. *Stiedler v. Pennsylvania R. Co.*, (N. J. 1920) 109 Atl. 512.

Employees not within the statute—*Carpenter repairing coal chute.*—A carpenter employed by a railroad company in repairing a chute within a state for the supply of coal to its interstate and intrastate trains is not engaged in interstate commerce within the intent and meaning of the federal Employers' Liability Act, and his suit under the act to recover damages for a personal injury thus occurring, alleged to have been caused by the railroad's negligence, brought in the state courts, will, on motion for judgment of nonsuit, be dismissed. *Capps v. Atlantic Coast Line R. Co.*, (1919) 178 N. C. 558, 101 S. E. 216, wherein the court said: "In the very recent case of *New York Central Ry. v. Gallagher, Guardian*, 248 U. S. 559, a petition for certiorari was denied in a suit where an employee of a company engaged in transporting both kinds of commerce, was killed in repairing coal packets of the company from which coal was supplied from time to time to locomotives engaged in both inter- and intrastate commerce. That case originated on petition before the industrial commission of the state of New York under a state statute for a claim on behalf of the infant dependent children of Daniel T. Gearty, the deceased employee; the facts stated being to the effect that he came to his death from injuries received by a fall from a plank on which he was standing and engaged in cutting heads off bolts in the coal pocket building, etc. The commission have allowed the claim, the cause was carried by appeal of the railroad company to the appellate division of the Supreme Court on the ground that as the facts disclosed a case under the federal Employers' Liability Act, the proceeding under the state statute could not be maintained. The court ruled that the federal act did not apply, and in sustaining the award of petitioner's claim, it was held that a carpenter in the general employ of a state railroad en-

gaged in repairing coal pockets from which coal was supplied to engines of the company engaged in inter- and intrastate commerce, was not engaged in repairing an instrumentality of interstate commerce, so as to prevent the application of the state statute, etc. 180 N. Y. App. Div. (S. Ct.) 88. This ruling was affirmed by the Court of Appeals (222 N. Y. 649). A petition for certiorari to the Supreme Court of the United States setting forth that the facts brought the cause within the provisions of the federal Employers' Liability Act was denied as stated. True, the action of the Supreme Court on these petitions for certiorari is not always necessarily intended to be controlling as a precedent, the exercise of revising power of the court in this manner being to some extent discretionary (*Hamilton Shoe Co. v. Wolf Bros.*, 240 U. S. 251; *Forayth v. Hammond*, 166 U. S. 514, 515); but on a judgment making final disposition of the cause, and where the petition for certiorari directly challenged the right of the state board to allow the claim, on the ground that the federal statute was controlling in the matter, it is the reasonable and well nigh the necessary inference that the Supreme Court of the United States intended to affirm the ruling of the New York court that the act of the deceased employee was not one in aid of interstate commerce. From these decisions we conclude that coal as an agency of interstate transportation does not become such until it is supplied, or in the act of being supplied, to engines or trains engaged at the time in carrying interstate commerce, and that the making of repairs on a chute or structure where it is stored for the purpose of being supplied to inter- and intrastate engines as called for is not such an act in aid of interstate transportation as to bring an injured employee's cause within the provisions of the federal statute, the same being too remote. The case of *B. & O. R. R. v. Branson*, 242 U. S. 623, reversing a decision of the state court in which recovery had been awarded under the federal Act, and two decisions in the state court where relief under the Act was denied, *Zavitscki's Administrator v. Chicago Ry.*, 181 Wis. 461, and case of *Grand Trunk Ry.*, reported in 100, at p. 908, are in general approval of the position."

Construction of new depot and semaphore.—An employee injured while assisting in the construction of a new depot and semaphore is not engaged in interstate commerce. *Williams v. Schaff*, (Mo. 1920) 222 S. W. 412, wherein it was said: "Neither the semaphore plaintiff was assisting to build nor the new depot was yet in use in any kind of commerce; for the old semaphore and depot had not been discarded. In fact the new ones were incomplete and the semaphore appears to have been far from completion. As suggested by Judge Sanborn, in the *Bravis Case* [217 Fed. 234], neither had ever been used, and it is possible neither ever would

be used, for some mishap might destroy them."

Laborer working in tunnel.—An employee killed by a train while working in a tunnel not used in the business of interstate commerce was not killed while engaged in interstate commerce. *Tilli v. Philadelphia, etc., R. Co.*, (1919) 263 Pa. St. 558, 107 Atl. 330.

e. Employee Supplying Fuel or Water (p. 1267)

Employees within the act — Supplying fuel.—If an employee is injured while coaling an engine for an interstate trip, he is entitled to the benefits of this act, although the accident occurred prior to the actual coupling of the engine to the interstate cars. *Moore v. Grand Trunk R. Co.*, (Vt. 1919) 108 Atl. 334, (following *New York Cent., etc., R. Co. v. Carr*, (1915) 238 U. S. 260, 35 S. Ct. 780, 59 U. S. (L. ed.) 1298), wherein the court said:

"In simple form the question under discussion comes to this: Engine 1018, making its regular trips, arrived in Island Pond at 5 p. m., on the day of the accident, as an instrumentality of international and interstate commerce, and left there at 6 a. m., next morning, as such an instrumentality. Did it, by being detached from the train it hauled in, lose its international and interstate character so that the plaintiff, when engaged in coaling it, was not employed in such commerce, within the meaning of the *Employers' Liability Act*?

"Supplying the locomotive with coal and water, and looking after the fire, on coming into that terminal, were acts essential to the locomotive's further efficient operation, but having no tendency to show an interruption in its international work; but rather, in the circumstances including the time of day and the early hour of its departure the next morning on its regular trip, they were acts which might reasonably be considered as tending to show preparation for that run. Considering therewith that the evidence was such as (we think) reasonably to warrant a finding that this locomotive was destined for such run, by an order issued prior to the time of the accident, it seems clear that, as the case stood, the question of whether the engine and the plaintiff were, at the time in question, engaged in an act so closely related to international or interstate commerce as to be practically a part of it, was for the jury to determine under proper instructions."

Supplying water.—An employee of an interstate railway company assigned to duty in a signaling tower and pumping station was engaged in interstate commerce within the meaning of the federal *Employers' Liability Act* while starting a gasoline engine at the pumping station, which was used to pump water into a tank from which water was to be supplied daily to locomotives in whatever commerce, interstate or intrastate, engaged. *Erie R. Co. v. Collins*, (1920) 253 U. S. 77, 40 S. Ct. 450, 64 U. S. (L. ed.) —, *affirming*

(C. C. A. 2d Cir. 1919) 259 Fed. 172, 170 C. C. A. 240.

f. Employee Guarding or Inspecting Property (p. 1269)

Employees within the statute — A flagman stationed as a watchman.—To the same effect as the original annotation see *Pittsburgh, etc., R. Co. v. Industrial Commission*, (1920) 291 Ill. 396, 126 N. E. 128, wherein the evidence showed that the plaintiff's intestate was killed by an intrastate train at a crossing where he flagged both interstate and intrastate trains; *Chicago, etc., R. Co. v. Industrial Commission*, (1919) 288 Ill. 603, 124 N. E. 344, wherein the court after quoting from a case in point said:

"This quotation is from *Southern Pacific Co. v. Industrial Accident Com. of California*, 174 Cal. 8, 161 Pac. 1139, L. R. A. 1917E 262, and it is a case strikingly in point. There a crossing flagman was engaged in flagging the highway for an intrastate train, and yet he was held to be employed in interstate commerce, where there was evidence that the track which he was protecting was used indiscriminately for intrastate and interstate commerce. The same reasoning was adopted in *Southern Pacific Co. v. Industrial Accident Com. of California*, 174 Cal. 16, 161 Pac. 1142, where the flagman was working at the crossing of a side track connecting the main line with the freight depot, the side track being used indiscriminately for intrastate and interstate commerce. . . . It has been contended by defendant in error that while the deceased may have been killed by a train engaged in interstate commerce he was not killed by a train of the plaintiff in error; therefore he was not engaged in interstate commerce of his employer. We cannot agree with this view. If an employé is engaged in protecting the instrumentalities of the interstate commerce of his master and is killed in the course of this employment, his injuries arise out of his employment, and the cause is one within the scope of the federal *Employers' Liability Act*, regardless of who inflicts the injury causing the death."

A watchman at a pier used for the landing of boats operated by a railroad company and used entirely in interstate commerce is within the act. *Delaware, etc., R. Co. v. Busse*, (C. C. A. 2d Cir. 1920) 263 Fed. 516.

Employees not within the statute — Watchman.—Where a night watchman in a railroad yard is killed by an engine of another company while he was standing on the latter's track east of his employer's track, mere proof that a regular interstate freight train of his employer, which it was a particular part of his duty to watch to prevent theft from the cars, was pulling out of the yard at the time on the track west of the one where he was killed, and that he had been directed to be always on the east side of that train, does not show that he was engaged in interstate commerce at the time he was killed.

Atchison, etc., R. Co. v. Industrial Commission, (1919) 290 Ill. 590, 125 N. E. 380.

In Chicago, etc., R. Co. v. Industrial Commission, (1919) 290 Ill. 599, 125 N. E. 378, an employee whose duty it was to guard property of a railroad company in its yards and who was shot by men carrying sacks of coal which had been stolen from cars standing in a yard was held not engaged in interstate commerce at the time of the shooting under circumstances stated by the court as follows:

"His duties were to guard the property of the company, and all property being transported by it as a common carrier, to prevent theft, and to apprehend persons stealing or suspected of stealing property. Prior to deceased's injury merchandise had been stolen from cars in trains Nos. 94 and 98 while in the yards. These were both interstate trains. T. J. Reardon was deceased's immediate superior. Deceased reported for duty at 6 o'clock p. m. August 21st, and he and Reardon went together to the yards, where train No. 98 had been made up and was standing. Their purpose was to guard it, and merchandise with which it was loaded, while it stood in the yards and as it was passing out of the East St. Louis terminals. About 7:30 p. m. the train was ready to depart. Reardon boarded it about the middle and directed deceased to go on ahead of it and hide himself behind a pile of ties on the east side of the tracks of the Chicago & Alton Railroad and between them and the tracks of the Wabash Railroad Company. The headlight of train No. 98 was plainly visible at this point. A few days previous the train had been broken into and a case of shoes dropped out of the car about the point where Lambert was sent to secrete himself. At the same time it was also deceased's duty to apprehend any person stealing any property in the yards who might come under his observation or whom he might suspect of stealing. After deceased had taken his position and the train had started, but before it reached the place where he was hiding, he saw two men coming toward him from the Wabash right of way, carrying sacks filled with some articles to him then unknown. He left his hiding place, started toward them, and called to them to halt, whereupon they opened fire on him and shot him and escaped. It was subsequently ascertained that the sacks the men were carrying contained coal. A number of cars loaded with coal were standing on nearby tracks. A few minutes after deceased was shot train No. 98 arrived at that point, and he was placed upon the engine and taken to a hospital."

Flagman.—See *Di Donato v. Philadelphia, etc., R. Co.*, (1920) 266 Pa. St. 412, 109 Atl. 627, which held that a flagman was not engaged in interstate commerce while flagging an intrastate train though the track was used for both intrastate and interstate commerce.

The court said: "But a crossing flagman is in the nature of a traffic officer who protects the public and pilots each train over the crossing; and how can it be said that he is engaged in through traffic when so conducting a local train? He is assisting that train, and his act is not essentially different from that of a conductor or brakeman thereon; for each is working for the safety of the train. Yet an employé upon an intrastate train is not engaged in interstate commerce. *Ill. Cent. R. R. v. Behrens*, 223 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1061, Ann. Cas. 1914C, 163. However, it is urged that flagging a local train promotes its safe passage, and thus tends to keep the track open and clear for through traffic; but certainly no more so than the work of the crew of the intrastate train on the same track, and, if this incidental matter of keeping the track open renders the one an interstate employment, why not both? The repair of a track or bridge over which interstate commerce passes is a direct immediate benefit thereto, entirely unlike any remote or collateral benefit it might possibly derive from flagging an intrastate train. And the true rule apparently is that to come within the range of interstate commerce the work must bear directly, and not remotely, thereon; otherwise practically all local work on trunk railways would be in interstate commerce; for one can scarcely conceive of any act so done that might not have some remote bearing upon such commerce. So, while this question does not seem to have been directly decided by the United States Supreme Court, and the rulings thereon by other courts are not in harmony, we conclude that a crossing watchman while flagging an intrastate train is not employed in interstate commerce, although trains engaged in such commerce use the same tracks."

g. Employee Going to or Returning from Work or Temporarily Diverted Therefrom (p. 1271)

Employees within the statute.—An employé of an interstate railway carrier, engaged in working as a section man upon the railroad of such carrier, who is injured returning from his work by attempting to board a moving freight train, pursuant to directions or orders of the section foreman so to do, is engaged in interstate commerce within the meaning of the Employers' Liability Act. *Schantz v. Northern Pac. R. Co.*, (N. D. 1919) 173 N. W. 556.

Employees not within the statute.—An employee riding home in a train of his employer on a pass after having finished his day's work as fireman on an interstate train and registering and checking out with other members of the train crew, is not then engaged in interstate commerce. *Knorr v. New Jersey Cent. R. Co.*, (Pa. 1920) 110 Atl. 797.

i. Other Employees (p. 1275)

Employees within the statute—Electric lineman.—The work of an electric lineman in wiping insulators on one of the main electric cables of an interstate railway carrier running from a power house to a reduction and transforming station, whence the current ran to the trolley wires and thence to the motors of the carrier's cars engaged in both intrastate and interstate commerce, is so directly and intimately connected with interstate transportation as to render a state workmen's compensation law inapplicable, where the lineman was killed as the result of an electric shock received while so engaged. *Southern Pac. Co. v. Industrial Acc. Commission*, (1920) 251 U. S. 259, 40 S. Ct. 130, 64 U. S. (L. ed.) —, *reversing* (1918) 178 Cal. 20, 171 Pac. 1071.

Baggage agent.—A baggage agent whose duty it was to meet both interstate and intrastate trains of the railroad company by whom he was employed, and to put on and take off baggage, and who was killed by an interstate train whilst in the performance of that duty, must be held to have been engaged in "interstate commerce" at the time he was killed. *Carberry v. Delaware, etc., R. Co.*, (1919) 93 N. J. L. 414, 108 Atl. 364.

Engine washer in roundhouse.—An engine washer injured by reason of the unlighted condition of a turntable used in part for engines used in interstate traffic is within the act. *Luak v. Bandy*, (1919) 76 Okla. 108, 184 Pac. 144.

Trucker injured while unloading interstate freight at destination was held to be engaged in interstate commerce in *Cox v. St. Louis, etc., R. Co.*, (Tex. 1920) 222 S. W. 964.

Employees not within the statute—Employee cutting up timber for crossties.—Where plaintiff, who was employed by defendant, a railroad company engaged in both interstate and intrastate commerce, was injured while working in a saw mill maintained and operated by defendant for cutting up timber and logs in making crossties, and it does not appear that the ties being made, at the time plaintiff was injured, were intended for any particular track or place or for any particular work of repair, but were for use generally at some future time, the purpose for which the crossties were intended was not then so definite and certain as to be beyond the possibility of a change in the use to which they would be devoted or from their being withdrawn from such purpose altogether, and, hence, the work in which plaintiff was engaged had no immediate connection with interstate commerce, and he cannot recover under the federal Employers' Liability Act. *Buynofsky v. Lehigh Valley R. Co.*, (1920) 228 N. Y. 249, 126 N. E. 714, *reversing* (1918) 183 App. Div. 901, 169 N. Y. S. 1086.

IV. INJURIES TO EMPLOYEES

1. Negligence Generally

d. Defects in Cars, Engines, Appliances, etc.

(1) In General (p. 1280)

Worn flange on locomotive wheel.—The Interstate Commerce Commission having approved rules and regulations prescribing with particularity the extent of wear on the flange of a locomotive wheel which renders it defective, conformity with those rules is the test of the duty of a railroad company and the question of "ordinary care" is eliminated. *Lancaster v. Allen*, (Tex. 1920) 217 S. W. 1032.

Evidence of cause of injury.—In Louisville, etc., R. Co. v. Campbell, (1919) 186 Ky. 628, 217 S. W. 687, evidence of the cause of injury was held inadequate in an action for injuries resulting from falling from a hand car, the theory that the fall was due to a defect in the handle of the hand car being held to rest on mere speculation.

(2) Duty of Carrier as to Place to Work (p. 1280)

Duty of employer as to place to work.—To same effect as original annotation, see *Lehigh Valley R. Co. v. Scanlon*, (C. C. A. 2d Cir. 1919) 259 Fed. 137, 170 C. C. A. 205, holding that the placing of a train on a certain track so that a switch tender was compelled to mount upon the coupling of the cars to cross the track, thus causing his injury, was a violation of the employer's duty to provide him a safe place in which to work.

Likewise leaving brake beams scattered in switch yard is negligence which will sustain a recovery by a switch tender injured by stumbling thereon. *Lock v. Chicago, etc., R. Co.*, (Mo. 1920) 219 S. W. 919.

But it is not negligence for a railroad company to use a car float, built as such floats usually are and with the customary clearance between the side of the car and the stanchions in the center of the float. *Pennsylvania R. Co. v. Nelson*, (C. C. A. 2d Cir. 1919) 259 Fed. 156, 170 C. C. A. 224.

(3) Duty of Carrier as to Appliances, etc. (p. 1281)

Selection by injured employee.—Where a wrecking crew is furnished with a number of chains, and the foreman, having selected one for use on a particular job, is injured by reason of its breaking because it is not large enough, there is no negligence on the part of the railroad company. *Roberg v. Houston, etc., Cent. R. Co.*, (Tex. Civ. App. 1920) 220 S. W. 790.

(5) Particular Acts or Conditions as Negligence (p. 1282)

Attaching defective car to train.—The attaching of a freight car, which has no drawbar or coupler at its rear end, to the rear

of the caboose in an interstate freight train, violates section 4 of the Safety Appliance Act of 1910 (8 Fed. Stat. Ann. (2d ed.) 1192) and constitutes negligence on the part of the railroad company, which renders it liable to one of its employees who is injured by falling between the caboose and such car. *Erie R. Co. v. Schleenbaker*, (C. C. A. 6th Cir. 1919) 257 Fed. 667, 168 C. C. A. 617.

f. Effect of Section on Particular Doctrines or Maxims

(2) Fellow Servant Doctrine (p. 1284)

In general.—To same effect as second paragraph of original annotation, see *Lehigh Valley R. Co. v. Scanlon*, (C. C. A. 2d Cir. 1919) 259 Fed. 137, 170 C. C. A. 205; *San Pedro, etc., R. Co. v. Brown*, (C. C. A. 9th Cir. 1919) 258 Fed. 806, 170 C. C. A. 100, 8 A. L. R. 865; *Pittsburgh, etc., R. Co. v. Cole*, (C. C. A. 6th Cir. 1919) 260 Fed. 357, 171 C. C. A. 223, certiorari denied (1919) 250 U. S. 671, 40 S. Ct. 15, 63 U. S. (L. ed.) (holding that the question whether the injury was caused by the negligence of a fellow servant was one for the jury); *Davis v. Chicago, etc., R. Co.*, (Neb. 1920) 177 N. W. 181; *McDowell v. Southern R. Co.*, (S. C. 1920) 102 S. E. 639; *Cox v. St. Louis, etc., R. Co.*, (Tex. 1920) 222 S. W. 964; *Wight v. Morgan*, (Tex. Civ. App. 1920) 220 S. W. 295; *Lock v. Chicago, etc., R. Co.*, (Mo. 1920) 219 S. W. 919 (holding railroad company liable for injury to switch tender caused by his stumbling over brake beam left lying in yard); *Kinzell v. Chicago, etc., R. Co.*, (Idaho 1920) 190 Pac. 255; *Werner v. Southern Pac. R. Co.*, (Cal. App. 1920) 185 Pac. 1016.

Doctrine recognized.—In *McCord v. Schaff*, (Mo. 1919) 216 S. W. 320, the court, without considering specifically the applicability of the doctrine, held in a suit under the Act that the negligent servant was a vice-principal, and on that ground allowed a recovery.

Particular instances.—*Operating train without giving warning*.—Operating a train without giving warning on a track in a railroad yard which is paralleled by a path used by a number of railroad employees, is negligence where such track is obscured by smoke from engines so as to make it impossible for trains thereon to be seen. *Central R. Co. v. Sharkey*, (C. C. A. 2d Cir. 1919) 259 Fed. 144, 170 C. C. A. 212.

2. Persons Entitled to Sue

a. In General (p. 1286)

Joinder of all beneficiaries in one suit is required. *Davis v. Wight*, (Tex. Civ. App. 1920) 218 S. W. 26.

b. Personal Representatives (p. 1287)

Personal representative must sue.—To same effect as first paragraph of original annotation, see *Ferris v. Jones*, (1920) 78 Okla. 154, 189 Pac. 527.

c. Widow (p. 1289)

Widow suing individually may amend by making herself personal representative.—To same effect as original annotation, see *Ferris v. Jones*, (1920) 78 Okla. 154, 189 Pac. 527.

3. Pleadings

a. In General (p. 1295)

Case within statute must be shown.—To come within the provisions of this Act, two things must concur: "first, the offending common carrier, by railroad, at the time of the injury, must be engaged in interstate commerce; second, the injury must be suffered by the employé while employed by such carrier in such commerce." *Frazier v. Hines*, (E. D. S. C. 1919) 260 Fed. 874.

Where an action in a state court is based on the federal act and a case within the act is not established the court will not dismiss the action but will render judgment under the state law. *Archibald v. Northern Pac. R. Co.*, (1919) 108 Wash. 97, 183 Pac. 95.

Statute need not be expressly referred to.—To same effect as original annotation, see *Lusk v. Bandy*, (1919) 76 Okla. 108, 184 Pac. 144.

Specific allegation that plaintiff seeks to recover under the federal Employers' Liability Act is unnecessary. It is sufficient if, from the ultimate facts pleaded, it appears that both parties at the time of the accident were employed in interstate commerce. *Lammers v. Chicago Great Western R. Co.*, (Ia. 1919) 175 N. W. 311.

Sufficiency of complaint generally.—Allegations in a petition of the representatives of a railroad employee to recover for death of the employee caused by the railway company's negligence, that the company was incorporated in Iowa and Illinois and operated its railway in and through the state of Oklahoma, and that when injured deceased was in the line of his duty, and that the injury occurred in Oklahoma, by reason of the negligence of the defendant in operating its train, imperfectly stated a cause of action under the federal Employers' Liability Act, and, if the company was in doubt as to whether the action was brought under the state or federal statute, they should have filed a motion to make the petition more definite and certain, or to require the plaintiff to elect. *Chicago, etc., R. Co. v. Owens*, (1920) 78 Okla. 50, 186 Pac. 1092.

Replication.—If a declaration in an action in a state court shows a common law action for negligence, a replication showing an action under this act would be a departure. *Carpenter v. Central Vermont R. Co.*, (Vt. 1919) 107 Atl. 569.

b. Particular Allegations (p. 1301)

Negligence.—Some specific act of negligence must be alleged and proved. *Nanfeto v. Chicago, etc., R. Co.*, (1919) 103 Neb. 577, 173 N. W. 575.

Conscious suffering.—Where the petition failed to allege that the plaintiff ever recovered consciousness after receiving the injury, and failed to state how long he survived after receiving said injury, and failed to state that the deceased suffered intense pain, it was held that it did not state sufficient allegations to predicate a cause of action to recover for conscious pain and suffering between the time of the injury and the time of the death of the deceased. *Chicago, etc., R. Co. v. Owens*, (1920) 78 Okla. 50, 186 Pac. 1092.

Death.—A declaration in an action for damages for alleged wrongful death, brought under the federal Employers' Liability Act, which in each of its two counts sets forth several charges of negligence, and then alleges that, by reason of all the matters and things therein previously set forth, the plaintiff's decedent came to his death, sufficiently states causal connection between the acts of negligence and the injury complained of. *Mills v. Virginian R. Co.*, (W. Va. 1920) 102 S. E. 604.

4. Practice and Procedure

c. Jury of Less than Twelve (p. 1313)

Verdict by three-fourths of jury.—To same effect as original annotation, see *St. Louis, etc., R. Co. v. Fraser*, (1919) 75 Okla. 265, 183 Pac. 478.

e. Form of Verdict (p. 1317)

Apportioning damages.—The verdict in an action for death by wrongful act may apportion the damages among the widow and minor children of the decedent. *Lusk v. Bandy*, (1919) 76 Okla. 108, 184 Pac. 144.

5. Evidence

b. Proof of Negligence (p. 1318)

Visible connection between injury and negligence charged.—Proof of negligence is not sufficient unless the evidence discloses an open and visible connection between the injury and negligence charged as a reasonable and probable result therefrom. The plaintiff must recover upon proof, not upon conjecture or surmise. *Watkins v. Hustis*, (N. H. 1919) 109 Atl. 713.

Section hand walking along track by direction of foreman.—A member of a gang of section men going for a pail of water, on starting in a particular direction, was called back by the foreman because he could not get through in the direction in which he had started, whereupon he went in the direction indicated along the railroad track, and was afterwards struck by an engine. It was held not to constitute negligence on the part of the defendant company. *Tsiampas v. Union Pac. R. Co.*, (Neb. 1920) 176 N. W. 366.

Evidence held insufficient.—In *Erie R. Co. v. Hansen*, (C. C. A. 3d Cir. 1919) 260 Fed. 100, 171 C. C. A. 136, it was held that the

evidence was insufficient to establish that the accident was due to the negligence of the employer.

In *Mullin v. Louisville, etc., R. Co.*, (C. C. A. 5th Cir. 1919) 261 Fed. 156, it was held that a verdict for the defendant was properly directed because of insufficiency of evidence of its negligence.

d. Presumptions (p. 1320)

Under state statute as to proof of injury.—The case cited to the original annotation was reversed by the United States Supreme Court in *New Orleans, etc., R. Co. v. Scarlet*, (1919) 249 U. S. 528, 39 S. Ct. 369, 63 U. S. (L. ed.) 752, it being there held that the prima facie statute of Mississippi did not apply to a case brought under the federal Employers' Liability Act. See to the same effect *Yazoo, etc., R. Co. v. Mullins*, (1919) 249 U. S. 531, 39 S. Ct. 368, 63 U. S. (L. ed.) 754, reversing (1917) 115 Miss. 343, 76 So. 147; *New Orleans, etc., R. Co. v. Harris*, (1918) 247 U. S. 367, 38 S. Ct. 535, 62 U. S. (L. ed.) 1167; *New Orleans, etc., R. Co. v. Hanna*, (1918) 118 Miss. 40, 78 So. 953; *New Orleans, etc., R. Co. v. Scarlet*, (1919) 120 Miss. 665, 83 So. 1; *Yazoo, etc., R. Co. v. Mullins*, (1919) 120 Miss. 662, 83 So. 1.

Where an injury results from a defective appliance, not covered by the Safety Appliance Act, in order to establish negligence it is necessary to prove the defect and notice to the employer, and a state statute relating to personal injury actions against railroads and providing that when a defect in an appliance by which an employee is injured is proved, negligence is presumed, has no application. *Kent v. Erie R. Co.*, (1920) 228 N. Y. 94, 126 N. E. 646 (reversing (1917) 181 App. Div. 969, 167 N. Y. S. 1108), wherein the court said:

"Both parties being engaged in interstate commerce, their respective rights and liabilities were governed by the federal Employers' Liability Act, and section 64 of the Railroad Law of the state of New York (Cons. Laws, c. 49) had no application whatever. *New Orleans & Northeastern R. R. Co. v. Harris*, 247 U. S. 367, 38 Sup. Ct. 535, 62 L. Ed. 1167; *New Orleans & Northeastern R. R. Co. v. Scarlet*, 249 U. S. 528, 39 Sup. Ct. 369, 63 L. Ed. 752; *Yazoo & Mississippi Valley R. R. Co. v. Mullins*, 249 U. S. 531, 39 Sup. Ct. 368, 63 L. Ed. 754; *Louisville & N. R. R. Co. v. Rhoda*, 238 U. S. 608, 35 Sup. Ct. 662, 59 L. Ed. 1487. Notwithstanding that fact, the trial court instructed the jury that the giving way of the handhold furnished, under that section, prima facie evidence of the defendant's negligence. I am of the opinion this was error, and necessitates a reversal of the judgment."

e. Burden of Proof (p. 1321)

Employee engaged in interstate commerce.—Where part of an employee's duties are

connected with interstate commerce and part of them are not, if the employer seeks to avoid liability under a state Workmen's Compensation Act on the ground the employee was engaged in interstate commerce at the time of his injury, and the liability, if any, is under the federal Employers' Liability Act, the burden is on the employer to show that the employee at the time of his injury was engaged in interstate commerce. *Atchison, etc., R. Co. v. Industrial Commission*, (1919) 290 Ill. 590, 125 N. E. 380. To same effect, see *Knorr v. New Jersey Cent. R. Co.*, (Pa. 1920) 110 Atl. 797; *Polk v. Philadelphia, etc., R. Co.*, (1920) 266 Pa. St. 335, 109 Atl. 627; *Di Donato v. Philadelphia, etc., R. Co.*, (1920) 266 Pa. St. 412, 109 Atl. 627, wherein the court said: "Plaintiff made out a prima facie case by showing, inter alia, the employment, work, and accident in this state, and the burden is on defendant, who interposed the federal statute, to prove facts necessary to bring the case within its terms. While a state court can take judicial notice of an act of Congress, it cannot take such notice of facts necessary to bring a particular case within its provisions. The federal Employers' Liability Act, applicable to interstate commerce only, bears no analogy to the federal Bankruptcy Act, which is of general application. There is no presumption that the train a watchman at a local crossing was flagging when killed was an interstate train. It is not a matter governed by presumption, but by proof (*Hench v. Penn. R. R. Co.*, 246 Pa. 1, 6, 91 Atl. 1056, L. R. A. 1915D, 557, Ann. Cas. 1916D, 230; and see *Hancock v. Phila. & R. Ry. Co.*, 264 Pa. 220, 107 Atl. 735), the burden of which rests upon the party alleging it, here the defendant (*Polk v. Philadelphia & R. Ry. Co.*, 109 Atl. 627, filed this term). This familiar rule of evidence is especially applicable here, otherwise plaintiff must prove a negative, to wit, that her husband was not killed while flagging an interstate train, and must do so when the evidence as to whether it was such or not is peculiarly within the knowledge of defendant. As the latter offered no evidence upon the question, that defense failed. It was its duty to individuate that particular act in which the deceased was engaged and show by competent evidence the train in question and that it was an interstate train, or at least that his act had some reasonably direct connection with such train. In *Osborne v. Gray*, 241 U. S. 16, 21, 36 Sup. Ct. 486, 487 (60 L. Ed. 865), the court, speaking through Mr. Justice Hughes, say:

"It is apparent that there was no evidence requiring the conclusion that the deceased was engaged in interstate commerce at the time of his injury, and we are asked to supply the deficiency by taking judicial notice that the cars came from without the state. This contention we are unable to sustain. The make-up of trains and the movement of cars are not matters which we may

assume to know without evidence. . . . The defendants knew the actual movement of the cars, and failing to inform the court upon this point, cannot complain that they have been deprived of a federal right."

Negligence.—To the same effect as the original note see *Watkins v. Hustis*, (N. H. 1919) 109 Atl. 713, wherein the court said: "The federal legislation under which this suit is brought does not abrogate or qualify the common-law rule that in all actions for negligence the plaintiff has the burden of establishing the defendant's negligence and his resulting injury."

6. Damages

a. Recovery by Employee (p. 1322)

Measure of damages in general.—To same effect as original annotation, see *Kinzell v. Chicago, etc., R. Co.*, (Idaho 1920) 190 Pac. 255; *Louisville, etc., R. Co. v. Briggs*, (1919) 165 Ky. 676, 215 S. W. 529, holding that an instruction stating a rule but slightly variant from that of the federal courts was not prejudicial.

The measure of damages in an action by an injured employee against a carrier engaged in interstate commerce is such sum as will fully and fairly compensate him for his pain and suffering, his mental anguish, the bodily injury sustained by him, his pecuniary loss, his loss of power and capacity to work, and its effect upon his future; and on these questions evidence of the wages he was receiving at the time he was injured, and what he should have been receiving in the same employment at the time of the trial, was properly submitted to the jury. *Keathley v. Chesapeake, etc., R. Co.*, (W. Va. 1920) 102 S. E. 244.

Disfigurement.—Shame and humiliation because of disfigurement may be an element in the recovery of damages for the injury. *Erie R. Co. v. Collins*, (1920) 253 U. S. 77, 40 S. Ct. 450, 64 U. S. (L. ed.) —, affirming (*C. C. A. 2d Cir.* 1919) 259 Fed. 172, 170 C. C. A. 240.

Instruction as to future effects of injury.—To the same effect as the original annotation see *Moore v. Grand Trunk R. Co.*, (Vt. 1919) 108 Atl. 334, wherein the court said: "The evidence showed that the nature and extent of plaintiff's injuries, his past improvement, and his condition at the time of the trial, were such as to render it practically impossible to tell with any great degree of certainty the length of time before complete recovery. Mere conjecture and speculation can form no basis for prospective damages. But the expert evidence tended to show the probable future progress of the improvement, and (in the opinion of one of the witnesses) that a year's time was too short in which to make full recovery. The evidence furnished a reasonable basis for the belief that for a year, at least, the plaintiff's inability to work, and his pain and suffering, would continue. The consideration of

the jury in this respect was, by the charge, expressly confined to the evidence. The plaintiff was entitled to have the question submitted to the jury, and we see no error in the instructions given."

b. Actions for Death

(1) In General (p. 1323)

Measure of damages generally.—To same effect as first paragraph of original annotation, see *Hines v. Mills*, (Tex. Civ. App. 1920) 218 S. W. 777.

Conscious suffering.—Damages for the conscious suffering of the intestate may be recovered. *McAdoo v. McCoy*, (Tex. Civ. App. 1919) 215 S. W. 870; *Chicago, etc., R. Co. v. Owens*, (1920) 78 Okla. 50, 186 Pac. 1092.

Effect of marriage of child.—A minor daughter who marries four months after the death of her father is entitled to some recovery for damages up to the time of her marriage. *Davis v. Wight*, (Tex. Civ. App. 1920) 218 S. W. 26.

(2) Pecuniary Loss (p. 1325)

Interest.—To the same effect as the original annotation, see *Bennett v. Atchison, etc., R. Co.*, (Ia. 1919) 174 N. W. 805, wherein the court said: "In no event is the plaintiff entitled to recover interest on her unliquidated demands before judgment is entered on those demands. If there is such a thing as an unliquidated demand, the claim made under this statute is essentially so. The amount plaintiff, as widow, is entitled to recover in such sum as the jury finds, when it comes to consider the whole case, is fair compensation to the plaintiff for the pecuniary loss which she sustains by the death of her husband, and that is measured by a review of the whole field of probabilities, involving the expectancy of the husband, the expectancy of the wife, the husband's earning capacity and ability to contribute, the probable amount he would contribute, the times when such contributions would be made, the amount and such other facts as tended to show the probable pecuniary loss to the wife as a proximate result of the husband's death. It will be noted that the federal Employers' Liability Act makes no provision for interest. The authorities on the question here submitted are but few. It was directly held that interest is not allowable in *Norton v. Erie Ry. Co.*, reported in 163 App. Div. 468, 148 N. Y. Supp. 771. In that case it was said, in substance, that the federal statute is paramount and exclusive, and the defendant's liability may not be extended by the provisions of the state statute. No provision is made in the federal act for adding such interest to the verdict. The order disallowing interest was affirmed. See *Grow v. Oregon Short Line*, first reported in 44 Utah 160, 138 Pac. 398, Ann. Cas. 1915B, 481, and again in 47 Utah 26, 150 Pac. 970. In the last case the ques-

tion of allowing interest on a verdict was considered, and the right denied. The time between the death and the rendition of the verdict was 4½ years. Following the rule that interest is not allowable on unliquidated demands, until reduced to judgment, the action of the court in refusing to allow interest before judgment must be and is affirmed."

c. Recovery by Widow and Children

(1) In General (p. 1327)

Measure of damages generally.—If the widow has been deprived of a reasonable expectancy of pecuniary benefit by her husband's death, she is entitled to compensation. The amount is largely in the discretion of the jury. *Bennett v. Atchison, etc., R. Co.*, (Ia. 1919) 174 N. W. 798, wherein the court said: "We do not speak of the legal duty of deceased to support his wife in the sense that such is a measure independent of pecuniary benefit. The legal duty is not the sole test. There must appear some reasonable expectation of pecuniary assistance or support of which plaintiff has been deprived. . . . It is suggested because of the absence of evidence, as argued by appellant, that the evidence does not show that deceased had, or ever would, contribute to his wife's support. We think the inference may be properly drawn that there is a reasonable expectation of pecuniary benefit from the relation of husband and wife. Under such circumstances, ordinarily, deceased would feel impelled by relationship to render service had he lived. It has been held that where it is shown there were brothers and sisters of deceased who were of tender age, and without estate, this presents a question for the jury as to whether or not they were dependent upon deceased employee. . . . We held in *McCullough v. Railway*, 160 Iowa 524-529, 142 N. W. 67, 47 L. R. A. (N. S.) 23, that substantial damages will be presumed in favor of the widow and children without special averment and proof other than a showing of the pecuniary value of the life of decedent to his family, and the method of arriving at such value is stated in the *McCullough Case*, 160 Iowa at page 532, 142 N. W. 67, 47 L. R. A. (N. S.) 23. See also *Bruckshaw v. Railway*, 173 Iowa 207-215, 155 N. W. 273; *Chesapeake, etc., Ry. v. Kelly*, 241 U. S. 485-491, 36 S. Ct. 630, 60 U. S. (L. ed.) 1117, L. R. A. 1917F 367. In the last case it was said that this question, like other questions of procedure and evidence, is to be determined according to the law of the forum. We think the evidence and the situation shown here was such that there was a basis in the evidence for the consideration of the jury in awarding compensation, notwithstanding the paucity of evidence. As said in the *McCullough Case*, evidence cannot be very definite as to the actual amount of pecuniary loss."

7. Questions for Court and Jury (p. 1334)

Employee engaged in interstate commerce.—In the trial of a cause arising under the federal Employers' Liability and Safety Appliance Acts, when there is testimony raising an issue of fact on the question as to whether or not the defendant railway company was at the time engaged in interstate commerce and whether or not the plaintiff at the time of the injury was so engaged in interstate commerce, it becomes a question to be submitted to the jury for their determination. *St. Louis, etc., R. Co. v. Fraser*, (1919) 75 Okla. 265, 183 Pac. 478.

Negligence of carrier.—In an action for personal injuries under the federal Employers' Liability Act, where the deceased, a boy 16 years of age, while employed as a section man upon the railway of the carrier, was injured by attempting to board a moving freight train upon his return from work, it was held, under the evidence, that the question of the negligence of the carrier in directing or ordering, through its section foreman, the deceased so to do, and of the contributory negligence of and the assumption of the risk by the deceased, were questions of fact for the jury. *Schantz v. Northern Pac. R. Co.*, (N. D. 1919) 173 N. W. 556.

Fellow servant as vice principal.—The question whether a fellow servant was such a vice principal that his order to the plaintiff to perform a certain act, which caused the plaintiff's injury, was binding on him, is a question of fact for the jury. *Pittsburgh, etc., R. Co. v. Cole*, (C. C. A. 6th Cir. 1919) 260 Fed. 357, 171 C. C. A. 223, certiorari denied (1919) 250 U. S. 671, 40 S. Ct. 15, 63 U. S. (L. ed.) 1199.

Safety of place of work.—In an action for personal injuries by a brakeman against a railroad company, the question whether the company furnished him a safe place in which to work is one for the jury. *Virginian R. Co. v. Halstead*, (C. C. A. 4th Cir. 1919) 258 Fed. 428, 169 C. C. A. 444.

8. Appeal and Error (p. 1336)

Harmless error as to applicability of statute.—Error in deducing that a case was not within the statute is harmless where the right of recovery is the same whether the state law or the federal statute applies. *Stevens v. Hines*, (Wash. 1920) 188 Pac. 917.

Trial on wrong theory.—"If a cause of action was not within the scope of the act, but was tried as though it were, it must be retried unless the rules of law, affecting liability and as established by the courts of the state, are the same as those which obtain under the federal statute, or are less favorable to the party against whom the verdict was given." *Williams v. Schaff*, (Mo. 1920) 222 S. W. 412.

Questions not raised below.—That the trial was had on the theory of common-law

liability when the case is within the Act cannot be raised for the first time on appeal. *Ford v. Dickinson*, (Mo. 1919) 217 S. W. 294.

Review of evidence.—In reviewing a verdict for the plaintiff his testimony as to the negligence of the defendant will be taken as true. *St. Louis, etc., R. Co. v. Fraser*, (1919) 75 Okla. 265, 183 Pac. 478.

Verdict defective in part—Modification.—Where a verdict in a damage suit for the death of an employee of a railroad company under the federal Employers' Liability Act itemizes the damages at \$10,000 for pecuniary loss and \$5,000 for conscious pain and suffering, and the petition fails to state a cause of action for conscious pain and suffering, but the item for pecuniary loss is proper, the court being able to separate the legal from the illegal amount of the verdicts, the cause will be modified and affirmed for the amount of the verdict that was proper. *Chicago, etc., R. Co. v. Owens*, (1920) 78 Okla. 50, 186 Pac. 1092.

Reversal of the entire judgment is necessary where the damages of several beneficiaries are fixed but damages are erroneously denied to another beneficiary. *Davis v. Wight*, (Tex. Civ. App. 1920) 218 S. W. 26.

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I. Construction of section.

II. Contributory negligence.

1. In general.
2. Effect on amount of damages.
3. Effect of violation of Safety Appliance Acts.
4. Evidence.
5. Instructions to jury.
6. Questions for jury.

I. CONSTRUCTION OF SECTION (p. 1340)

In general.—Where it is shown that the railroad company was guilty of negligence having a causal relation to the injury, contributory negligence upon the part of the plaintiff will not be a bar to a recovery, although the injuries could have been avoided by the exercise of ordinary care upon the part of the plaintiff. *Louisville, etc., R. Co. v. Hood*, 149 Ga. 829, 102 S. E. 521.

II. CONTRIBUTORY NEGLIGENCE

1. In General (p. 1342)

Necessity and effect of pleading contributory negligence.—An averment in plaintiff's pleading that he was in the exercise of due care and diligence is a necessary averment in a declaration based on an action at common law, but it would be out of place and mere surplusage in a declaration based on the federal Employers' Liability Act, under which contributory negligence does not defeat the action but goes only to the diminution of plaintiff's damages, and as to which the bur-

den is placed on the defendant. *Carpenter v. Central Vermont R. Co.*, (Vt. 1919) 107 Atl. 569.

2. Effect on Amount of Damages (p. 1344)

Doctrine as to effect of contributory negligence in general.—To same effect as original annotation, see *Central R. Co. v. Sharkey*, (C. C. A. 2d Cir. 1919) 259 Fed. 144, 170 C. C. A. 212; *Lehigh Valley R. Co. v. Scanlon*, (C. C. A. 2d Cir. 1919) 259 Fed. 137, 170 C. C. A. 205; *Kansas City Southern R. Co. v. Sparks*, (Ark. 1920) 222 S. W. 724; *Werner v. Southern R. Co.*, (Cal. App. 1920) 185 Pac. 1016; *Kenyon v. Illinois Cent. R. Co.*, (Ia. 1919) 173 N. W. 44; *Bennett v. Atchison, etc., R. Co.*, (Ia. 1919) 174 N. W. 798; *Pruitt v. Norfolk Western R. Co.*, (Ky. 1920) 221 S. W. 552; *Childers v. Northern Pac. R. Co.*, (Mo. App. 1920) 218 S. W. 441; *Lock v. Chicago, etc., R. Co.*, (Mo. 1920) 219 S. W. 919; *Manes v. St. Louis-San Francisco R. Co.*, (Mo. App. 1920) 220 S. W. 14; *Reed v. Director General of Railroads*, (Pa. 1920) 110 Atl. 254; *McDowell v. Southern R. Co.*, (S. C. 1920) 102 S. E. 639; *Kalahian v. Hines*, (Wis. 1920) 177 N. W. 602.

3. Effect of Violation of Safety Appliance Acts (p. 1346)

General principles.—To the same effect as the original annotation see *Thornton v. Minneapolis, etc., R. Co.*, (Ia. 1919) 175 N. W. 71; *Thayer v. Denver, etc., R. Co.*, (1919) 25 N. M. 559, 185 Pac. 542; *McAdoo v. McCoy*, (Tex. Civ. App. 1919) 215 S. W. 870.

Judicial notice of safety appliance standards of Interstate Commerce Commission will be taken up by the courts. *Goulette v. Grand Trunk R. Co.*, (Vt. 1919) 107 Atl. 118.

4. Evidence (p. 1348)

Burden of proof.—To the same effect as the original annotation see *Crugley v. Grand Trunk R. Co.*, (N. H. 1919) 108 Atl. 293.

In *Fisher v. Chicago, etc., R. Co.*, (1919) 290 Ill. 49, 124 N. E. 831, wherein it was held that the burden of proof was on the defendant to prove contributory negligence, the court said:

"It is contended that the court erred in instructing the jury, that, if the defendant relies upon the defense of contributory negligence, the burden is upon it to establish that defense by a preponderance of the evidence. The objections made to the instruction are that the requirement to establish the defense of contributory negligence imposed upon the plaintiff in error too high a degree of proof, and that it withdrew from it the benefit of facts put in evidence by the plaintiff tending to show negligence on the part of Fisher. To establish by a preponderance of the evidence is only to prove by a preponderance of the evidence, and would not be understood by the jury in any different sense."

Sufficiency.—In *Knowles v. Western, etc., R. Co.*, (Ga. App. 1919) 100 S. E. 640, the court said: "In this case an interstate carrier was sued for personal injuries under the federal Employers' Liability Act. . . . The evidence discloses that on a rainy night the plaintiff was walking, with a lighted lantern, beside a railroad track, and fell into a ditch or underpass, with which he was familiar and was thus injured. The plaintiff testifies that he was engrossed with his duty and for the moment did not realize the danger or the proximity of the underpass. The rule announced in the case of *King v. S. A. L. Ry.*, 1 Ga. App. 88, 58 S. E. 252, cannot be extended so as to apply to this case. The evidence here does not show that any negligence of the defendant caused the injury, and, on the other hand, the evidence shows that the injury was the result of the plaintiff's own negligence and lack of ordinary care. . . . It may be further stated that the evidence discloses that there was a safe way around the place where plaintiff was injured, and that this way was known to him."

5. Instructions to Jury (p. 1349)

Harmless charge.—A charge that contributory negligence would prevent a recovery under the federal Employers' Liability Act could not have prejudiced the defendants, being more favorable to them than they were entitled to. *Chicago, etc., R. Co. v. Ward*, (1920) 252 U. S. 18, 40 S. Ct. 275, 64 U. S. (L. ed.) —, *affirming* (*Okl.* 1918) 173 Pac. 212.

Contributory negligence brought into case through evidence.—In an action under this Act it is proper for the trial judge to instruct the jury regarding the issue of contributory negligence where that issue is brought into the case through the evidence, although not raised by the pleadings. *Pittsburgh, etc., R. Co. v. Cole*, (C. C. A. 6th Cir. 1919) 260 Fed. 357, 171 C. C. A. 223, *certiorari denied* (1919) 250 U. S. 671, 40 S. Ct. 15, 63 U. S. (L. ed.) 1199.

Right of defendant to complain.—If the instructions asked by the plaintiff and given stake his case on a finding that he was free from contributory negligence, the defendant, who asks no instructions, cannot complain of the failure to submit the question of contributory negligence as reducing damages. *Lafaver v. Pryor*, (Mo. App. 1920) 218 S. W. 970.

Instruction as to diminution of damages approved.—In *Chicago, etc., R. Co. v. Smith*, (Tex. 1920) 222 S. W. 1099, the following instruction as to diminution of damages was held to be sufficient in the absence of a specific request: "If you find that plaintiff was injured as alleged in his petition, and the proximate cause thereof was the concurring negligence, if any, of the plaintiff and defendant under the issues hereinbefore submitted for your finding, then in answer

to this question you will diminish your finding on this issue in proportion to the amount of negligence attributable to plaintiff."

6. Questions for Jury (p. 1351)

Contributory negligence for jury.—To same effect as original annotation, see *Lehigh Valley R. Co. v. Scanlon*, (C. C. A. 2d Cir. 1919) 259 Fed. 137, 170 C. C. A. 205; *Pittsburgh, etc., R. Co. v. Cole*, (C. C. A. 6th Cir. 1919) 280 Fed. 357, 171 C. C. A. 223, *certiorari denied* (1919) 250 U. S. 671, 40 S. Ct. 15, 63 U. S. (L. ed.) 1199.

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- I. In general, 752.
- II. Principles generally as to assumption of risk, 752.
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 2. Knowledge as affecting, 753.
 3. Acts of master or superior as affecting, 754.
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 5. Negligence of fellow servant, 754.
- III. Particular employees, 756.
- IV. Burden of proof, 758.
- V. Questions for court and jury, 758.

I. IN GENERAL (p. 1352)

Construction generally.—To same effect as first paragraph of original annotation, see *Thayer v. Denver, etc., R. Co.*, (1919) 25 N. M. 559, 185 Pac. 542.

Effect limited to terms of Act.—To the same effect as the original annotation, see *Kansas City Southern R. Co. v. Sparks*, (Ark. 1920) 222 S. W. 724; *Thornton v. Minneapolis, etc., R. Co.*, (Ia. 1919) 175 N. W. 71; *Coons v. Louisville, etc., R. Co.*, (1919) 185 Ky. 741, 215 S. W. 946; *Pruitt v. Norfolk & Western R. Co.*, (Ky. 1920) 221 S. W. 552; *Lusk v. Bandy*, (1919) 76 Okla. 108, 184 Pac. 144; *Curtis v. Erie R. Co.*, (Pa. 1920) 109 Atl. 871; *McAdoo v. McCoy*, (Tex. Civ. App. 1919) 215 S. W. 870; *Gulf, etc., R. Co. v. Clement*, (Tex. Civ. App. 1920) 220 S. W. 407; *Hines v. Bannon*, (Tex. Civ. App. 1920) 221 S. W. 684.

Assumption of risk is a defense to which a defendant sued under the federal Employers' Liability Act is entitled, where the injury was caused otherwise than by the violation of some statute enacted to promote the safety of employees. *Chicago, etc., R. Co. v. Ward*, (1920) 252 U. S. 18, 40 S. Ct. 275, 64 U. S. (L. ed.) —, *affirming* (Okla. 1918) 173 Pac. 212.

In *Dutrey v. Philadelphia, etc., R. Co.*, (1919) 265 Pa. St. 215, 108 Atl. 620, the court said: "Except, then, as to the injuries resulting from the violation of statutes, the common-law doctrine of assumption of risk still remains as a complete defense in an action under this statute, and is applicable to a case such as presented by the facts now before us. The employee assumes,

as a risk of his employment, such dangers as are normally and necessarily incident to his occupation, and a workman of mature years is taken to assume them whether he is aware of their existence or not; but risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care. They are the unusual, extraordinary, and unexpected acts, and the employé is not to be treated as assuming such risks until he becomes aware of their existence, unless the act or risk is so obvious that an ordinarily prudent person would have observed and appreciated them."

Pleading.—To the same effect as the original annotation see *Lewis v. Texas, etc., R. Co.*, (1920) 146 La. 227, 83 So. 535, wherein the court said: "Defendant has argued on this hearing that the deceased assumed the risks of his employment, and that therefore his widow cannot recover damages. The federal Employers' Liability Act provides for the assumption of 'extraordinary risks incident to his (employee's) employment,' but the record does not disclose that Lewis assumed any extraordinary risks in boarding the motorcar, under the direction of his employers, for the purpose of being taken back to the boarding cars of the defendant company, where he was required to return each night. But defendant failed to plead assumption of risk on the part of Lewis; and as this is a special defense, which has to be specially pleaded, it cannot be heard on the trial of the case at this time, particularly on an application for rehearing, when it was not pleaded or argued in the trial court or on the former hearing of the case in this court."

II. PRINCIPLES GENERALLY AS TO ASSUMPTION OF RISK

1. In General (p. 1355)

Rule as to usual and ordinary risks.—To same effect as original annotation, see *Erie R. Co. v. Collins*, (C. C. A. 2d Cir. 1919) 259 Fed. 172, 170 C. C. A. 240, *affirming* (W. D. N. Y. 1917) 245 Fed. 811; *Leary v. New York Cent. R. Co.*, (Mass. 1920) 126 N. E. 792.

The servant assumes all the risks of his employment which are known to him, or which could have been known by the exercise of ordinary care of a person of reasonable prudence and diligence in like circumstances. Risks not naturally incident to the occupation, but which arise from the negligence of the master, are not assumed by the servant until he becomes aware of such negligence and of the risks arising therefrom, unless the negligence and risk are so apparent and obvious that an ordinary and careful person would observe the one and appreciate the other. *Lusk v. Bandy*, (1919) 76 Okla. 108, 184 Pac. 144.

Unusual or extraordinary risks.—So far as extraordinary hazards are concerned, an

interstate railway employee may assume that the employer and his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the dangers arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them. *Chicago, etc., R. Co. v. Ward*, (1920) 252 U. S. 18, 40 S. Ct. 275, 64 U. S. (L. ed.) —, *affirming* (Okla. 1918) 173 Pac. 212, wherein it was held that a switchman riding on a cut of freight cars which he was to check by applying a brake when these cars should be cut off from the engine does not assume the risk of sudden precipitation from the front end of a car by the abrupt checking resulting from the failure of the engine foreman to make the disconnection at the proper time.

An instruction on behalf of an interstate employee intended to negative assumption by him of an extraordinary risk and hazard, but omitting the proviso "unless open and apparent," is not erroneous where such risk and hazard, by negligence of the defendant, was suddenly created, and he did not in fact see the danger, and had the right to assume and did assume he would not be subjected to such extraordinary danger as resulted in his injury. *Keathley v. Chesapeake, etc., R. Co.*, (W. Va. 1920) 102 S. E. 244.

Distinction between assumed risk and contributory negligence.—To same effect as original annotation, see *Anzolotti v. McAdoo*, (S. D. N. Y. 1919) 262 Fed. 568.

When defense may be pleaded.—In order to avail himself of the defense of assumption of risk the employer must show that the dangers arose either from continuing in the discharge of the work, or from an omission by the employee to do something which was not a part of the discharge of his duties. Accordingly, the defense may not be pleaded where it does not appear that the employee had no way of discharging his duties other than the dangerous one he adopted. In such case the question presented is one of contributory negligence rather than assumption of risk. *Anzolotti v. McAdoo*, (S. D. N. Y. 1919) 262 Fed. 568.

Brake beams left scattered in a switch yard do not, as to a switch tender, constitute a risk ordinarily incident to the employment, "and he had a right to assume that the appellant had exercised proper care with respect to providing a reasonably safe place for him to work, free from any obstacles which would be likely to cause him injury. In other words, as the statute has been construed by the courts, an employee cannot be treated as having assumed a risk until he becomes aware of the defect or obstruction and of the risk arising from it, unless it is so obvious that an ordinarily prudent person under similar circumstances would have observed it." *Lock v. Chicago, etc., R. Co.*, (Mo. 1920) 219 S. W. 919.

Known defects in platform.—A station employee who knew of defects in a cement

walk leading to the baggage room, and who undertook to move a truck loaded with trunks over that walk when the lights were turned off, assumed the risk of injury from a trunk falling from the truck. *Hines v. Wicks*, (Tex. Civ. App. 1920) 220 S. W. 581.

2. Knowledge as Affecting (p. 1356)

Actual knowledge.—"The servant does not assume any risks or dangers arising from the negligence of the master of which he has no knowledge; but he does assume the risks and dangers caused by the master's negligence of which he had prior knowledge." *Hines v. Bannon*, (Tex. Civ. App. 1920) 221 S. W. 684, holding that risk of injury from known defects in floor of "dirt spreader" were assumed by employee.

Appliances or place of work not safe.—To same effect as original annotation, see *Pennsylvania R. Co. v. Nelson*, (C. C. A. 2d Cir. 1919) 259 Fed. 156, 170 C. C. A. 224.

In *Hatton v. New York, etc., R. Co.*, (C. C. A. 1st Cir. 1919) 261 Fed. 667, it appears that the plaintiff's decedent, an experienced trainman, was injured while unloading a barrel from a freight car. A gangplank had been placed between the car and the station platform, and the barrel was being placed upon it, when the end of the gangplank on the platform slipped on some ice, causing the plaintiff's decedent to fall and sustain the injuries from which he later died. It was shown that he had knowledge of the presence of the ice on the platform and had been warned by a fellow servant that the plank was in an insecure position. It was held that he had assumed the risk and that there could be no recovery for his injury.

Knowledge of rules.—The rules and regulations of a railroad company, formulated for the government or control of their employees, are only operative upon such of the employees as have received notice thereof, or who are chargeable with knowledge of their existence. *Anderson v. Director General of Railroads*, (N. J. 1920) 110 Atl. 829.

Risk of dangers arising from causes ab extra.—In *Anderson v. Director General of Railroads*, (N. J. 1920) 110 Atl. 829, it appeared that plaintiff's intestate, a conductor, while riding on the step of an engine in the yard, was killed when another engine collided with it. The contention of the defendant was that the step of the engine upon which the decedent stood at the time of the accident was a place of known danger, and that, therefore, he assumed all the risks incident to that position. The court, answering this contention, said: "We content ourselves with repeating what was said by the Supreme Court in the case of *Brackney v. Public Service Corporation*, 77 N. J. Law, 1, 71 Atl. 149, where the plaintiff had taken up his position on the front platform of a trolley car, and was injured by a collision between it and a passing vehicle:

"A person, under such circumstances, assumes such risks as are incident to the ordi-

nary operation of the car, and not risk of dangers arising from causes ab extra.”

Well known dangerous yard movement.—A member of a train crew assumes the risk arising from a well known dangerous yard movement. *Reed v. Director General of Railroads*, (Pa. 1920) 110 Atl. 254, where the court said:

“Taking the evidence in the light most favorable to plaintiff, as of course we must do, we find the facts to be as follows: Decedent was a member of a crew which had brought a train from South Bethlehem to Philadelphia. Some of the cars contained goods shipped in interstate commerce. When all the cars were released at their appropriate places, the engine went back to get the caboose, for the purpose of taking it to the point where it was to stay until wanted for further traffic, and then itself go to the round-house, where it remained until again needed. This movement was through defendant's yard, where there were a number of tracks, upon which cars and locomotives were being shifted constantly. Through the yard ran also the main passenger tracks of defendant, and, at the points where other tracks crossed over or connected therewith, derailing devices had been wisely installed for the purpose of preventing locomotives and cars using the other tracks from running onto or over the passenger tracks, at a time when passenger trains were standing or moving thereon, and thereby possibly causing collision and serious loss of life.

“The engine and caboose which had reached South Bethlehem were moving over a track which had one of those derailing devices where it connected with the passenger tracks. The caboose being in front of the locomotive, the engineer could not see the device when operating the engine from his cab, and hence decedent was directed to and did locate himself on the front of the caboose, with a duty to signal the engineer in time for him to safely stop if the derailing device was set against further passage. It was so set on this occasion, but either through the negligence of decedent himself, or of the engineer in not noticing or heeding the signaling of decedent, the latter did not stop in time, the caboose was derailed, and decedent was crushed to death between it and cars on an adjoining track. In considering the present question we also assume the negligence was that of the engineer, and not of decedent. . . . In the present case decedent knew of the risks he assumed in the movement of the engine and caboose through the yard; he knew the place was a dangerous one; he knew that if he did not warn the engineer in time, or if the latter did not see or heed the signals, the engine and caboose would be derailed, a collision with engines or cars on other tracks was probable, and he might be injured or killed as a result thereof. In other words, he was engaged in a well-known dangerous yard movement; and the Supreme Court of the United States, which

is, of course, the final arbiter in construing the federal Employers' Liability Act, has repeatedly held that under such circumstances the person injured assumes the ordinary risks of his employment, and no recovery can be had if injury or death results therefrom.”

3. Acts of Master or Superior as Affecting (p. 1357)

Assurance of safety by foreman held to prevent assumption by trucker of risk of injury from defect in truck which he was using to unload freight car. *Cox v. St. Louis, etc., R. Co.*, (Tex. 1920) 222 S. W. 964.

4. Negligence of Employer (p. 1359)

Rule stated.—The risks which a servant may incur in any employment fall naturally into one or the other of two classes: First, the ordinary risks of the service, that is, those which are not created by the master's negligence and which remain after he has used due care to remove them; and, second, the extraordinary risks or those which are created by the master's negligence. It is probably a universal rule that the servant merely by entering the service of the master assumes the ordinary risks of the service, and if he is injured solely because of them he cannot recover. But at common law and under the federal Employers' Liability Act risks created by the master's negligence are not assumed by the servant unless with an actual or constructive knowledge thereof and appreciation of the danger therefrom he voluntarily enters or continues in the employment of the master. *Yazoo, etc., R. Co. v. Dees*, (Miss. 1920) 83 So. 613.

An employee of a railroad company, except in cases involving violation by the carrier of the statute enacted for the safety of employees, assumes the ordinary risks and hazards of his particular employment, and also those defects and risks which are known to him, or which are plainly observable, although due to the master's negligence. *Louisville, etc., R. Co. v. Hood*, (Ga. App. 1920) 102 S. E. 133.

5. Negligence of Fellow Servant (p. 1361)

Rule stated.—To same effect as original annotation, see *Lehigh Valley R. Co. v. Scanlon*, (C. C. A. 2d Cir. 1919) 259 Fed. 137, 170 C. C. A. 205.

The federal Employers' Liability Act places a coemployee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of the assumption of risk. *Chicago, etc., R. Co. v. Ward*, (1920) 252 U. S. 18, 40 S. Ct. 275, 64 U. S. (L. ed.) —, *affirming* (Okla. 1918) 173 Pac. 212.

In *Anderson v. Director General of Railroads*, (N. J. 1920) 110 Atl. 829, the court said “By the first section of the federal act a right of action is conferred by the injury or death of the employé ‘resulting in whole

or in part from the negligence of any of the employes of the carrier.' Although section 4 of the act recognizes the common-law doctrine of assumed risk as still existent, with certain expressed limitations based upon statutory duties imposed upon the employer, and although that doctrine included the proposition that an employé assumed the risk of injury resulting from the negligent act of a fellow servant, yet the federal statute, having expressly declared that an action will lie where the injury or death of the employé has resulted from the negligence of a fellow servant, has also declared, by necessary implication, that the negligence of a fellow servant shall not constitute a defense to such action. To hold, therefore, that an injury resulting from the negligence of a fellow servant is one of the risks assumed by an employé, and that the carrier may set up that assumption in bar of the action, would be, in legal effect, to strike out the express provision of the act just recited."

In *San Pedro, etc., R. Co. v. Brown*, (C. C. A. 9th Cir. 1919) 258 Fed. 806, 170 C. C. A. 100, 8 A. L. R. 865, the court commenting on the rule stated in the original annotation said:

"It is also argued that Brown must be held to have assumed the risk of the injury he sustained as a result of his reliance on his coemployé and the failure of his coemployé to place the flag and so protect him. The point is based upon a portion of the charge of the lower court to the effect that Brown did not assume the risks that were attendant upon the negligence of a fellow servant.

"Clearly, under the act, the defense of assumption of risk is open to the carrier, except in actions brought under section 4, which provides that, in an action for damages for injury to an employé, 'such employé shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employé.' *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. But Brown was not injured by reason of any defect in the machinery, or by reason of any danger normally or necessarily incident to the occupation of inspecting cars. The accident would not have happened at all, but for the negligence of a fellow servant; and as to employers, while engaged in interstate commerce, the servant so engaged does not agree, as between himself and the carrier, to assume the risk of the negligence of his fellow servant. *Watson v. St. Louis R. Co.* (C. C.) 169 Fed. 950. In *Boldt v. Penn. Ry.*, 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385, the court affirmed the action of the trial court in refusing to charge that 'the risk the employé now assumes, since the passage of the federal Employers' Liability

Act, is the ordinary danger incident to his employment, which does not now include the assumption of risk incident to the negligence of defendant's officers, agents, or employes.' The opinion expressed was that the requested charge was erroneous, because the action there brought was not one within the provisions of section 4 of the act. But as far as we are advised it has never been held that in an action brought under the statute, where an employé trusts to another to do an act necessary for his safety, and he himself is not aware of the failure of such employé to do the act, and actually goes on with his work, relying upon the performance of the act by his fellow servant, and by reason of the negligence of the employé relied upon injury follows, the risk of such negligence on the part of the fellow servant is assumed by the injured man. In *Illinois Central Railroad Co. v. Skaggs*, 240 U. S. 86, 36 Sup. Ct. 249, 60 L. Ed. 528, upon a writ of error to review a judgment recovered under the federal Employers' Liability Act, it was argued that the railroad company could not be negligent to an employé whose failure of duty and neglect produced the dangerous condition. The court took it for granted that under the statute recovery by an employé for the consequences of actions exclusively his own could not be had. In qualifying the assumption, the court said in effect that where the injury to the employé does not result in whole or in part from the negligence of any of the agents or employes of the employing carrier, or by reason of any defect or insufficiency, due to its negligence, in its property or equipment, action would not lie. 'But,' continued the court, 'on the other hand, it cannot be said that there can be no recovery simply because the injured employé participated in the act which caused the injury. The injury must be whether there is neglect on the part of the employing carrier, and, if the injury to one employé resulted in whole or in part from the negligence of any of its other employes, it is liable under the express terms of the act; that is, the statute abolished the fellow-servant rule. If the injury was due to the neglect of a coemployé in the performance of his duty, that neglect must be attributed to the employer; and, if the injured employé was himself guilty of negligence contributing to the injury, the statute expressly provides that it shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé.' This decision we believe to be applicable to the facts in the case before us. Brown, pursuing the usual practice at Yermo, may have participated in the act of failing to put up the flag; but Ables' failure was, in large part, the direct cause of the damage. Brown relied upon Ables, and in reliance upon him went on to perform his duty. By the express terms of the statute the negligence of Ables may be attributed to the carrier."

Ordinarily the servant assumes the risks incident to the negligent acts of the officers, agents and fellow employees of the master, but he does not assume the risks of unusual and extraordinary acts of negligence. *Dutrey v. Philadelphia, etc., R. Co.*, (1919) 265 Pa. St. 215, 108 Atl. 620, wherein the court said:

"Except, then, as to the injuries resulting from the violation of statutes, the common-law doctrine of assumption of risk still remains as a complete defense in an action under this statute, and is applicable to a case such as presented by the facts now before us. The employé assumes, as a risk of his employment, such dangers as are normally and necessarily incident to his occupation, and a workman of mature years is taken to assume them whether he is aware of their existence or not; but risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care. They are the usual, extraordinary, and unexpected acts, and the employé is not to be treated as assuming such risks until he becomes aware of their existence, unless the act or risk is so obvious that an ordinarily prudent person would have observed and appreciated them."

Known or obvious negligence.—Under the federal Employers' Liability Act, an employee does not assume a risk attributable to the negligence of his coemployees until he is aware of it, unless the risk is so obvious that an ordinarily prudent person in his situation would observe and appreciate it. *Erie R. Co. v. Purucker*, (1917) 244 U. S. 320, 37 S. Ct. 629, 61 U. S. (L. ed.) 1166; *Central R. Co. v. Sharkey*, (C. C. A. 2d Cir. 1919) 259 Fed. 144; *Erie R. Co. v. Collins*, (C. C. A. 2d Cir. 1919) 259 Fed. 172, 170 C. C. A. 240, *affirming* (W. D. N. Y. 1917) 245 Fed. 811.

"A workman does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them, the risk of the negligence of his employer, or of the employer's agents or servants, for such risks are not risks incidental to the employment." *Delaware, etc., R. Co. v. Busse*, (C. C. A. 2d Cir. 1920) 263 Fed. 516.

"Under the federal Employers' Liability Act, a servant does not ordinarily assume the negligent acts of a fellow servant; but, if he becomes aware of the risk and danger arising therefrom and continued in the employment, or if the risk and dangers therefrom are so obvious that an ordinarily prudent person under the same circumstances would have observed the one and appreciated the other, then the employee assumes the risk arising from the negligent act of a co-employee." *Ferris v. Jones*, (1920) 78 Okla. 154, 189 Pac. 527.

"Except in cases specified in section 4, the employé assumes the risk due to the negligence of other employes if the danger is obvious as fully known to him." *Curtis v. Erie R. Co.*, (Pa. 1920) 109 Atl. 871.

As to the negligence of a fellow servant there is under the federal law no assumption of risks until at least actual knowledge of such particular negligence is brought to the plaintiff's attention or it is so obvious that the ordinarily prudent person would observe it. *Kalashian v. Hines*, (Wis. 1920) 177 N. W. 602.

In *Southern R. Co. v. Simmons*, (Ga. App. 1919) 100 S. E. 5, the court said: "The plaintiff was a section hand in the employ of the defendant, and was injured while engaged in the work which he was employed to perform. The uncontradicted evidence shows that, as to the acts of negligence charged, the defendant used all ordinary care for the plaintiff's safety, unless it be that the foreman was negligent in ordering him to remove the lever car at the time and place he did; and, even though the defendant was negligent in this respect, such negligence was known to the plaintiff, and was plainly observable. He therefore assumed the risk occasioned thereby, and cannot recover."

III. PARTICULAR EMPLOYEES (p. 1362)

Section men, trackwalkers and repairmen.

—In *Bennett v. Atchison, etc., R. Co.*, (Ia. 1919) 174 N. W. 798, the petition alleged, among other things, substantially that plaintiff's intestate, a trackwalker, was struck and killed on a portion of defendant's double tracks, which run through a deep cut, and on a curve, and that when two trains were passing in said cut, deceased could not avoid an approaching train on one track, except by crossing the adjacent track; that while deceased was engaged in his duties, and while his red signal flag was being displayed, defendant's employees in charge of a passenger train going west on the north track sounded its whistle, and deceased heard and observed said train, and to avoid it stepped over on or across the other track when, without warning or other signal, a freight train, running at high speed, and without sounding the whistle or giving any other warnings, and at the moment when deceased was avoiding danger from the passenger train, negligently ran upon and over said deceased, causing instant death; that the trainmen on the freight did, or could have seen deceased in his perilous condition in time to have prevented the death of deceased; that defendant was negligent in operating its said trains through said cut so nearly at the same time when the defendant should have or did know that the deceased was at said place, and in said cut at said time, and not avoiding said injuries. The answer is in general denial, and that deceased was guilty of contributory negligence, and, further, "that the alleged injuries for damages, on account of which this action was brought, arose out of the risks of the employment in which said deceased was engaged, of which risks he had full knowledge and notice, and that deceased, by entering and continuing in said employment, voluntarily assumed said risks." On

an appeal from a judgment for the plaintiff, the court said: "The trial court did not instruct the jury on the question of assumption of risks, and of this appellant complains. Many cases are cited by both sides, both state and federal, on the question, and the question is argued as to whether the common-law rule of assumed risk, as applied to this case, is changed by the federal Employers' Liability Act. . . . Appellant contends that the rule is not changed, and they cite *Jacobs v. Railway*, 241 U. S. 229, 36 S. Ct. 588, 60 U. S. (L. ed.) 970; *Baugham v. Railway*, 241 U. S. 237, 36 S. Ct. 592, 60 U. S. (L. ed.) 977. As we understand appellee's argument, they admit that the common-law doctrine of assumption of risk remains in this class of cases the same as it did before the enactment of the Liability Act. But since the question has not been raised by the pleading, we deem it unnecessary to discuss this feature further. Appellant states its proposition that deceased assumed all risk incident to his work, and to the usual and proper operation of its trains. It seems to be conceded, as it must be, that deceased did not assume the added risk of the employer's negligence, unless he had knowledge of the improper operation of the train and conditions which created the danger, and that he had an appreciation of the danger attending such conditions. The burden is upon the defendant to allege and prove such assumption of risk. *Scott v. Railway*, 160 Iowa 306, 141 N. W. 1065; *Taylor v. Railway*, 170 N. W. 388-391; *Martin v. Light Co.*, 131 Iowa 724-734-735, 106 N. W. 359. Appellee challenges the sufficiency of the answer to raise this question, and contends that the answer does not more than plead the assumption of the risk which inheres in the contract of hiring. In *Shebeck v. Cracker Co.*, 120 Iowa 414-416, 94 N. W. 930, the answer alleged that the defective condition of the machinery was well known to the deceased, and that, knowing it, he remained in defendant's service without protest, and this was held to tender a plea of assumption of risk; that is, the added risk because of the employer's negligence. The substance of the answer at this point is that the alleged injuries arose out of the risks of the employment of which risks deceased had full notice and knowledge, and that deceased, by entering and continuing in said employment, voluntarily assumed said risks. There is nothing therein that deceased had knowledge, or appreciated the danger, the negligent manner in which defendants operated the train, or that he assumed such risk. It simply states that he assumed the risks of his employment, which is no more than saying that he assumed the ordinary risks. We think the case at this point is ruled by *Martin v. Light Co.*, *supra*. See, also, *Brums v. Brick Co.*, 152 Iowa 61, 130 N. W. 1083. The matter is discussed in the *Martin Case*, 131 Iowa, at pages 735 and 737, 106 N. W. 359. Furthermore, the evidence does not show that deceased assumed such additional risk."

A judgment for a section hand injured by a switch engine while clearing snow from a switch in a railroad yard was reversed in *Tober v. Pere Marquette R. Co.*, (Mich. 1920) 177 N. W. 385, and a new trial granted for errors committed by the trial court in instructions to jury.

Engineer.—In an action under the federal Employers' Liability Act 1908 to recover damages for the death of a locomotive engineer who, while leaning out of the cab of his engine and looking backward, was struck by one of the steel girders of an overhead bridge, the special findings show that the clearance between the bridge and the side of the engine was approximately two feet; that deceased had been running an engine over the bridge for 15 years; that in the year previous to the accident he had run an engine of the same class over the same bridge 300 times, including 26 times in that month; that he had warned his fireman against the dangers in passing through the same kind of bridges; that the engine he was operating did not sway from side to side in going over the bridge more than was ordinarily the case in engines of similar type. Held, that the defendant was entitled to judgment on the findings, because they establish that deceased had assumed the risk. *McDougall v. Atchison, etc., R. Co.*, (Kan. 1920) 186 Pac. 1028.

Workman in railroad repair shop.—Where in a railroad repair shop the master has prescribed no particular means whereby the workmen shall climb upon locomotives undergoing repair, but the workmen, when required to take off or replace parts of such engines, have always climbed thereon by means of projecting parts of the engine and cab, an experienced workman, accustomed repeatedly each day to climb upon engines by the use of such means, must rely upon his own judgment in selecting handholds, and assumes the risk thereof. And where an experienced workman in a railroad repair shop, in replacing a part of a dismantled locomotive, uses as a handhold in climbing thereon a loose pipe placed or stuck upon a projecting bolt, mistaking it for a stationary part of the engine, and falls and is injured by reason of its giving way, the placing of the loose pipe in such position by a fellow servant of the injured workman does not constitute actionable negligence, where the circumstances are such as to require the injured workman to rely upon his own judgment in the means employed in climbing upon the engine, and where the risk of injury therefrom has been assumed by him. *Davis v. Chicago, etc., R. Co.*, ((Neb. 1920) 177 N. W. 181.

Switchmen.—A switchman does not assume the risk of the light in switch lamps going out because employees charged with the duty of filling the lamps with oil neglected to perform that duty. *Yazoo, etc., R. Co. v. Dees*, (Miss. 1920) 83 So. 613.

A brakeman who without order or signal gets off a moving train at an unusual and

unnecessary distance from the place where he is to throw a switch is not entitled to recover for an injury received from falling into an unguarded culvert near the place where he got off the train. *Manuel v. Louisville, etc., R. Co.*, (1919) 186 Ky. 584, 215 S. W. 280.

Brakeman coupling cars is held to assume risk of injury from uneven condition of roadbed. *Hamm v. Texas, etc., R. Co.*, (Tex. Civ. App. 1920) 221 S. W. 345.

Employees in freight yards are aware that cars and engines move in all directions at irregular intervals, and so long as the movement is not unusual employees assume the risk of the accidental hazards incident to employment in such places, and must be on the lookout for their personal safety. *Curtis v. Erie R. Co.*, (Pa. 1920) 109 Atl. 871.

IV. BURDEN OF PROOF (p. 1363)

General rule.—*assumption of risk.*—To the same effect as the original annotation, see *Kenyon v. Illinois Cent. R. Co.*, (Ia. 1919) 173 N. W. 44; *Dutrey v. Philadelphia, etc., R. Co.*, (1919) 265 Pa. St. 215, 108 Atl. 620; *McDowell v. Southern R. Co.*, (S. C. 1920) 102 S. E. 639.

See further to the same effect *Crugley v. Grand Trunk R. Co.*, (N. H. 1919) 109 Atl. 293, wherein the court said:

"In *Central Vermont R. R. v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B 252, it was held that the rule as to burden of proof upon the issue of contributory negligence is not a mere matter of procedure, but of substantive law; that Congress presumably enacted the federal Employers' Liability Act with the intent that the federal rule on this subject should apply; and that therefore it does apply, although the suit be brought in a state court in a jurisdiction where the local rule is different.

"In view of this decision, and of the federal rule that the burden of proof upon the issue of assumption of risk is upon the defendant, there is no reasonable doubt that the construction of the statute as to contributory negligence will be followed as to assumption of risk. *New Orleans, etc., Co. v. Harris*, 247 U. S. 367, 372, 38 Sup. Ct. 535, 62 L. Ed. 1167. The federal interpretation of the statute has progressed sufficiently to indicate the rule to be applied at trials. In suits brought under this act, juries should be instructed that upon the issues of contributory negligence and assumption of risk the burden is on the defendant. It was therefore error to charge that the plaintiff had the burden upon assumption of risk, and for this reason the verdict must be set aside."

V. QUESTIONS FOR COURT AND JURY (p. 1363)

General rule.—To same effect as original annotation, see *Virginian R. Co. v. Halstead*, (C. C. A. 4th Cir. 1919) 258 Fed. 428, 169

C. C. A. 444; *Erie R. Co. v. Collins*, (C. C. A. 2d Cir. 1919) 259 Fed. 172, 170 C. C. A. 240, *affirming* (W. D. N. Y. 1917) 245 Fed. 811; *Pittsburgh, etc., R. Co. v. Cole*, (C. C. A. 6th Cir. 1919) 260 Fed. 357, 171 C. C. A. 223, *certiorari denied* (1919) 250 U. S. 671, 40 S. Ct. 15, 63 U. S. (L. ed.) 1199; *Schantz v. Northern Pac. R. Co.*, (N. D. 1919) 173 N. W. 556; *Dutrey v. Philadelphia, etc., R. Co.*, (1919) 265 Pa. St. 215, 108 Atl. 620; *McDowell v. Southern R. Co.*, (S. C. 1920) 102 S. E. 639.

On the issue of assumption of risk by a servant who has sustained injuries, where the evidence is harmonious and consistent and the circumstances are such that all reasonable men must reach the same conclusion, the question whether the plaintiff assumed the risk is one of law for the determination of the court; but where the facts are controverted, or are such that different inferences may be drawn therefrom, the question as to the assumption of the risk should be submitted to the jury under proper instructions from the court. *Luak v. Bandy*, (1919) 76 Okla. 108, 184 Pac. 144.

Harmless error in charge.—The inaccuracy of a charge on the assumption of risk could have worked no harm to the defendant where the situation did not make the doctrine of assumed risk a defense to the action. *Chicago, etc., R. Co. v. Ward*, (1920) 252 U. S. 18, 40 S. Ct. 275, 64 U. S. (L. ed.) —, *affirming* (Okla. 1918) 173 Pac. 212.

Section hand standing on hand car.—Whether a minor servant eighteen years old, working as a section hand on a railroad, comprehended and fully appreciated the danger attendant upon his standing on the front end of a lever hand car of standard make and working the lever, while the car was under way, in the absence of warning thereof and advice as to means of avoiding it, is a question proper for jury determination, and their findings that he did not and that the failure of the employer, through its foreman, to give him warning of such danger, or to put him in a safer place on the car, in view of his immaturity and inexperience, was negligence on its part and the proximate cause of the injury, cannot be disturbed by the trial court. *Mills v. Virginian R. Co.*, (W. Va. 1920) 102 S. E. 604.

Vol. VIII, p. 1364, sec. 5. [First ed., 1909 Supp., p. 585.]

II. Applicability of section generally.

III. Settlement and release after injury.

II. APPLICABILITY OF SECTION GENERALLY (p. 1365)

Requirement of notice of claim.—A provision in a contract of employment that the employee will give notice in writing within thirty days of any personal injury for which he claims damages and that failing such notice his cause of action therefor shall be

barred is void as applied to injuries received by the employee while engaged in interstate commerce. *Panhandle, etc., R. Co. v. Brooks*, (Tex. 1920) 222 S. W. 186.

III. SETTLEMENT AND RELEASE AFTER INJURY (p. 1367)

Rescission of contract of release on ground of fraud.—The well-established principle of law that, before a party to a contract is entitled to have it rescinded for fraud in its procurement, he must pay back or tender any valuable consideration received under the terms of the contract, applies to an action for personal injuries brought under the federal Employers' Liability Act where the plaintiff, after the infliction of the injury sued for, signed, for a valuable consideration, a contract releasing the defendant from all liability therefor. *Central of Georgia R. Co. v. Hoban*, (Ga. App. 1920) 102 S. E. 46.

Vol. VIII, p. 1369, sec. 6. [First ed., 1912 Supp., p. 335.]

- I. Limitation of action.
- II. Jurisdiction and venue.
- III. Removal to federal court.

I. LIMITATION OF ACTION (p. 1370)

Necessity of pleading act to obtain benefit of it.—This section operates to define and limit the right to maintain an action, and hence is not, strictly speaking, a statute of limitations required to be specially pleaded. *Louisville, etc., R. Co. v. Echols*, (Ala. 1920) 84 So. 827.

It has been held, however, that the statutory limitation is waived by a failure to plead it. *Pittsburgh, etc., R. Co. v. Ireton*, (Ind. App. 1920) 126 N. E. 431.

Time of accrual of cause of action.—When the cause of action is to recover damages for the death of the injured employee it accrues when an administrator is appointed. *Williams v. Western, etc., R. Co.*, (Ga. App. 1920) 102 S. E. 186, wherein the court said: "The authorities are conflicting on the question as to when a cause of action under this act accrues. Some hold that the right accrues upon the appointment of an administrator of the estate of the person for whose homicide a suit is brought, while others hold that it accrues upon the death of the decedent. The weight of authority seems to support the view that the cause of action accrues with the appointment of the administrator. Without attempting any lengthy discussion or elaboration of the authorities pro and con, we are content to rest our decision on the authority of the recent well-considered and exhaustively treated case of *American R. Co. of Porto Rico v. Coronas*, decided by the United States Circuit Court of Appeals, First Circuit, 230 Fed. 545, 144 C. C. A. 599, L. R. A. 1916E 1095. It is there held: 'A cause of action to recover damages for death under the federal Employers' Liability Act

accrues when an administrator is appointed, and not at the time of death, within the meaning of the section providing that no action shall be maintained unless commenced within two years from the day the cause of action accrued.' L. R. A. 1916E 1095. We adopt the conclusion reached in that case, and hold that the cause of action in this case accrued with the appointment of the administrators."

Limitation on liability.—The provision that "no action shall be maintained . . . unless commenced within two years," etc., is a limitation on the liability, and if an action be not commenced within the period thus specified, the right of action conferred by the statute is extinguished. *Carpenter v. Central Vermont R. Co.*, (Vt. 1919) 107 Atl. 569.

Application to Alaska.—In *Sandstrom v. Pacific Steamship Co.*, (C. C. A. 9th Cir. 1919) 260 Fed. 661, 171 C. C. A. 425, it was held that the one year limitation contained in section 4 of the Employers' Liability Act of June 11, 1906 (8 Fed. Stat. Ann. (2d ed.) 1209), applied to Alaska.

Filing of amended complaint after two year period.—Where an original complaint does not indicate whether the injury occurred in intrastate or interstate commerce and the action was brought within two years from the accrual of the cause of action, an amendment to the complaint bringing the action within the terms of this act is not a departure, and though made after the expiration of the two years is not barred by this section. So where an action is begun by an injured employee under this act and he subsequently dies and his wife revives the action under authority of section 9 of the act and files an amended complaint including therein a cause of action for his death, such amended complaint is good though made over two years after the death occurred. *Louisville, etc., R. Co. v. Echols*, (Ala. 1920) 84 So. 827.

Where an amendment serves only to amplify or enlarge the allegations of the original petition, it relates back, and the fact that it is filed after two years has elapsed does not make it subject to the statute of limitations. *Lammers v. Chicago Great Western R. Co.*, (Ia. 1919) 175 N. W. 311, wherein the court said: "We think it clear that the amendment did not state a new cause of action, but only amplified and enlarged the cause of action by specifically and directly asking relief under the federal Employers' Liability Act, and therefore related back to the original cause of action."

Where a declaration setting up a cause of action at common law is amended to set up a cause of action under the federal Employers' Liability Act the amended declaration introduces a new cause of action which must have been commenced within the statutory period. *Carpenter v. Central Vermont R. Co.*, (Vt. 1919) 107 Atl. 569.

Where a woman sues as widow for the death of her husband and thereafter amends

so as to sue as administratrix and to add an allegation that the husband was at the time of his death engaged in interstate commerce no new cause of action is stated. *Wilson v. Denver, etc., R. Co.*, (Colo. 1920) 187 Pac. 1027, following former decision 62 Colo. 492, 163 Pac. 857.

II. JURISDICTION AND VENUE (p. 1372)

Necessity of diversity of citizenship.—Under the provisions of this Act diversity of citizenship of the parties is not necessary. *Missouri Pac. R. Co. v. Mette*, (C. C. A. 8th Cir. 1919) 261 Fed. 755.

III. REMOVAL TO FEDERAL COURT (p. 1374)

Removal prohibited for any cause.—To same effect as original annotation, see *Frazier v. Hines*, (E. D. S. C. 1919) 260 Fed. 874.

Dismissal of action in state court as "removal."—The provisions of this section do not prevent a plaintiff from dismissing an action under this Act which he has brought in a state court, and thereafter bringing it in a federal court. *Missouri Pac. R. Co. v. Mette*, (C. C. A. 8th Cir. 1919) 261 Fed. 755, wherein the court said: "When plaintiff afterwards brought the same suit in a United States court, such proceeding was not a removal, within the meaning of the Removal Act, nor within the meaning of section 6 of the Employers' Liability Act."

Vol. VIII, p. 1378, sec. 9. [First ed., 1912 Supp., p. 335.]

- I. Construction and operation generally.
- II. Survival of actions.

I. CONSTRUCTION AND OPERATION GENERALLY (p. 1378)

Two causes of action on death of injured employee.—Two distinct causes of action, made so by the subsequent death of the injured employee, are created by the federal act where the same wrongful act or neglect causes both the injury and after a legally appreciable period the employee's death. And these two causes of action may be united in one action. *Louisville, etc., R. Co. v. Echols*, (Ala. 1920) 84 So. 827.

II. SURVIVAL OF ACTIONS (p. 1380)

Effect of recovery by employee himself.—A deceased employee's personal representative has no right to maintain an action when the employee himself has recovered for the injury he suffered. *Seaboard Air Line R. Co. v. Oliver*, (C. C. A. 5th Cir. 1919) 261 Fed. 1, 171 C. C. A. 597, the court saying: "So far as we are advised, the question . . . has not heretofore been ruled on. . . . If, during the life of the injured employee, his employer's liability for the tort is extinguished by any occurrence ordinarily having that effect, the employee's personal representative has no right of action for the

injury, as the single cause of action upon which a suit by him must be based has ceased to exist. . . . The cause of action counted on has been extinguished by payment of the judgment recovered by the decedent for the wrong he suffered."

Claim for conscious pain and suffering as properly pleaded in action by widow for pecuniary loss.—A claim for conscious pain and suffering under this section may be made in an action by a widow claiming damages for pecuniary loss to herself and child, but unless pleaded there can be no recovery for such pain and suffering. *Lewis v. Texas, etc., R. Co.*, (1920) 146 La. 227, 83 So. 535.

Vol. VIII, p. 1387, sec. 2. [First ed., 1909 Supp., p. 582.]

- II. Constitutionality and construction.
- IV. "Require or permit."
- V. Employees within Act.
- VII. Night and day offices.

II. CONSTITUTIONALITY AND CONSTRUCTION (p. 1389)

Construction.—To same effect as original annotation, see *U. S. v. Baker*, (S. D. Tex. 1919) 261 Fed. 703.

IV. "REQUIRE OR PERMIT" (p. 1389)

Intent is not an essential of the offense prohibited by this section. *U. S. v. Baker*, (S. D. Tex. 1919) 261 Fed. 703, wherein it was said: "In a case of this kind, where the words 'knowingly and willfully' are not employed, and the carrier is made liable if it requires or permits any employé to be or remain on duty in violation of statutory provisions, the fact of doing the thing prohibited by the statute constitutes the offense, although there is no turpitude nor wrong arising out of willfulness or special intent."

"In the case of *A. T. & S. F. v. United States*, 236 Fed. 907, 150 C. C. A. 169, the evidence showed that the operation complained of in the action had not been instituted by the company after the taking effect of the Hours of Service Act, but had existed long prior thereto. The court said:

"This course of handling the business was adopted by the company for reasons of convenience, not to evade any law. It began before the passage of the Hours of Service Act. . . . And what could not be done as a new departure would be equally inadmissible as an old custom."

"While it thus appears clear that the presence or absence of a specific intent to employ a subterfuge to violate the law is not material in determining the question of its violation vel non, it is equally clear that, in determining the amount of penalty which should be assessed therefor, specific intent should have just weight. Finding as I do a violation of the law through the doing of the act which the law forbids, without any evidence of the presence in the mind of the

receiver of a specific intent to violate it, or that the method employed for the doing of the work was arrived at as a subterfuge, I shall, in finding for the United States, assess the minimum penalty upon each count."

V. EMPLOYEES WITHIN ACT (p. 1391)

Employees of terminal company.—A company maintaining a station and engaged in conducting the usual terminal operations for a number of interstate railways, is a "common carrier" and subject to prosecution for keeping a telegraph operator on duty for a longer period than that prescribed in this section. *U. S. v. Atlanta Terminal Co.*, (C. C. A. 5th Cir. 1919) 260 Fed. 779, 171 C. C. A. 505. The defendant contended that it was not engaged in the transportation of passengers or property by railroad. Answering this contention, the court said:

"It is true that it had no cars or engines and no trainmen or engineers. It had, however, railroad tracks, a station, switches, and a telegraph office and signal towers. It employed a station master, signal tower men, car inspectors, telegraph operators, ticket sellers, and baggage checkers and handlers. It is true that the passengers and baggage were carried on the cars and by the engines of the various railroad companies entering the terminal. However, they became passengers as soon as they bought tickets from defendant's agents, and while still on the defendant's station premises, and before boarding their train. Part of the transportation preceded their entrance to their trains, and that part was handled exclusively by the defendant. The same is true as to the passengers' property. It became baggage and began its transportation as soon as it was checked in the defendant's baggage room. After the passenger boarded the coach, and after his property was loaded into the baggage car, both still remained under the control of the defendant, until the train had left the terminal track. Until that time its movements were subject to the control and direction of the defendant's station master, to whose orders the train crew was subservient, and whose orders alone could start or stop the train while it was within the terminal limits. The train orders which governed its movements, after its departure, were transmitted to the train crew through the defendant's telegraph operator—the same person who is alleged to have been kept on duty in violation of the act. So that while the manual acts which started, moved, and stopped the train were not those of the defendant's employees, the orders and directions which put it in motion and caused it to stop were those of defendant's employees.

"Direction and control are as much a part of transportation as are the physical acts of running the engine or handling the train. It is also true that trains, in motion, could only enter and leave the terminal tracks through switches thrown by signal men of

defendant, and upon signals given the train crews by defendant's signal men. These acts were acts of transportation, and the defendant was engaged in transportation of passengers and baggage, upon a railroad, while doing them. The fact that the railroad company engaged jointly with defendant in the transportation does not change the conclusion reached. If the railroad companies had performed the entire service themselves, it would all have been transportation. The fact that part of it was performed by their agent, a separate corporation, does not make it less so. That it was transportation by railroad appears from the fact that it was carried on by a corporation organized as a railroad company and over its own railroad tracks. That they were short ones does not signify; nor does the fact that the defendant did not own the engine or cars. The mischief sought to be remedied by the Hours of Service Act is the same, whether the service is performed by the railroad company or by its agent, the Terminal Company, jointly with it, and whether by the use of its own cars and engines or those of the Terminal Company. It is equally important that the remedy be applied to the latter as to the former. The hazard from the excessive hours of service is the same in either case.

"That the service performed by the defendant was interstate transportation appears clearly from the stipulated facts. The transportation of the railroad companies in which it participated was interstate transportation of passengers and baggage. The fact that the defendant performed its part thereof entirely in Georgia is unimportant, since it was part of an interstate movement and partook of the nature of the entire movement."

VII. NIGHT AND DAY OFFICES (p. 1400)

Employment of operators by different companies as affecting character of station.—The fact that for a part of the twenty-four hour period the telegraphic messages of a railroad company are handled by persons employed not by itself, but by another company, does not make the station a daytime station only. *U. S. v. Baker*, (S. D. Tex. 1919) 261 Fed. 703.

1918 Supp., p. 755, sec. 3.

Agreement between receiver of insolvent railroad and employees for lesser wage.—Nothing in the provisions of the Adamson Act, fixing a permanent eight-hour standard working day for employees engaged in the operation of trains upon interstate railway carriers, and temporarily regulating the wages of such employees, forbids the operation of an insolvent road under an agreement between receiver and employees for a lesser wage, which agreement the employees desire to keep. *Ft. Smith, etc., R. Co. v. Mills*, (1920) 253 U. S. 206, 40 S. Ct. 526, 64 U. S. (L. ed.) —, wherein the court said: "The

Act in question, known as the Adamson Law, was passed to meet the emergency created by the threat of a general railroad strike. It fixed eight hours as a day's work and provided that for some months, pending an investigation, the compensation of employees of railroads subject to the Act to Regulate Commerce should not be 'reduced below the present standard day's wage,' and that time in excess of eight hours should be paid for pro rata at the same rate. The time has expired long since but the rights of the parties require a decision of the case.

"In *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024, it was decided that the Act was within the constitutional power of Congress to regulate commerce among the States; that since, by virtue of the organic interdependence of different parts of the Union, not only comfort but life would be endangered on a large scale if interstate railroad traffic suddenly stopped, Congress could meet the danger of such a stoppage by legislation, and that, in view of the public interest, the mere fact that it required an expenditure to tide the country over the trouble would not of itself alone show a taking of property without due process of law. It was held that these principles applied no less when the emergency was caused by the combined action of men than when it was due to a catastrophe of nature; and that the expenditure required was not necessarily unconstitutional because it took the form of requiring the railroad to pay more, as it might have required the men to take less, during the short time necessary for an investigation ordered by the law.

"But the bill in *Wilson v. New* raised only the general objections to the Act that were common to every railroad. In that case it was not necessary to consider to what extremes the law might be carried or what were its constitutional limits. It was not decided, for instance, that Congress could or did require a railroad to continue in business at a loss. See *Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. —. It was not decided that there might not be circumstances to which the Act could not be applied consistently with the Fifth Amendment, or that the Act in spite of its universal language must be construed to reach literally every carrier by railroad subject to the Act to Regulate Commerce. It is true that the first section of the statute purports to apply to any such carrier, and the third to the compensation of railway employees subject to this Act. But the statute avowedly was enacted in haste to meet an emergency, and the general language necessary to satisfy the demands of the men need not be taken to go further than the emergency required or to have been intended to make trouble rather than to allay it. We cannot suppose that it was meant to forbid work being done at a less price than the rates laid down, when

both parties to the bargain wished to go on as before and when the circumstances of the road were so exceptional that the lower compensation accepted would not affect the market for labor upon other roads.

"But that is the present case. An insolvent road had succeeded in making satisfactory terms with its men, enabling it to go on, barely paying its way, if it did so, not without impairing even the mortgage security, not to speak of its capital. We must accept the allegations of the bill and must assume that the men were not merely negatively refraining from demands under the Act but, presumably appreciating the situation, desired to keep on as they were. To break up such a bargain would be at least unjust and impolitic and not at all within the ends that the Adamson Law had in view. We think it reasonable to assume that the circumstances in which, and the purposes for which the law was passed import an exception in a case like this."

1918 Supp., p. 757, sec. 1.

Civil service rules as applicable to persons employed by Director General.—Persons employed by the Director General of Railroads in connection with the federal control of railroads need not be appointed in accordance with the Civil Service Act and rules. (1919) 31 Op. Atty.-Gen. 530.

Judicial notice.—The federal control of railroads rests on the proclamation of the President and will be judicially noticed. *Krichman v. U. S.*, (C. C. A. 2d Cir. 1920) 263 Fed. 538.

Judicial notice will be taken of the fact that on Sept. 24, 1919, a railroad was subject to this Act. *Chicago, etc., R. Co. v. Public Utilities Commission*, (Colo. 1920) 190 Pac. 539.

Disregarding contracts with individual shippers.—The fact that cars are needed for government use is a defense to an action for breach of a contract to furnish them to an individual shipper. *Underwood v. Hines*, (Mo. App. 1920) 222 S. W. 1037.

Service of process on a ticket agent and a division superintendent of a railroad operating under federal control in the district where plaintiff resides.—does not constitute service on another railroad under federal control operating entirely without such district. *Seaver v. Hines*, (D. C. N. H. 1919) 261 Fed. 239. The court said: "If I understand the position of the plaintiff correctly, the question here is whether the government management and control of the railroads of the country as a war measure, and under the war powers of Congress, so far consolidated or merged the various railroads of the United States into one system as to create a situation which would make it reasonable and proper to assume jurisdiction over a cause of action, and a railroad management, foreign to the district where the suit is sought to be prosecuted, under a kind of service which

would not have been effective to that end prior to the assumption of federal control. . . . The service in this case was upon the 'ticket agent of the within-named defendant at the station of the Boston & Maine Railroad at Concord, New Hampshire,' and on 'William R. Mooney, division superintendent of the Southern division of the Boston & Maine Railroad, one of the railroads now under the operation and control of the within-named defendant and agent of the within-named defendant having charge of the property of the within-named defendant in said state and district of New Hampshire.'

"All the agencies and the properties referred to in the return upon the writ are in every substantial and essential sense, so far as judicial procedure goes, the agencies and properties of the Boston & Maine Railroad, because there has been no substantial or permanent taking over of the properties, and as such they are quite independent of the Rutland Railroad of Vermont and New York, unless affected by the act of Congress, the order of the President, or the orders and regulations of the Director General.

"It would hardly be contended, it is supposed, that such a service prior to government control of the railroads would have been even a hint in the direction of creating jurisdiction over the rights of a foreign railroad like that of the Rutland, and I do not think there is anything in the act of Congress, or the executive orders in question, or in the character of the management and control which could reasonably be accepted as fairly intended to enlarge the modes of procedure, or to increase rights and remedies in respect to jurisdiction beyond those common to law and equity proceedings existing prior to government management based upon war necessity.

"While as a matter of form and as a matter of convenience and precaution, it may, perhaps, be well enough to assume that the requirement that all proceedings against the railroads under government control shall, in name, be drawn against the Director General, is a reasonable one, it would be quite another and a different thing to say that, by virtue of this formal and measurably fictional requirement, all individual railroads have lost their identity, and that their interests have been so far consolidated and merged into a system with a single entity that service, for instance, upon a station agent of a railroad in the extreme Eastern district of Maine would be service upon a railroad in the extreme Western district of California."

But service of process on an agent of the railroad against which the suit is brought is sufficient. *Vicksburg, etc., R. Co. v. Anderson-Tully Co.*, (C. C. A. 5th Cir. 1919) 261 Fed. 741.

1918 Supp., p. 760, sec. 3.

Compensation by Director General for use of railroad—Adjustment.—In *Railway Steel Spring Co. v. Chicago, etc., R. Co.*, (N. D.

Ill. 1919) 261 Fed. 690, it was held that the annual compensation offered by the Director General to the receiver of a railroad for the use of the railroad during federal control was inadequate, and the receiver was directed to proceed under this section to obtain adequate compensation.

1918 Supp., p. 762, sec. 10.

Purpose of enactment.—The intention of Congress in enacting this section "was that the railroads, although under federal control, should continue to be subject to all legal liabilities, enforceable in the ordinary way as if federal control did not exist, except that attachment on mesne process and levy on execution were forbidden." *Dampskibs Actieselskabet Sangstad v. Hustis*, (D. C. Mass. 1919) 257 Fed. 862.

Validity of section.—The section is not invalid because it authorizes an action against a carrier for acts arising during the federal control. *Missouri Pac. R. Co. v. Ault*, (1919) 140 Ark. 572, 216 S. W. 3.

The expression "actions at law and suits in equity" as used in this section includes admiralty suits. *Dampskibs Actieselskabet Sangstad v. Hustis*, (D. C. Mass. 1919) 257 Fed. 862; *The Catawissa*, (D. C. Mass. 1919) 257 Fed. 863.

General orders 18 and 18a are invalid. *Hines v. Kelly*, (Tex. Civ. App. 1920) 222 S. W. 648; *El Paso, etc., R. Co. v. Lovick*, (Tex. 1920) 218 S. W. 489.

General Order No. 26 does not deprive the court of its discretion as to the grant of a continuance. *El Paso, etc., R. Co. v. Lovick*, (Tex. 1920) 218 S. W. 489, holding discretion not to have been abused in denial of continuance.

Validity of General Order No. 50 of the Director General requiring certain suits to be brought against him has been held invalid as being in conflict with this section. *Franke v. Chicago, etc., R. Co.*, (1919) 170 Wis. 71, 173 N. W. 701; *Mobile, etc., R. Co. v. Jobe*, (Miss. 1920) 84 So. 910, wherein it was further held that this section amounted to a mere invitation to bring suits against the Director General instead of the railroads, excepting, however, suits for fines, penalties, and forfeitures. See further on this question 1919 Supp. p. 776.

In *State v. Calhoun*, (Mo. 1920) 220 S. W. 6, the court said regarding General Orders 50 and 50a:

"The orders referred to are enabling orders and not disabling in character; that is, they were designed to give the courts jurisdiction over the person of the director general, by proper service, in those courts where they have jurisdiction of the subject matter of the suit, but where the laws make no provision for the service of summons on the person of the director general, for instance."

Arrest of vessel in admiralty suit.—This section does not prohibit the arrest in an admiralty suit of a vessel chartered to a rail-

road under federal control. The *Catawissa*, (D. C. Mass. 1919) 257 Fed. 863, wherein the court said:

"I have just decided that section 10 of the Railroad Act (Act March 21, 1918, c. 25, 40 Stat. 456) authorizes suits in admiralty against railroads while under federal control. *Dampskibs, etc., v. Hustis, Receiver* (D. C. Mass.) 257 Fed. 862, filed June 6, 1919. It follows that the usual admiralty procedure applies to such cases including the right of arrest, unless that is forbidden by the last sentence of the first paragraph of section 10: 'But no process meane or final shall be levied against any property under such federal control.' If the arrest of the *Catawissa* be merely the equivalent of attachment on mesne process in an action at law, it is so forbidden. The arrest of the respondent in admiralty proceedings is, however, much more than an attachment on mesne process. It is the foundation of the jurisdiction. The seizure of the vessel is not simply for the purpose of securing property out of which a decree, if one be obtained, can be satisfied; it is the assertion of jurisdiction over the res, and is necessary to such jurisdiction. The purpose of the sentence quoted is to protect the property of carriers against seizure as security in legal proceedings or for the satisfaction of judgments or decrees. The arrest of a vessel in admiralty, while it has the result of furnishing security, is primarily for a different and more fundamental purpose. The *Brig Ann*, 9 Cranch 291, 3 L. Ed. 734; The *Propeller Commerce*, 1 Black 574, 580, 17 L. Ed. 107; *Taylor v. Carryl*, 20 How. 583, 599, 15 L. Ed. 1028.

"The statutory provision just quoted does not, therefore, prevent arrest in admiralty proceedings, and process may issue against the *Catawissa*."

A vessel operated by the Director General is liable for collision but is not liable to seizure, the words "mesne process" including original process in admiralty. The *City of Philadelphia*, (E. D. Pa. 1920) 263 Fed. 234.

State regulation of emigrant agents.—The mere possession and control of a railroad by the United States does not empower the railway company to act in violation of the statute of a state, in regard to emigrant agents, unless it is made to appear that there is a general or special order of the Director General to that effect. *State v. Bates*, (S. C. 1919) 101 S. E. 651.

For causes of action arising prior to federal control suit may not be brought against the Director General. *Bolton v. Hines*, (Ark. 1920) 221 S. W. 459.

Right of action against Director General in personal injury case.—A person injured by an employee of a railroad which was under federal control has the right to bring suit against the Director General instead of the company owning the road. *Leemans v. Hines*, (Wis. 1920) 177 N. W. 27.

An action for personal injuries received during federal control should be dismissed as

to the receiver of the railroad and allowed to proceed against the Director General alone. *Baker v. Bell*, (Tex. Civ. App. 1920) 219 S. W. 245.

Trustee process against Director General.—In *Fitzhugh v. Grand Trunk Ry.*, (N. H. 1920) 109 Atl. 562, the action was by an individual against a railroad company being operated under federal control and another for loss sustained because of what the defendants did in pursuance of a conspiracy to prevent his obtaining work by threatening to boycott anyone who might employ him. The Director General was summoned as trustee but he moved for a discharge. On this issue the court said:

"The test therefore to determine whether the plaintiff can summon the Director General as trustee is to inquire whether the defendants or any of them have a claim growing out of the use or operation of a railroad by the Director General which could be enforced in a suit against the road but for Order No. 50, and for which the road could be charged as trustee except for federal control. But it does not follow from the fact the plaintiff can obtain a judgment against the Director General that the court will issue an execution to enforce it; for the judgment will be against him in his official capacity, and section 10 forbids the levy of an execution on the property of a carrier so long as it is under federal control.

"The order therefore should be the Director General's motion is denied, but, unless it shall appear on the filing of his disclosure that some of the defendants have a claim which they can reduce to a judgment in a suit against him in the courts of this state, and that General Order No. 50 is still in force, he will be discharged as trustee."

Action against both railroad company and Director General.—In *Clements v. Southern R. Co.*, (1920) 179 N. C. 225, 102 S. E. 399, it was held that an action by a railroad employee for personal injuries was properly brought against both the Director General in control of the railroad and the railroad corporation, and that the corporation was served with process if it was served upon a local agent.

Liability of railroad to suit.—A railroad company occupies the same status as to liability to suit after being taken over by the government as before. *Missouri Pac. R. Co. v. Ault*, (1919) 140 Ark. 572, 216 S. W. 3.

But compare *Houston, etc., R. Co. v. Long*, (Tex. Civ. App. 1920) 219 S. W. 212, wherein it was held that a carrier was not liable to an employee for personal injuries received during federal control, since that control superseded the relation of master and servant between the carrier and its employees. *Houston, etc., R. Co. v. Long*, (Tex. Civ. App. 1920) 219 S. W. 212.

In *McGrath v. Northern Pac. R. Co.*, (N. D. 1920) 177 N. W. 383, the complaint charged that in November, 1918, at Dunn Center, N. D., the defendant took, carried away, and converted certain cattle, the prop-

erty of the plaintiff, but at that time and place it conclusively appeared that the government was in full and absolute control of the railway, and that neither defendant nor any of its agents or servants had any control over the operation of the railway, and in the commission of the alleged conversion the railway company did not act or claim to act as an instrumentality or agency of the federal government. It was held, therefore, that the railway company was in no manner liable for the torts or wrongs or contracts of the government or its Director General, or any other party over whom it had no control. *McGrath v. Northern Pac. R. Co.*, (N. D. 1920) 177 N. W. 383.

Suits for statutory penalty.—A state statute providing for double damages for the killing of stock by railroad companies by reason of failure to fence tracks, was held in one jurisdiction inapplicable in a suit against a railroad operated by the federal government, the suit being against the Director General. *Hines v. Taylor*, (Fla. 1920) 84 So. 381.

But a suit for a state statutory penalty brought against the railroad company instead of the Director General in control at the time the penalty was incurred is properly maintained. *Mobile, etc., R. Co. v. Jobe*, (Miss. 1920) 84 So. 910.

So a statute imposing upon a railroad company a penalty for the delay in the transportation of an intrastate shipment is in the nature of a police regulation and an action brought to enforce the penalty in the state court should be against the carrier alone. *Owens v. Hines*, (1919) 178 N. C. 325, 100 S. E. 617, wherein the court said: "The U. S. Supreme Court, in *R. R. v. North Dakota*, 39 S. C. Reporter, 502, in an opinion by Chief Justice White, filed 2 June, 1919, held that under the Act of 21 March, 1918, section 10, authorizing the President to fix rates for railroads under federal control, but providing for review by the interstate commerce commission, and section 15, declaring that 'nothing in the act shall be construed to impair lawful police regulations of the state,' the President had power to prescribe intrastate rates for railroads under federal control, though such rates shall conflict with the rates previously fixed by state authority. Our Rev., 2632, provides that in shipment of less than a carload there shall be a penalty of ten dollars for the first day's delay and a dollar per day for each succeeding day shall be allowed. In this case there was a delay for twenty days. After deducting the exemption of eight days, as properly allowed by the judge, there was a net delay of twelve days, the penalty for which is twenty-one dollars, as correctly stated by the judge. This was an intrastate shipment and this court has held that Rev., 2632, is a valid law. *Davis v. R. R.*, 147 N. C. 68; *Wall v. R. R.*, ib., 407. The statute prescribing such penalty for delay was a police regulation and section 15 of the Act of 21 March, 1918, as recited by Chief Justice

White in *R. R. v. North Dakota*, *supra*, declared that 'nothing in that Act should be construed to impair lawful police regulations of the state.' This was the view taken by the U. S. Railroad Administration, for in General Order No. 50-A, 11 January, 1919, it is provided: 'General Order No. 50, issued October 28, 1918, is hereby amended to read as follows: It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the director general of railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the director general of railroads, which action, suit, or proceeding but for federal control might have been brought against the carrier company, shall be brought against the director general of railroads, and not otherwise: Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.' It seems clear from this order that the director general of railroads did not assume to repeal the state police regulation fixing a penalty for delay in the transportation of freight between two points in this state, but only directed that he should be made a party defendant in other actions brought against any railroad company, and he provided: 'This order shall not apply to actions, suits or proceedings, for the recovery of fines, penalties and forfeitures.' He thus recognized, as Chief Justice White has stated, that the police regulations were not impaired by the federal statute, but provided that he should be exempt from being made a party to the suits therefor."

Pending suits did not abate by reason of the assumption of federal control, though the suits were ones which under General Orders 18 and 26 of the Director General could not have been brought against him in the jurisdiction. *El Paso, etc., R. Co. v. Havens*, (Tex. Civ. App. 1919) 216 S. W. 444.

Venue of action.—Congress did not delegate to the executive the power to fix the venue of actions, and the venue remained as it was before the Federal Control Act was passed. *Alabama, etc., R. Co. v. Journey*, (Miss. 1920) 84 So. 706.

Service of process.—A service of summons on a freight agent was a service on the railroad company employing him although the railroad was under control of the Director General of Railroads. *Christian v. Great Northern R. Co.*, (Wis. 1920) 177 N. W. 29, wherein the court said: "As is said in *Rutherford v. U. P. R. Co.* (D. C.) 254 Fed. 880, and *Mardis v. Hines* (D. C.) 258 Fed. 945, the Director General was in exclusive possession of the railroads, and exercised an exclusive control over them. But such exclusive possession and exclusive control was through the boards of directors, re-

ceivers, officers, and employes of the transportation systems, who by executive order were to continue the operation of the railroads in the usual and ordinary course of the business of common carriers. If a superintendent of the defendant company discharged one station agent and employed another in his place, which in the absence of any specific direction from the Director General he no doubt had power and authority to do, the person discharged was released from the service of the Director General, and the person employed entered such service by reason of the fact that he was the agent and employe of the company, although he was at the same time and in a larger view the agent and employe of the Director General. But he was such agent and employe of the Director General because he was the agent and employe of the company."

Though two railroads are both under the control of the Director General the possession by one of them of cars of the other does not permit of service of process on employes of the former company in a suit for injuries on the line of the latter company. *Seaver v. Hines*, (D. C. N. H. 1920) 263 Fed. 454.

Amendment substituting Director General as defendant in place of railroad company was allowed in action against company by owner of land adjoining a railroad right of way for damages from sparks of passing locomotive. *Peacock v. Detroit, etc., R. Co.*, (Mich. 1919) 175 N. W. 580, 8 A. L. R. 964.

In *Robinson v. Central of Georgia R. Co.*, (Ga. 1920) 102 S. E. 532, the action which was by a railroad employee against the railroad for personal injuries was brought after the government took over the railroad, but prior to the assent of General Order No. 50, promulgated by the Director General of railroads, which in effect gave directions that suits for injuries resulting from operation of railroads while under federal control should be brought against the Director General. It was held that the petition could be amended by substituting the Director General of railroads as the suit was maintainable against the government without the aid of General Order No. 50.

Refusal to direct a verdict for the carrier is harmless error where the judgment entered protected the carrier by providing that no execution should issue thereon but the judgment should be paid by the United States. *Houston, etc., R. Co. v. Long*, (Tex. Civ. App. 1920) 219 S. W. 212.

Removal.—A suit against the Director General of Railroads for personal injuries is not removable because of diversity of citizenship between the plaintiff and the carrier, but is removable as a "case at law under the laws of the United States." *Westbrook v. Director General of Railroads*, (N. D. Ga. 1920) 263 Fed. 211.

An action in a state court to recover damages for the wrongful death of the driver of an automobile truck in a collision with a

train, operated by a railroad under federal control, is not removable to a federal court in view of the provisions of this section. *Loughnan v. Hines*, (W. D. Wash. 1919) 261 Fed. 218, wherein the court said regarding the provisions of this section:

"Unless an action such as the present was contemplated by Congress in making the foregoing provision—denying the carrier the right to transfer such an action to the federal court—virtually all effect must be denied it. Contrasting actions at law and suits in equity in the first part of the quoted portion of the section with actions, alone, in the latter part of the section, may perhaps show an intention that suits in equity, where a federal question is involved, could be removed, as heretofore. But, however that may be, by the language of the latter part of the section, an intent is clearly shown that actions at law, where merely the liquidation and settlement of the amount of a claim upon a common carrier liability are involved, and the control and use of railroad property by the Director General is not sought to be interfered with, should, if started in the state court, not be removed, over the objection of the plaintiff, to the federal court upon the ground that they involve a federal question."

Attorney's fees by state statute made costs and recoverable as such in suits against railroads for failure to fence their roads, are collectable in suits brought against the Director General. *Hines v. Taylor*, (Fla. 1920) 84 So. 381.

1918 Supp., p. 763, sec. 11.

Larceny of goods being transported by express company under federal control.—Goods stolen by employees of a railroad under federal control while being transported by such railroad for an express company, are not property "derived from or used in connection with the possession, use or operation" of the railroad within the meaning of this section. Where, however, the express company is also under federal control, such larceny is a violation of this section since it interferes with and impedes the possession, operation, and control of the express company. *Kambeitz v. U. S.*, (C. C. A. 2d Cir. 1919) 262 Fed. 378.

1918 Supp., p. 765, sec. 15.

Terminal railway company held not taken over by Director General of Railroads and therefore state Public Utilities Commission had authority to regulate rates thereon. *Public Utilities Commission v. Springfield Terminal R. Co.*, (1920) 292 Ill. 505, 127 N. E. 128.

An order for the erection of a new station and an industrial track may be made by a state public utilities commission notwithstanding the fact that the railroad was under federal control. *Chicago, etc., R. Co. v. Public Utilities Commission*, (Colo. 1920) 190 Pac. 539.

RIVERS, HARBORS AND CANALS

Vol. IX, p. 49, sec. 4. [First ed., vol. VI, p. 801.]

Condition precedent to suit in admiralty.—To same effect as 1919 Supplement annotation, see *The O. L. Halenbeck*, (C. C. A. 2d Cir. 1919) 260 Fed. 554, 171 C. C. A. 338. The court said:

"After the writing, and before the filing of this opinion, the Supreme Court of the United States in *P. Sanford Ross, Inc. v. United States*, 250 U. S. 269, 39 Sup. Ct. 452, 63 L. Ed. — (decided June 2, 1919), held against the contentions of the appellant which are urged upon us in these appeals. There the court said:

"The act of Congress here in question imposes a direct liability upon the vessel for the pecuniary penalties prescribed, and declares that it may be proceeded against summarily by libel in any District Court of the United States having jurisdiction thereof. This precludes the idea that the proceeding by libel is to be deferred to await the possibly slow course of criminal proceedings against the person individually responsible. It treats the offending vessel as a guilty thing, upon the familiar principle of the maritime law, and permits a proceeding against her in any court of admiralty 'having jurisdiction thereof'—meaning any court within whose jurisdiction she may be found."

Vol. IX, p. 60, sec. 15. [First ed., vol. VI, p. 817.]

Knowledge of wreck required.—"We agree with the decision in *Eastern Corporations v. Great Lakes*, 256 Fed. 497, that the act of Congress above quoted is a criminal statute, and further, that the duty of marking a wreck thereby imposed does not arise until the owner receives information that his vessel is sunk." *Sullivan v. Ross*, (C. C. A. 2d Cir. 1920) 263 Fed. 348.

Violation as negligence.—"The effect of any failure to observe the provisions of this statute raises a presumption of negligence, or, as the matter is sometimes put, a failure to do what the act requires is evidence of negligence; but it is no more. Thus for civil purposes the act is but declaratory of the general maritime law in this respect." *Sullivan v. Ross*, (C. C. A. 2d Cir. 1920) 263 Fed. 348, holding that presumption was not rebutted by evidence.

Dredge anchored in narrow channel.—In *Otto Marmet Coal, etc., Co. v. Fieger-Austin Dredging Co.*, (C. C. A. 6th Cir. 1919) 259 Fed. 435, 170 C. C. A. 411, it was held that there was a violation of this section by the anchoring of a dredging plant at night near a sharp bend in a narrow channel of the Ohio river.

Vol. IX, p. 81, sec. 9. [First ed., vol. VI, p. 805.]

Navigable waters entirely within the limits of a state.—Under this section the authority of a state to authorize the erection of a bridge at points where both banks of a navigable stream are parts of the same state remains subject to the approval of Congress as expressed through its administrative officers. *People v. Hudson River Connecting R. Corp.*, (1920) 228 N. Y. 203, 126 N. E. 801, wherein the court said:

"This act is mainly concerned with maintaining freedom of navigation and preventing obstructions thereto from being erected. So far as the erection of bridges or other obstructions to navigation is concerned, it is an act of exclusion, and prohibits their commencement until the consent of Congress is obtained, together with the approval of plans by the Chief of Engineers and the Secretary of War. *Cummings v. Chicago*, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525.

"This act does not prohibit the erection of such structures under the authority of the Legislature of a state at points where both banks of the navigable waters are parts of the same state, provided that the location and plans are submitted to and approved by the Chief of Engineers and the Secretary of War before construction is commenced.

"Under this act the authority of the state to authorize such structures wholly within its limits remains subject to the approval of Congress as expressed through its administrative officers. *Miller v. Mayor of New York*, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971."

Interference by state with bridge franchise granted by Congress.—The legislature of a state cannot interfere with the plenary power of Congress to authorize a bridge for interstate commerce by depriving the corporation authorized and vested with a grant of franchise from Congress, of the power *intra vires* to avail itself of the franchise by subsequently imposing the penalty of injunction and forfeiture of its charter for exercise of the franchise. *People v. Hudson River Connecting R. Corp.*, (1920) 228 N. Y. 203, 126 N. E. 801.

Taxation of bridge by state.—The fact that Congress has authorized the building of a railroad bridge over a navigable river does not prevent the state from taxing it where Congress is silent on the matter. *People v. St. Louis*, (1920) 291 Ill. 600, 126 N. E. 529, wherein the court said:

"It is also argued by counsel for appellant that as this bridge was constructed under the authority of an act of Congress it cannot be taxed by the state authorities. It is clear that by this act of Congress the fed-

eral government did not retain exclusive power of legislation on all matters pertaining to this bridge; therefore, under the reasoning of *Moline Water Power Co. v. Cox*, 252 Ill. 348, 96 N. E. 1044, the state authorities retained the power to tax the bridge. The federal government has authorized the construction of several railroad bridges over the Mississippi river near St. Louis, and one of them—the Eads bridge, as we understand it—is not only used by railroads, but it is used for street cars, vehicles, and pedestrians, and yet it has been taxed by the state authorities. *People v. St. Louis Merchants' Bridge Co.* (No. 12580), 291 Ill. 95, 125 N. E. 752.”

Approval of War Department.—The provision of this section requiring the approval of the Chief of Engineers and of the Secretary of War to any modification of plans, does not mean that the Board of Engineers of the War Department shall act as consulting or supervising architects in matters of bridge construction. Their only purpose and obligation is to pass upon the plans for structures in navigable streams in order to determine their effect upon streams from the standpoint of navigation, and not in any sense for the purpose of determining their structural or architectural efficiency. Hence, where changes in plans do not affect the location of the bridge or its obstructive nature in the stream by enlarging its size or changing its shape, they need not be submitted to the War Department. *Freeport Texas Co. v. Houston, etc., R. Co.*, (S. D. Tex. 1919) 257 Fed. 213.

Waiver of penalty for failure to construct bridge within time limit set by Congress.—Where an act of Congress granted authority to a railroad company to construct, maintain and operate a bridge, together with the necessary approaches thereto, across the Hudson river in New York state at a certain point and a later act extended the time for commencing and completing the bridge, whatever penalty or forfeiture is incurred by the failure of the company to comply with the provisions of the original statute is waived by the only authority entitled to enforce such forfeiture. *People v. Hudson River Connecting R. Corp.*, (1920) 228 N. Y. 203, 126 N. E. 801.

Vol. IX, p. 93, sec. 4. [First ed., 1909 Supp., p. 601.]

Failure to open draw promptly.—Where a tug with barges in tow on approaching a drawbridge signals for it to be opened and the engineer in charge of the drawbridge fails to open it promptly or to respond to the tug's signals, the owner of the drawbridge is liable for a collision between one of the barges in tow and a barge anchored near the shore, occasioned by the tug's attempting to make a turn in order to avoid colliding with the bridge. *The Charles Mulford*, (S. D. N. Y. 1916) 257 Fed. 131.

In *New England Fuel, etc., Co. v. Boston*, (D. C. Mass.) 1919) 257 Fed. 778, it was held that a city, which maintained a drawbridge, was liable for a collision by a steamship and tug with the bridge, where it appeared that the bridge tenders failed to open the draw promptly, thereby causing the steamship to collide with the bridge, and, after opening it, permitted it to swing too far and injure the tug while it was passing through the draw opening. The steamship was also held liable for negligent handling of its engines.

Failure to take precautions.—In *The No. 9*, (D. C. Del. 1919) 258 Fed. 693, it was held that a tug was liable for injuries to a tow caused by a collision of the tow with a drawbridge while going through the draw, where it appeared that the master of the tug knew that the draw was defective and did not take timely measures of precaution.

Vol. IX, p. 111, sec. 4. [First ed., 1914 Supp., p. 372.]

War emergency services.—See annotation under Act of July 1, 1918, *supra*, p. 662.

Revision of scale of wages.—It would be legal for the Panama Canal authorities to revise the scale of wages in effect on the Isthmus so that the same should be based on the wages of civilian employees of the naval establishments in the continental United States after the latter have received the benefit of the increases provided in the Naval Appropriation Act of March 4, 1917 (39 Stat. 1195). (1917) 31 Op. Atty-Gen. 138.

SALVAGE

Vol. IX, p. 121, sec. 1. [First ed., 1914 Supp., p. 384.]

Amount of salvage.—In *The Professor Koch*, (D. C. Mass. 1919) 260 Fed. 969, it was held that three tugs, whose combined value was \$175,000, were entitled to a salvage award of \$10,000, for pulling a barge, valued with her cargo at \$830,000, off a rock where she was stranded, towing her inside the breakwater of a nearby harbor and later towing her into another harbor, where such salvage services were performed in fair weather and neither the tugs nor the men on them were subjected to any extraordinary hazards.

In *The Bessie L. Morse*, (D. C. Me. 1919) 260 Fed. 252, it was held that a gasoline boat, worth from \$5,000 to \$6,000, was entitled to a salvage award of \$500 for towing ashore a schooner, worth from \$2,800 to \$6,000, which was afire, where there was danger of the explosion of gasoline on board the schooner.

In *The Jason*, (E. D. Va. 1919) 257 Fed. 438, it was held that a tug worth \$75,000 was entitled to an award of \$15,000 for salvaging a ship and cargo worth \$3,600,000, which had been seriously damaged, while at anchor in a harbor, by a collision with another ship during a storm.

Apportionment of award.—Whenever a salvage award is made to the master and crew of a vessel, it should be shared among them in proportion to the wage bill. *The F. Q. Barstow*, (D. C. Md. 1919) 257 Fed. 793.

Vol. IX, p. 122, sec. 3. [First ed., 1914 Supp., p. 384.]

When life salvors share in award to salvors of vessel.—Under this section life salvors are not entitled to any part of the contract price awarded to a towing company for raising a sunken vessel after the life salvors have performed their services. In *re St. Joseph-Chicago Steamship Co.*, (N. D. Ill. 1919) 262 Fed. 535. In discussing the effect of this section, the court said:

"The statute in question was intended only to apply to cases where the vessel and cargo, together with her crew, including also passengers, were exposed to a common danger threatening their destruction and loss; to cases where service is rendered by a volunteer adventurer, and such service is successful in saving lives and property, consisting either of the cargo, the vessel, or both. The services rendered in the saving of lives were to be considered when remuneration for salvage was awarded, so that they might participate in and be given a part of any sum paid for saving the vessel or

other property. In such a case, the life salvor, by virtue of his service rendered at the time that the property was saved, became a cosalvor, with a right to recover compensation for a service, when, under the general maritime law, he would get nothing. It was for the purpose of enabling such a salvor to recover for his services that the statute was passed. It was not intended that, as between different sets of salvors, the life salvor was to participate in awards which might be made for services rendered months, and even years, after the life-saving service had been performed.

"The salvage service in saving life, to be compensated for under this statute, must have been performed substantially at the time and while both lives and property were in distress and danger of loss; not, of course, at the same instant of time, but during the period of peril. The life salvors, therefore, are not entitled, under the statute, to any part of the contract price awarded to the towing company for raising and righting the Eastland.

"Second. The claim and lien of the towing company, being for services last in point of time, is paramount and preferred over all others, including those of the life salvors. The life salvors rendered their services on the day of the disaster and the two days following, and we may assume that those services were fully accomplished some days before any attempt was made to raise the steamer. We have, then, this situation: All of the lives saved that could be, and the steamer lying on the bottom of the Chicago river, an obstruction to navigation, and of no value to any one as she lay there. The towing company entered into its contract to raise the boat on July 27, 1915; began work on August 4, 1915; completed the contract and turned the ship over to the owners on August 16th of that same year. The services, therefore, of the towing company were subsequent in point of time to those of the life salvors. There was no connection between the services of the towing company and those of the life salvors. The life salvors had no claim for their services against anybody at the time they were rendered. The towing company was engaged in the wrecking business on the Great Lakes, and was under no obligation, legal or moral, to raise the steamer; and if it had not done the work successfully under its contract there would have been no property to sell, and no fund, or at least a very small one, for distribution. Nothing that the life salvors did contributed to the success of the subsequent service rendered by the towing company.

"It is a well-known rule of the maritime law of the United States that the last salvor is entitled to preference over the first or

former salvors. The two services, namely, life-saving service and wrecking service, were rendered at different times, and were not allied in any way. The first service in no way helped the second service, or preserved any of the property that was finally salvaged by the towing company. As priority, in point of logic, depends upon the rank of benefits conferred, so, therefore, must the towing company's claim be preferred to the claims of the life salvors."

Vol. IX, p. 122, sec. 4. [First ed., 1914 Supp., p. 384.]

Failure to present claims within limitation period.—Life salvors are not entitled to any part of the contract price awarded to a towing company for raising a sunken vessel, where they do not present their claims until more than two years after the date when they performed their services. *In re St. Joseph-Chicago Steamship Co.*, (N. D. Ill. 1919) 262 Fed. 535, wherein the court said:

"The act of Congress under which these life salvors proceed created a new cause of action. 'A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the

specified time, the action and the right of action no longer exist, and the defendant is exempt from liability.' *Partee v. St. Louis & S. F. R. Co.*, 204 Fed. 970, 123 C. C. A. 292, 51 L. R. A. (N. S.) 721, and cases cited.

"It is, however, now contended that inasmuch as no claim is made against the steamer or her proceeds directly, but only against the amount awarded to the towing company, that the two-year limitation in the statute does not apply until after the award to the towing company had been established, and it is argued that until the decision of the Court of Appeals on July 23, 1918, the right of the towing company to recover for its services had not been determined, and that therefore the life salvors had until July 23, 1920, to file their claims for a fair share of the remuneration awarded to the towing company.

"The language of the statute is plain, and not in any degree ambiguous or doubtful. On the day their services were rendered the life salvors had some sort of claim, present, contingent, inchoate, or otherwise, and they were bound, under the law, to present that claim to this court where the limitation proceedings were pending. They have not brought themselves within the exception noted in section 4, and no explanation is made of the reason why they were late in asking for relief. Indeed, I am of the opinion that, inasmuch as the fundamental law required the claims to be filed within a certain time, no explanation would excuse the delay. The court is powerless, under the language of the act, to grant an extension of time beyond the two years, except as provided by the statute, and this case does not come within that exception."

SEAMEN

Vol. IX, p. 139, sec. 4511. [First ed., vol. VI, p. 853.]

Requirements of articles—Voyage and services indefinite.—Shipping articles between the master of a vessel and the libelants at Baltimore prescribed the voyage and duration thereof as follows: "From the port of Baltimore, Md., to such ports and places in any part of the world, via an American port, as the master may direct, and back to a final port of discharge in the United States, for a term of time not to exceed six calendar months." This provision was held too indefinite and uncertain as to the voyage and services contracted for to bind the libelants, and they were entitled to be paid the wages due them up to the date of their refusal to continue the voyage. *The Quogue*, (E. D. Va. 1919) 261 Fed. 414.

Vol. IX, p. 149, sec. 4523. [First ed., vol. VI, p. 862.]

See notes to vol. IX, p. 139, sec. 4511, immediately preceding.

Vol. IX, p. 158, sec. 4530. [First ed., 1916 Supp., p. 228.]

Constitutionality.—To same effect as 1919 Supplement annotation, see *The Westmeath*, (C. C. A. 2d Cir. 1919) 258 Fed. 446, 169 C. C. A. 462, wherein it was said:

"That the statute impairs, or rather abrogates, the foreign seaman's shipping contract, is admitted; but we know of no reason why Congress, if so minded, may not pass such a statute. 'It is no answer (to a plain congressional declaration) to say that it interferes with the validity of contracts,

for no provision of the Constitution prohibits Congress from doing this, as it does the states.' *Mitchell v. Clark*, 110 U. S. 643, 4 Sup. Ct. 170, 28 L. Ed. 279.

"It is, however, urged that any interpretation of the act which enables a seaman on a foreign ship to accomplish that which is embodied in the decree appealed from, is violative of the Fifth Amendment, in that it interferes 'with the liberty to contract on such terms as may be advisable to the parties to the contract,' and is therefore 'a deprivation, of liberty without due process of law,' and for this reliance is placed upon *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. In our opinion this very contention was in substance made in *Patterson v. The Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, and there disposed of; and this decision was recently approved in *The Talus*, 249 U. S. —, 39 Sup. Ct. 84, 63 L. Ed. — (December 23, 1918).

"The employment and discharge, treatment, status, and punishment of merchant seamen has long been a part of the regulation of water-borne commerce. With the advisability or expediency of declaring all seamen, irrespective of nationality, to have a status, or be entitled to treatment when within a harbor of the United States totally differing from the treatment or status accorded them in every other part of the world, we have no concern, but entertain no doubt of the power of Congress to enact this statute as a commercial regulation."

Congress could, as it did in this section, make applicable to foreign seamen on foreign vessels when in American ports the provisions authorizing seamen to demand and receive one-half the wages earned at any port where the vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, notwithstanding any contractual obligations to the contrary. *Strathearn Steamship Co. v. Dillon*, (1920) 252 U. S. 348, 40 S. Ct. 350, 64 U. S. (L. ed.) — (*affirming* (C. C. A. 5th Cir. 1919) 256 Fed. 631, 168 C. C. A. 25) wherein the court commenting on the contention of attorneys that the court's construction of this section which subordinated contractual obligations of foreign seamen to the statutory obligation said: "We come, then, to consider the contention that this construction renders the statute unconstitutional as being destructive of contract rights. But we think this contention must be decided adversely to the petitioner upon the authority of previous cases in this court. The matter was fully considered in *Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821, in which the previous decisions of this court were reviewed, and the conclusion reached that the jurisdiction of this government over foreign merchant vessels in our ports was such as to give authority to Congress to make provisions of the character now under consideration; that it was for this government

to determine upon what terms and conditions vessels of other countries might be permitted to enter our harbors, and to impose conditions upon the shipment of sailors in our own ports, and make them applicable to foreign as well as domestic vessels. Upon the authority of that case, and others cited in the opinion therein, we have no doubt as to the authority of Congress to pass a statute of this sort, applicable to foreign vessels in our ports, and controlling the employment of payment of seamen as a condition of the right of such foreign vessels to enter and use the ports of the United States."

Right to one-half wages — Necessity of demand.—To same effect as original annotation, see *The Italier*, (C. C. A. 2d Cir. 1919) 257 Fed. 712, 168 C. C. A. 662, wherein the court said: "It seems, also, to be thought that the demand for half wages under R. S. § 4530, as amended, is a ceremony of no moment, and may be made (as it was made in this case) after the seaman leaves his ship (in Judge Story's phrase) *animo dereliquendi*. Such is not the case. The seaman's is a lawful engagement and its propriety is to be judged primarily by the law of the ship's flag. But Congress has plainly declared that, when foreign vessels are in harbors of the United States, R. S. § 4530, as amended, shall apply to seamen on such vessels. Therefore such seamen are entitled to one-half of the wages earned down to the time of demand made, and such demand must be made within the territorial jurisdiction of the United States, and at a port where said vessel 'shall load or deliver cargo.'"

Time of demand.—A foreign vessel need not have been five days in an American port before seamen thereon may make the wage demand provided for by this section. *Strathearn Steamship Co. v. Dillon*, (1920) 252 U. S. 348, 40 S. Ct. 350, 64 U. S. (L. ed.) — (*affirming* (C. C. A. 5th Cir. 1919) 256 Fed. 631, 168 C. C. A. 25) wherein the court said: "But it is insisted that Dillon's action was premature, as he made a demand upon the master within less than five days after the vessel arrived in an American port. This contention was sustained in the district court, but it was ruled otherwise in the court of appeals. Turning to the language of the act, it enacts in substance that the demand shall not be made before the expiration of five days, nor oftener than once in five days. Subject to such limitation, such demand may be made in the port where the vessel stops to load or deliver cargo. It is true that the act is made to apply to seamen on foreign vessels while in United States ports, but this is far from requiring that the wages shall be earned in such ports, or that the vessels shall be in such ports five days before demand for one-half the wages earned is made. It is the wages of the voyage for which provision is made, with the limitation of the

right to demand one-half of the amount earned not oftener than once in five days. The section permits no demand until five days after the voyage has begun, and then provides that it may be made at every port where the vessel stops to load or deliver cargo, subject to the five-day limitation. If the vessel must be five days in port before demand can be made, it would defeat the purpose of the law as to vessels not remaining that long in port, and would run counter to the manifest purpose of Congress to prevent a seaman from being without means while in a port of the United States.

"We agree with the Circuit Court of Appeals of the fifth circuit, whose judgment we are now reviewing, that the demand was not premature. It is true that the Circuit Court of Appeals for the second circuit held in the case of *The Italier*, 168 C. C. A. 662, 257 Fed. 712, that demand made before the vessel had been in port for five days was premature; this was upon the theory that the law was not in force until the vessel had arrived in a port of the United States. But the limitation upon demand has no reference to the length of stay in the domestic port. The right to recover wages is controlled by the provisions of the statute and includes wages earned from the beginning of the voyage. It is the right to demand and recover such wages, with the limitation of the intervals of demand as laid down in the statute, which is given to the seaman while the ship is in a harbor of the United States."

To same effect, see *The Sutherland*, (D. C. Me. 1919) 260 Fed. 247.

Amount.—In order to ascertain the amount payable to a seaman under this section, his total wages should be divided in two, and all advances and previous payments deducted from the quotient, the remainder, if any, being the amount demandable by the seaman. *The Rathlin Head*, (C. C. A. 5th Cir. 1920) 262 Fed. 751. In passing upon this question, the court said:

"The question presented is as to the proper method of computing the amount payable to seamen at intermediate ports under this section, in cases in which previous payments or advances have been made. Appellants contend that from the total wages earned from the commencement of the voyage to the date of demand there should first be deducted all advances and payments; one-half of the remainder being the amount payable. The appellee contends, and the district judge held, that the total wages should first be divided in two, and from the quotient should be deducted all advances and previous payments; the remainder, if any, being the amount demandable by the seaman.

"There has been diversity of opinion among the district courts as to which method is the proper one. The cases of *The Ixion*, 237 Fed. 142, and *In re Ivertsen*, 237 Fed. 498, hold in line with the contention of appellants. The cases of *The Jacob N.*

Haskell, 235 Fed. 914, *The London*, 238 Fed. 645, *The Delagoa*, 244 Fed. 835, *The Meteor*, 241 Fed. 735, and *The Thor*, 248 Fed. 942, support the contention of the appellee. The case of *The London*, 238 Fed. 645, was affirmed by the Circuit Court of Appeals for the third circuit in an opinion reported in 241 Fed. 863, 154 C. C. A. 565, and a certiorari to the decree of the Circuit Court of Appeals was denied by the Supreme Court, 245 U. S. 652, 38 Sup. Ct. 11, 62 L. Ed. 532. In the case of *Sandberg v. McDonald*, Claimant of the *Talus*, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200, the Supreme Court implicitly recognized the correctness of the method adopted by the district judge in this case. The statement of facts contained in the opinion of the Supreme Court in that case recites that—

"The master then paid to them [the demanding seamen] a sum which, with the cash paid them and the price of the articles purchased as stated above, together with the advances made in Liverpool, equaled or exceeded the one-half of the wages then earned by each of them from the commencement of his service for the ship."

"While the adequacy of the payment was questioned in that case on a different ground—i. e., the alleged invalidity of advances made to the seamen in Liverpool—the payments would have been insufficient (granting the present contention of appellants to be correct), even after the allowance of the Liverpool advances, and the Supreme Court, by its affirmation of the decree dismissing the libel, in view of the language quoted, in effect approved the method of computing the half wages demandable under the statute, which was adopted in that case in the court below, and which was that adopted in the district court in this case.

"The 'one-half part of the wages which he shall have then earned' is literally one-half of the wages earned by the seaman to the date of demand, without deductions. The language of the act places emphasis upon wages earned, and not upon amounts due when demand is made. The statute does not concern itself with what is due as upon a partial or final settlement, but requires the payment of an amount proportioned upon earnings rather than upon balances due. While the statute does not expressly say that wages theretofore paid shall be taken into consideration in the computation, the absurdity of a contrary construction is enough to warrant the implication that they are to be considered. If the ascertainment, required by the act, was of the amount owing on a settlement, the ordinary method of computation would be to first deduct from gross earnings previous payments and allow one-half of the residue. But the statute says 'one-half part of the wages which he shall have then earned.' His gross earnings or total wages must therefore be divided in two, in order to arrive at 'one-half part of the wages which he shall have then

earned,' which is what the statute read literally accords him the right to demand. The implied condition to the demand is that he shall not have already received the whole or any part of the wages demanded. Otherwise, a double payment would result, and the act will not be construed so as to produce such an inequitable result. The implied condition makes it necessary to deduct from the half earnings, when so ascertained, all previous payments. The remainder is what the seaman is entitled to demand. The evident aim of Congress was to provide that the seaman should be entitled, pending the termination of the voyage, to demand and receive at intermediate ports of loading or unloading, with five-day intervals, a sum equal to one-half of his then earnings, when there was added to it all previous payments, and that the master should retain until the termination of the voyage the remaining half of the seaman's wages as an assurance against desertion. . . . Our conclusion is that the weight of authority and of reason is persuasive that Congress intended to provide by section 4 of the Seamen's Act of 1915, that the half of a seaman's wages should remain in the hands of the master until the voyage was ended, as a security against his leaving the ship, and that the seaman should be entitled to receive only a sum, which at the time demanded would represent one-half of his then earned wages, when there was added to it the total of all previous advances and payments."

Effect of advances.—The prevailing construction of this section is that when a vessel arrives at a port in the United States, the seaman is entitled to be paid one-half of the wages he has earned up to that time, and against such one-half there must be charged all prior payments which he has received. The Sutherland, (D. C. Me. 1919) 260 Fed. 247.

Where seamen on a foreign ship in a United States port make a demand under this section for one-half of their earned wages, credit should be given to the ship in respect of advances made to the claimants beyond the boundaries of the United States. The *Italer*, (C. C. A. 2d Cir. 1919) 257 Fed. 712, 168 C. C. A. 662.

Effect of desertion.—Seamen who desert a vessel before making a demand under this section for one-half of their earned wages, are not entitled to recover any wages. The *Italer*, (C. C. A. 2d Cir. 1919) 257 Fed. 712, 168 C. C. A. 662. In discussing the effect of desertion in such a case, the court said:

"It seems to be thought (judging from the tenor of argument in this and similar causes) that the Seamen's Act of 1915 has abolished the offense of desertion in the mercantile marine. While it is true that arrest for desertion, the bodily return of a deserter to his ship, and generally the hold-

ing of a seaman to his shipping contract by physical force, are things of the past, even in respect of foreign vessels so far as the United States is concerned (sections 16-18), desertion is still an offense on American vessels, entailing (inter alia) forfeiture of 'all or any part of the wages or emoluments which the [deserter] has then earned' (R. S. § 4596, as amended).

"Desertion" is not defined by any act of Congress. Quite possibly the definition of desertion varies in different countries. This record does not inform us whether Belgium defines desertion in any special way. Although the Belgian law would control, if proven (*The Nigretia*, 255 Fed. 56, — C. C. A. —), we may, in the absence of such evidence, apply the general maritime law.

"The definition of desertion 'in the sense of the maritime law' is settled, and consists in 'a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty.' *Cloutman v. Tunison*, 1 Sumn. 373, Fed. Cas. No. 2,907, where the subsequent cases are collated. Within this definition we have no doubt on the evidence that all the libelants who made demand for half wages deserted before the presentation of such demand. . . . Since a deserter may forfeit all his wages, it is also a prerequisite to recovery under the statute that there should be wages due him when he makes demand, and there are no wages due to a deserter."

Foreign seamen.—To same effect as original annotation, see *The Sutherland*, (D. C. Me. 1919) 260 Fed. 247, wherein it was said:

"The theory of the courts appears to be that, under the statute, all vessels coming into the jurisdiction of the country come under the laws and regulations of the United States, and that it is competent for Congress to prescribe conditions of entry, and of clearance, for foreign vessels, since it may exclude them altogether. Under the construction given this statute by the federal courts, I must conclude that the statute is applicable to these libelants, although they were foreign seamen on a foreign vessel."

Foreign seamen on foreign vessels in American ports are entitled to the benefits of the provisions of this section notwithstanding contractual obligations to the contrary. *Strathearn Steamship Co. v. Dillon*, (1920) 252 U. S. 348, 40 S. Ct. 350, 64 U. S. (L. ed.) — (affirming (C. C. A. 5th Cir. 1919) 256 Fed. 631, 168 C. C. A. 25) wherein the court said:

"In *Sandberg v. McDonald*, 248 U. S. 185, 39 Sup. Ct. 84, 63 L. Ed. 200, and *Neilson v. Rhine Shipping Co.*, 248 U. S. 205, 39 Sup. Ct. 89, 63 L. Ed. 208, we had occasion to deal with section 11 of the Seamen's Act and held that it did not invalidate advancement of seamen's wages in foreign countries when legal where made. The instant case

requires us to consider now section 4 of the same act. . . .

"This section has to do with the recovery of wages by seamen, and by its terms gives to every seaman on a vessel of the United States the right to demand one-half the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the end of the voyage, and stipulations in the contract to the contrary are declared to be void. A failure of the master to comply with the demand releases the seaman from his contract, and entitles him to recover full payment of the wages, and the section is made applicable to seamen on foreign vessels while in harbors of the United States, and the courts of the United States are open to such seamen for enforcement of the act.

"This section is an amendment of section 4530 of the Revised Statutes; it was intended to supplant that section, as amended by the act of December 21, 1898, which provided:

"'Every seaman on a vessel of the United States shall be entitled to receive from the master of the vessel to which he belongs one-half part of the wages which shall be due him at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended unless the contrary be expressly stipulated in the contract,' etc.

"The section, of which the statute now under consideration is an amendment, expressly excepted from the right to recover one-half of the wages those cases in which the contract otherwise provided. In the amended section all such contract provisions are expressly rendered void, and the right to recover is given the seamen notwithstanding contractual obligations to the contrary. The language applies to all seamen on vessels of the United States, and the second proviso of the section as it now reads makes it applicable to seamen on foreign vessels while in harbors of the United States. The proviso does not stop there, for it contains the express provision that the courts of the United States shall be open to seamen on foreign vessels for its enforcement. The latter provision is of the utmost importance in determining the proper construction of this section of the act. It manifests the purpose of Congress to give the benefit of the act to seamen on foreign vessels, and to open the doors of the federal courts to foreign seamen. No such provision was necessary as to American seamen for they had the right, independently of this statute to seek redress in the courts of the United States, and if it were the intention of Congress to limit the provision of the act to American seamen, this feature would have been wholly superfluous.

"It is said that it is the purpose to limit the benefit of the act to American seamen, notwithstanding this provision giving access

to seamen on foreign vessels to the courts of the United States, because of the title of the act in which its purpose is expressed 'to promote the welfare of American seamen in the merchant marine of the United States.' But the title is more than this, and not only declares the purposes to promote the welfare of American seamen but further to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea. But the title of an act cannot limit the plain meaning of its text, although it may be looked to to aid in construction in cases of doubt. *Cornell v. Coyne*, 192 U. S. 418, 430, 48 L. ed. 504, 509, 24 Sup. Ct. Rep. 383, and cases cited. Apart from the text, which we think plain, it is by no means clear that if the act were given a construction to limit its application to American seamen only, the purposes of Congress would be subverted, for such limited construction would have a tendency to prevent the employment of American seamen, and to promote the engagement of those who were not entitled to sue for one-half wages under the provisions of the law. But, taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act. Before the amendment, as we have already pointed out, the right to recover one-half the wages could not be enforced in face of a contractual obligation to the contrary. Congress, for reasons which it deemed sufficient, amended the act so as to permit the recovery upon the conditions named in the statute."

Vol. IX, p. 174, sec. 10. [First ed., 1916 Supp., p. 232.]

Application of section—*Foreign vessels.*—To same effect as second paragraph of original annotation, see *The Elizabeth Maersk*, (E. D. La. 1919) 258 Fed. 765.

Paying seamen's debt.—An advance by the master of a vessel to seamen on the day they sign, in order to enable them to pay a debt, is illegal, as being in violation of this section, and should not be deducted from their wages. *The Elizabeth Maersk*, (E. D. La. 1919) 258 Fed. 765.

Vol. IX, p. 180, sec. 20. [First ed., 1916 Supp., p. 251.]

Construction.—To same effect as 1918 Supplement annotation, see *Hanrahan v. Pacific Transport Co.*, (C. C. A. 2d Cir. 1919) 262 Fed. 951.

The master of a launch, hired by a company to convey its employees to their work, is not a fellow servant of an employee in-

jured in the launch while on his way to his place of work. *Maryland Dredging, etc., Co. v. State*, (C. C. A. 4th Cir. 1919) 262 Fed. 11.

Vol. IX, p. 185, sec. 4556. [First ed., vol. VI, p. 887.]

Absence of handrail as showing vessel to be unseaworthy.—A vessel is not unseaworthy because she has no handrail up, while lying alongside a wharf discharging cargo. *Hanrahan v. Pacific Transport Co.*, (C. C. A. 2d Cir. 1919) 262 Fed. 951.

Vol. IX, p. 195, sec. 4569. [First ed., vol. VI, p. 895.]

Care of injured seaman.—If an injured seaman is placed in a hospital and unwarrantably leaves it, the vessel is not bound to provide further treatment for him. *The Santa Barbara*, (C. C. A. 2d Cir. 1920) 263 Fed. 369.

Venereal disease.—A seaman is not entitled to be treated at the expense of the ship for a venereal disease contracted by him. *The Alector*, (E. D. Va. 1920) 263 Fed. 1007.

SHIPPING AND NAVIGATION

Vol. IX, p. 246, sec. 2. [First ed., vol. VII, p. 92.]

Affixing facsimile signature to orders, vouchers, etc.—The affixing of the stamped facsimile signature of the Chief of the Bureau of Navigation to orders, vouchers, etc., properly initialed by officers duly authorized to affix the same thereto, under the direction and control of the Chief of the Bureau of Navigation, is a sufficient approval thereof by the Chief of the Bureau of Navigation. The Chief of the Bureau of Navigation cannot transfer to others any duty which the law imposes upon him in connection with the approval of orders, vouchers, etc., but after he has in some appropriate way passed judgment in such cases, the manual act of affixing his signature in evidence of his approval may be done by others thereunto duly authorized by him. 31 Op. Atty-Gen. 349, wherein it was said:

"From the opinion of the Judge Advocate General annexed to the above-mentioned letter it appears that there is no statute which requires the signing of the orders, vouchers, etc., concerning which this question is asked by the Chief of the Bureau of Navigation. The provisions of law and the regulations respecting this matter require only that the orders and vouchers be approved by the Department or by the Chief of the Bureau of Navigation.

"It further appears from the said opinion, that the Chief of the Bureau of Navigation of the Navy Department in July, 1918, delivered to two officers on duty in the said bureau rubber stamp facsimiles of his signature with the following instructions, 'This stamp "L. C. Palmer" when used and initialed by you is my official signature.'

"Attorney General Wirt, answering a very similar inquiry (1 Op. 670, 672), said:

"The adoption and acknowledgment of the signature, though written by another makes it a man's own. As to usage, and even official usage, I believe that by far the greater part of our judicial records are not

signed by the clerk of the court himself, but are signed by deputies, who use the name of the clerk on a mere general verbal authority.

"There would be great difficulty in maintaining the proposition as a legal one, that when the law required signing, it means that it must be done with pen and ink. No book has laid down the proposition, or even given color to it. I believe that a signature made with straw dipped in blood would be equally valid and obligatory; and if so, where is the legal restriction on the implement which the signer may use? If he may use one pen, why may he not use several?—a polygraph, for example, or types—or a stamp, which the court, in *Lemaign v. Stanley*, said would be a sufficient satisfaction of the statutory requisition of signing. The law requires signing merely as an indication and proof of the parties' assent. It places the Treasury of United States under the guardianship of the Secretary. It requires that no money shall be drawn from the Treasury without his authority. The evidence which it demands of his authority, is, that the warrants shall be signed by him; but as to the method of signing, that is left entirely to himself. He may write his name in full, or he may write his initials; or he may print his initials with a pen; that pen may be made of a goose quill, or of metal; and I see no legal objection to its being made in the form of a stamp or copperplate. It is still his act; it flows from his assent, and is the evidence of that assent. . . . It is true that the stamp may be forged, but so also may the autograph of the Secretary. There would, perhaps, be more difficulty in the latter case than in the former; and the superior facility of forging a stamp, or a copperplate, may be a very good reason why the legislature should, by a positive law, prohibit the use of it, and define the manner in which the signing shall be done. They have not yet defined it; and the word signing does not, as we have seen, necessarily imply *ex vi termini*, the use of pen and ink, held and guided by the hand

of the Secretary himself; it does not imply it in legal acceptation, at least.'

"This reasoning has been accepted in subsequent opinions of the Attorney General."

Vol. IX, p. 283, sec. 4189. [First ed., vol. VII, p. 41.]

Vessel licensed but not enrolled.—In *The Scandanavia II*, (D. C. Md. 1919) 258 Fed. 144, the court regarded it as doubtful whether the provisions of section 9 of the Shipping Board Act (1918 Supp. Fed. Stat. Ann. 788) applied to a vessel under twenty tons burden, which was licensed but not enrolled, and hence refused to declare such a vessel forfeited under this section because the license was fraudulently obtained.

Vol. IX, p. 338, sec. 1. [First ed., vol. VII, p. 82.]

Fees for attending to effects of deceased seaman.—A shipping commissioner is entitled to a fee for attending to the effects of a deceased seaman, since such service is not one of those for which the payment of a fee is prohibited by this section. *In re Nickerson*, (D. C. Mass. 1919) 260 Fed. 1020. Regarding this section, the court said:

"The effect of this statute is to make the commissioner's compensation dependent on the services which he renders, and to put the payment for those services on the United States, instead of on individuals. The commissioner is not entitled to be paid by the United States for services for which he would not, prior to the statute referred to, have been entitled to charge individuals.

"Under the law as it stood prior to the act of June 19, 1886, it must be taken as established in this court that the commissioner was entitled to make a charge for expenses in accordance with Judge Shepley's order of 1873. The question then is whether the statute in question abolishes that charge. The language of the act is extremely precise:

"No fee shall be charged . . . for the following services, to wit."

"Attending to the effects of a deceased seaman was not among the services scheduled. The compensation substituted by the act in lieu of fees is based upon 'a detailed report of such services and the fees provided by law.' It seems clear that the commissioner, if he reported such a fee as is here claimed, could not be allowed for it out of the treasury under the statute. It was obviously not the intention of Congress to change by the statute the amount of compensation, but only the method of payment."

Vol. IX, p. 343, sec. 14. [First ed., 1909 Supp., p. 655.]

Application of section.—Regulations promulgated pursuant to this section apply only

to sea-going barges. *New York, etc., R. Co. v. Wilkins*, (C. C. A. 4th Cir. 1919) 257 Fed. 42, 168 C. C. A. 254.

Vol. IX, p. 346, sec. 1. [First ed., 1912 Supp., p. 352.]

II. Definition and nature of maritime lien.

III. Person entitled to lien.

V. "Repairs, supplies or other necessities."

VIII. Necessity that credit was given to vessel.

II. DEFINITION AND NATURE OF MARITIME LIEN (p. 348)

Merger of lien in account stated.—A maritime lien arising upon the completion of repairs to a vessel, is not lost because the repairer thereafter renders bills to the owner, nor because he alleges in his libel that the bills were retained without objection and therefore became an account stated. *The Hattie Thomas*, (C. C. A. 2d Cir. 1920) 262 Fed. 943. The court said:

"In *Morse Dry Dock & Repair Co. v. Munson S. S. Line* (D. C.) 155 Fed. 150, affirmed by this court in 158 Fed. 1021, 85 C. C. A. 666, there was an action for repairs in similar form. The suit was in personam. The libel alleged that the respondent engaged the libellant to repair four steamers, that the work was finished, and that there was a balance due. The itemized bills for the work and materials against each vessel were delivered by the libellant to the respondent; the respondent admitted the correctness of the bills and promised to pay the account. The libel was drafted in very much the same language as is this. The court assumed jurisdiction in admiralty, and sustained the libel, and rendered a verdict, which was affirmed in this court, where it was said:

"We think the District Judge was correct in holding that the action was upon an account stated"—and affirmed upon the District Judge's opinion. Indeed, the answer admits by failure to deny that the appellee has a maritime lien. *Dunham v. Cudlipp*, 94 N. Y. 129.

"The acceptance of a note of a third person for a pre-existing debt does not constitute payment, in the absence of an express agreement to that effect. *Atlas S. S. Co. v. Colombian Land Co.*, 102 Fed. 358, 42 C. C. A. 398. And the acceptance of the note of a third person and taken for debt of a vessel, does not discharge the maritime lien. *The James T. Easton* (D. C.) 49 Fed. 656. Where a debt was for material and supplies furnished to a vessel, and therefore cognizable in admiralty, it does not deprive a creditor of the right to sue in admiralty by taking a bond and mortgage, unless it appears that such was the express intention of the parties. *Robins Dry Dock*

& Repair Co. v. Chesbrough, 216 Fed. 121, 132 C. C. A. 365. And so a maritime contract is not changed into a nonmaritime contract because of an account stated. *Morse Dry Dock & Repair Co. v. Munson Steamship Line*, 158 Fed. 1021, 85 C. C. A. 666."

III. PERSON ENTITLED TO LIEN (p. 348)

Part owner.—Under ordinary circumstances, one part owner of a vessel cannot obtain a lien against his co-owners, and a stockholder in a company owning a vessel has been regarded as a part owner. The rule is based upon the presumption that in such cases the advance or payment is made on the credit of the owner, not of the vessel. This presumption, however, may be rebutted. Thus, where advances and payments by stockholders in a corporation owning a vessel, are made on the credit of the vessel and the master is so informed at the time, and it does not appear that in claiming a lien they are acting unfairly either toward their co-owners (i. e., other stockholders in the corporation), or subsequent lienors, the lien will be allowed. *The Puritan*, (D. C. Mass. 1919) 258 Fed. 271.

Person believed to be acting as agent.—The fact that the master of a vessel believed that a person employed to make repairs was acting for a former employer, when in reality he was in business for himself, does not prevent such person from obtaining a lien under this section. *The Kalfarli*, (E. D. N. Y. 1920) 263 Fed. 958.

V. "REPAIRS, SUPPLIES OR OTHER NECESSARIES" (p. 349)

Wharfage.—Wharfage for an injured vessel and the use of a dry dock during its repair will support a lien under this section. *The Andrew J. Smith*, (E. D. N. Y. 1920) 263 Fed. 1004.

Supplies furnished in home port.—It is no defense to a suit for a maritime lien under this section that the repairs and supplies were furnished at the home port. *The Lady Rasendyll*, (N. D. N. Y. 1919) 258 Fed. 504.

Raising sunken vessel in home port.—A maritime lien under this section arises from the raising of a sunken vessel in its home port where such service is necessary as a part of repairing it. *The Convoy*, (E. D. N. Y. 1919) 257 Fed. 843, wherein the court, in discussing the scope of liens under this section, said:

"It is evident that a maritime lien may arise in a home port from furnishing either 'repairs' or 'necessaries.' If a vessel is placed on a dry dock or pumped out in order to raise her sufficiently for the making of repairs, a lien will arise for the entire bill, just as a lien for the actual work of repair is created. If, therefore, a vessel is lying on the bottom, and as a part of repairing a hole in the vessel she has to be raised, there seems to be no logical reason why it should not be treated as a part of the

work from which a lien would arise. The essential element would seem to be that the vessel was to be repaired—that is, to be restored—and that she had not been abandoned or treated as material for the building of another vessel. On the other hand, if the sunken vessel had been treated as a total loss, and yet is saved, the fact that she might be restored to service by having certain repairs made would not take the work out of the class of salvage.

"In the case at bar the allegations of the libel show that the case is not one of salvage; the vessel was not, apparently, given up as a total loss, and hence the fact that the services were rendered in the home port does not affect the question which it presented, viz., whether the work of raising the vessel was either 'necessary' or a part of the repairs. Certainly nothing could be more necessary, in the ordinary sense, than the raising of the vessel; but the word 'necessaries' in the statute has been limited to such things as go to the actual equipment of the vessel as a navigating object. The statute expressly includes the use of a dry dock and marine railway; but mere services involving the consumption of power or fuel, such as towing, have been held not to be a 'necessary,' in the sense meant by the statute."

Sufficiency of evidence of repairs.—In *The Elizabeth Monroe Smith*, (C. C. A. 4th Cir. 1919) 258 Fed. 609, 170 C. C. A. 63, a vessel was libeled for a repair bill. The owner offered no testimony, and it appeared from the testimony of the shipbroker, who negotiated the sale of the ship to the owner, that he brought the ship from Philadelphia to the repairman at Norfolk for the purpose of having made to her the repairs recommended by the underwriters, and certain others which the owner itself wanted done, and that one of the owner's representatives was present directing the repairs. It was held that, in the absence of any countervailing testimony, this was sufficient to entitle the libellant to a lien under this section.

VIII. NECESSITY THAT CREDIT WAS GIVEN TO VESSEL (p. 352)

Charterer bound to furnish supplies.—In denying a lien for coal furnished to a vessel, the charterer being bound to provide coal, the court, in *Curacao Trading Co. v. Bjorge*, (C. C. A. 5th Cir. 1920) 263 Fed. 693, said:

"It is not claimed that under the law as it was before the enactment of the Act of June 23, 1910, 'relating to liens on vessels for repairs, supplies, or other necessities' (36 Stat. 604), the coal was so furnished as to give a lien on the vessel. Assuming, without deciding, that that statute is applicable to the transaction in question, we are not of opinion that the furnisher acquired the lien claimed. According to the evidence it was not procured by the master, or by any one authorized to bind the vessel therefor, but was procured by and furnished to the

charterers on their order and credit. So far as appears, the master had nothing to do with getting the coal, except that, under directions from the charterers, of which the appellant was informed, he told the appellant how many tons were required. The statute does not create a presumption that a charterer, unless he is also either the 'ship's husband, master or a person to whom the management of the vessel at the port of supply is intrusted' has authority from the owner to procure repairs, supplies, or other necessities for the vessel. No lien on a vessel is given for supplies procured by one having no such relations to it that, under the terms of the statute, he is presumed to have authority from the owner to procure supplies."

Waiver of lien.—Where a fuel company furnishes coal to a vessel without knowledge that it is under charter and that the charterer is to pay for its coal, but on learning such facts, immediately bills the coal to the charterer and attempts to obtain payment from him, it thereby waives any lien it may have against the vessel under this section, and may not thereafter enforce it. *The Eastern*, (D. C. Mass. 1919) 257 Fed. 874.

Vol. IX, p. 354, sec. 2. [First ed., 1912 Supp., p. 353.]

"The management of the vessel."—In *The Eastern*, (D. C. Mass. 1919) 257 Fed. 874, coal was furnished to a vessel on the order of her chief engineer. It was held that "the management of the vessel," in respect to her coal supply, was intrusted to her chief engineer, and that the fuel company was entitled to a lien for furnishing it.

Vol. IX, p. 355, sec. 3. [First ed., 1912 Supp., p. 353.]

Clause in charter-party requiring charterer to save owner harmless from liens.—In *The South Coast*, (1920) 251 U. S. 519, 40 S. Ct. 233, 64 U. S. (L. ed.) —, *affirming* (C. C. A. 9th Cir. 1917) 247 Fed. 84 159 C. C. A. 302, there was a libel against the steamer *South Coast*, belonging to the claimant, a California corporation, and registered in San Francisco, for necessary supplies furnished in San Pedro, California. The answer denies the authority of the master to bind the steamer. The bare vessel at the time was under charter to one Levick, the contract stipulating that Levick was to pay all charges and to save the owner harmless from all liens or expenses that it might be put to in consequence of such liens. There was also a provision that the owner might retake the vessel in case of failure of Levick to discharge within thirty days any debts which were liens upon it, and another for surrender of the vessel free of all liens upon Levick's failure to make certain payments. When the supplies were ordered, representatives of the owner in San Pedro warned the

libellant that the steamer was under charter, and that he must not furnish the supplies on the credit of the vessel. He replied that he would not furnish them in any other way, but the reply does not affect the case, because, by the terms of the charter, the master who ordered them, although appointed by the owner, was under the orders of Levick. It is agreed by both courts below that if the owner had power to prevent the attaching of a lien by its warning, it had done so. Both courts, however, held that the charter gave the master power to create the lien. 233 Fed. 327, 159 C. C. A. 302, 247 Fed. 84. The Supreme Court, on certiorari, affirmed the Circuit Court's holding. The court, through Mr. Justice Holmes, said: "By the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604, a maritime lien is given for such supplies, and by section 3 a presumption is declared that a master appointed by a charterer has authority from the owner to procure them. It is true that the act goes on that nothing in it shall be considered to give a lien where the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, or for any other reason, the person ordering the necessities was without authority to bind the vessel. But the authority of the owner to prohibit or to speak was displaced, so far as the charter went, by that conferred upon the charterers, who became owners pro hac vice, and, therefore, unless the charter excluded the master's power, the owner could not forbid its use. The charter party recognizes that liens may be imposed by the charterers and allowed to stand for less than a month and there seems to be no sufficient reason for supposing the words not to refer to all the ordinary maritime liens recognized by the law. The statute had given a lien for supplies in a domestic port and therefore had made that one of these ordinary liens. Therefore the charterer was assumed to have power to authorize the master to impose a lien in a domestic port, and if the assumption expressed in words was not equivalent to a grant of power, at least it cannot be taken to have excluded it. There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship."

Proviso—Generally.—In *Coyle v. North America Steamship Corp.*, (C. C. A. 5th Cir. 1920) 262 Fed. 250, it was held that the single fact that the furnisher of supplies to a vessel was informed that it was under charter to the party on whose order the supplies were furnished did not charge such furnisher with notice of the terms of the charter party, and that where the order was given by a business associate of the charterer, on the requisition of the ship's engineer, and the master and engineer of the ship acquiesced in the delivery of the supplies to the vessel, it must be regarded as having been given by the master of the vessel, and

the vessel was bound thereby. The court said:

"The mere fact that one knows or is informed that a ship is under charter is not enough to charge him with notice of the terms of the charter party. The *George Dumois*, 68 Fed. 926, 15 C. C. A. 675. In the case just cited the claim was for coal furnished to a ship in a foreign port on an order given by one known to be the charterer of it. The coal was received by the master and officers of the ship, was a necessary supply to the ship, without which the voyage could not have been prosecuted, and was used by the ship in prosecuting the voyage. That case arose and was decided before the enactment of the above-mentioned act of June 23, 1910, relating to liens on vessels for repairs, etc. It was held that under the law as it then existed a lien on the ship resulted from the furnishing of supplies under the circumstances stated, unless it was shown that the furnisher relied on the credit of the owner or charterer, not of the ship, and that, though the furnisher knew that the order for the coal was given by the charterer, he was not bound to know the terms of the charter party, which in fact included a provision requiring the charterer to pay for such supplies. If there had been no change in the law, that decision would be an authority supporting a ruling in the instant case that the furnishing of coal by the libellant was under such circumstances as to have the effect of creating a lien on the ship.

"While the evidence showed that Mr. Hiller, in giving the order for the coal, did so at the request of a business associate of the charterer, it also showed that when he gave the order he was apprised of the amount of coal needed by a requisition of the ship's engineer, an appointee of the owner, and that the master and the engineer acquiesced in the delivery of the coal to the ship; the former giving a receipt for it. An order so given is to be regarded as given by the ship's master, though a business associate of the charterer co-operated in procuring the giving of it. *The Philadelphia*, 75 Fed. 684, 21 C. C. A. 501; *Norwegian Steamship Co. v. Washington*, 57 Fed. 224, 6 C. C. A. 313; *In re Alaska Fishing & Development Co.* (D. C.) 167 Fed. 875.

"The necessity, existing under the law as it formerly was, of alleging and proving that necessary supplies furnished on such an order as the one shown in the instant case were furnished on the credit of the vessel, is dispensed with by the provision of the above referred to act of June 23, 1910, that designated persons, including a ship's master, 'shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessities for the vessel.' This provision is qualified by the following one contained in section 3 of the act:

"But nothing in this act shall be con-

strued to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter party, agreement for the sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessities was without authority to bind the vessel therefor."

"Language used in the last-quoted provision, 'nothing in this act shall be construed to confer a lien,' etc., is some indication of the absence of an intention to deprive a furnisher of a lien on a ship for necessary supplies furnished to it under such circumstances that he would have had a lien under the previously existing law, unaffected by any lien statute. It is questionable whether the same meaning properly can be attributed to the proviso that it would have had if, instead of the last-quoted language, it had used some such language as the following:

"But the furnisher shall not have a lien if he knew, or by the exercise of reasonable diligence, etc."

"If the transaction now in question had occurred before the enactment of the act mentioned, as it was a furnishing on the order of the master of necessary supplies to a ship in a foreign port, there would have been a lien on the ship, unless it had been shown that the supplies were not furnished on its credit, or that the libellant knew, or by the exercise of reasonable diligence could have ascertained, that the master was without authority to bind the vessel therefor, and the circumstance that the libellant knew that the ship was under charter would not have been enough to rebut the presumption that the supplies were obtained on its credit, though the charterer participated in the ordering of them, and the charter party required the charterer to pay for them. *The George Dumois*, *supra*. As the libellant would have had a lien if the statute had not been enacted, there is some ground for saying that language used in the statute stands in the way of its being given the effect of preventing a lien in the libellant's favor attaching.

"But, assuming that the statute has the effect of preventing the furnishing of necessary supplies to a vessel in a foreign port giving a lien on it, if a lien would not have resulted if the transaction had been in the vessel's home port, it is plain that an effect of the statute is to either create or recognize a presumption of the validity of such an order as the one on which the libellant furnished the coal, and that proof of the giving of that order and of compliance with it by delivering the coal to the ship with its master's acquiescence was *prima facie* sufficient to entitle the libellant to the lien claimed, and put upon the claimant the burden of proving that the master was without authority to bind the vessel, and that the libellant knew, or by the exercise of reasonable diligence could have known, of such

lack of authority. The *Yankee*, 233 Fed. 919, 147 C. C. A. 593."

Reasonable diligence.—Where coal is furnished to a vessel at the request of its engineer in pursuance of a regular custom, and the information that it is under charter is not communicated to the fuel company until after the coal has been furnished, the company is not lacking in reasonable diligence, within the meaning of this section, because it did not ascertain the existence of the charter before putting the coal on board. *The Eastern*, (D. C. Mass. 1919) 257 Fed. 874.

Rebuttal of presumption of master's authority.—"Nothing in the act indicates that the presumption of authority in a vessel's master to procure necessities for it could be rebutted or destroyed by showing that the furnisher knew or was informed that the vessel was under charter. To rebut or overcome the presumption of the master's authority to bind the vessel, it must be shown that the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that the terms of a charter party, or something else, deprived the master of authority to bind the vessel for necessities furnished to it." *Coyle v. North America Steamship Corp.*, (C. C. A. 5th Cir. 1920) 262 Fed. 250.

1918 Supp., p. 788, sec. 9.

Application of section—Vessels licensed but not enrolled.—In *The Scandinavia II*, (D. C. Md. 1919) 258 Fed. 144, the court regarded it as doubtful whether the provisions of this section applied to a vessel, under twenty tons burden, which was licensed, but not enrolled, and refused to declare such a vessel forfeited under R. S. sec. 4189 (9 Fed. Stat. Ann. (2d ed.) 283) because the license was fraudulently obtained. Regarding this question, it said:

"The claimant argues that, whatever may have been the deceitful purpose of Wilson and the officials of the company which employed him, they did nothing which was in law fraudulent, because he says that the act of 1916 concerns itself with only two of the three classes of vessels of the United States, namely, those which are registered, and those which are at once licensed and enrolled, and has nothing to do with those which, because they are under 20 tons burden, are licensed, but not enrolled. He relies upon the phrasing of the third paragraph of the ninth section of the Shipping Board Act, already mentioned. In that it is said:

"When the United States is at war . . . no vessel, registered or enrolled and licensed under the laws of the United States, shall, without the approval of the board, be sold, leased, or chartered to any person not a citizen of the United States."

"The presumption would be strongly against the federal Legislature having intended to limit its definition of citizens in

the manner now claimed, were it not that Congress, two years later, seems to have thought that it had. By the act of July 15, 1918, the word 'documented,' when used in connection with ships, is defined to mean: 'Registered, enrolled or licensed under the laws of the United States.' The report of the House committee on merchant marine and fisheries (No. 568, House, 65th Congress, Second Session) declares that the purpose in so doing was to 'bring under the act vessels licensed, but not enrolled (i. e., ships under 20 tons). In view of the military value of even small vessels, this change is considered important.' The report of the House committee was adopted by the Senate committee on commerce as a part of its report. Senate, 536, 65th Congress, Second Session.

"In the light of this fact, there is at least a doubt as to whether the act of 1916 in any wise affected the status of such small craft. The provision here sought to be enforced is highly penal.

"The libel will be dismissed."

"Employed solely as a merchant vessel."

—A vessel engaged in carrying food products from this country to Europe is employed as a merchant vessel within the meaning of this section, and the fact that her cargo is owned by a foreign government does not alter the essentially mercantile character of the service she is rendering. Nor does the fact that she is commanded by officers of the United States Navy and has a naval crew, render her immune from process, since the government is deemed to have waived its privileges by employing her as a merchant vessel. *The Jeannette Skinner*, (D. C. Md. 1919) 258 Fed. 768.

Vessels of sovereign—Immunity from process.—The immunity from process of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign of the property at the time process is served. This general rule of law is not affected by this section. The vessels referred to herein are such as are operated, not by the government, but by persons who have "purchased or leased or chartered" them from the government. *The Carol Poma*, (C. C. A. 2d Cir. 1919) 259 Fed. 369, 170 C. C. A. 345.

Liability for collision of vessel chartered by Shipping Board.—To same effect as 1919 Supplement annotation, see *The Jeannette Skinner*, (D. C. Md. 1919) 258 Fed. 768; *The Nishmaha*, (D. C. Ore. 1920) 263 Fed. 959.

1918 Supp., p. 790, sec. 11.

Emergency Fleet Corporation—Immunity from process.—In *Commonwealth Finance Corp. v. Landis*, (E. D. Pa. 1919) 261 Fed. 440, it appeared that several actions had been brought against the Emergency Fleet Corporation. The defense was interposed

that the corporation was the United States, and hence not subject to process. Regarding this defense the court said:

"We have had neither time nor opportunity to investigate the organization of this corporation, for the purpose of getting first-hand information of what it is. We have not taken the time to make this investigation, because counsel agree upon what are the essentials of this organization. These are that the Fleet Corporation is a private corporation, in the organization of which it is provided that the United States shall own more than 50 per cent. of its stock, and may own, and the fact is that at present it does own, all of the capital stock, except a few shares, which, for organization purposes, are required to be owned by those who have certain official relations with the company. It is further organized for the purpose of acting as an agent of the United States, and doing what the United States might do direct. These things, which are expected to be thus done by the corporation, are essentially of a military character, and primarily for the welfare and protection of the people.

"We have, in consequence, room for the following distinctions and the following at least possible differences: One of the distinctions is that the Fleet Corporation is, as before stated, a private corporation, and, in this sense, a private individual or a person authorized to perform a public service as an agent of the United States. One of these possible differences is that private persons or individuals may be among the ultimate owners of the assets of the corporation, and the United States is required to be also among these ultimate owners, and the property and assets of the corporation may be actually and wholly in use for public purposes, or may at least possibly not be in such actual use, or all such property and assets may not be in such actual use.

"There is another respect in which a distinction, which is also a difference, may exist. The Fleet Corporation may be acting as such agent of the United States, or may not be so acting, or it may so act in some of its activities, and not in others. It follows from this that when it is acting as the United States, and such of its property and assets as are in the actual use of the United States, neither it as such agent nor such property can be drawn into or jeopardized by disputes between private parties. It would also follow, however, that in so far as it is acting as a private corporation, and in so far as its property and assets are and are used as its private property, it is not immune from the liabilities and responsibilities which are imposed by law upon litigants.

"The foregoing observations indicate the line to be drawn. It is easy to draw the line, but not so easy to determine when and where it shall be drawn. It has been determined for us that when the corporation, through one of its activities, was fabricating ships for the

United States that the property which otherwise would be the private property of the corporation was being devoted to and used in this public purpose, it might be found to be the property of the United States, and that any one who was guilty of selling any part of it was subject to indictment for stealing the property of the United States. *United States v. Carlin*, (D. C.) 259 Fed. 904.

"It has also been determined for us that, when the United States had bought and become the owner of all the property, assets, and franchises of a railroad, and there was nothing which by any possibility could be seized under an execution issued upon a judgment, and nothing upon which any part of that judgment could be a lien other than property of the United States, a proceeding having for its sole purpose and objective such a method of enforcing the payment of a claim, being thus prosecuted, could not be sustained. *Ballaine v. Alaska*, 259 Fed. 183, — C. C. A. —. There is authority, however, for the proposition that under some circumstances a proceeding against a corporation having these general relations with the United States can be upheld. *Salas v. United States*, 234 Fed. 942, 148 C. C. A. 440.

"There is thus presented this broad distinction, and this general proposition, that sometimes a proceeding set in motion to have determined the obligation of a corporation of this general kind is permitted to become effective and sometimes it is not. This proposition necessarily involves the thought that there is a question to be determined, and this again necessarily carries the further thought that the corporation is not immune from process, because otherwise nothing other than such immunity could be determined. It may be that if any one of these plaintiffs secures a final judgment against this corporation, he will be unable to enforce payment of the judgment because of the fact that there is no property out of the sale of which the judgment can be paid, other than either property of the United States or property which is in use by the United States for military purposes. The futility or hopelessness of execution process does not, however, deprive a litigant of judgment process.

"There is this very practical and common-sense view of the broad question here involved and of the general situation presented. Private persons and individuals must deal with this corporation as contractors or otherwise in the accomplishment of the work with which the corporation has to do. Supplies of materials must be furnished to the corporation and to those who have contracted with it. Obligations of some kind to make payment must be incurred. Congress has found it to be best to so provide that the United States shall not directly incur these obligations. If the obligations incurred were the obligations of the United States, it has so far laid aside the robes of sovereignty as

to permit the question of the existence of such obligation to be determined by the Court of Claims and within limits by the District Courts. If this remedy was pursued by any one having a claim, no matter how just that claim might be, the United States might very well interpose the defense that it had not incurred any obligation, and the foregoing remedy would be denied the claimant. If the corporation was not amenable to process, then the intolerable situation would be presented that the corporation was free to admit or repudiate its obligations at its free will and pleasure. The sovereign, it must be conceded, cannot be sued without its consent; but the doctrine must also be accepted that he may consent."

To same effect, see *Gould Coupler Co. v. United States Shipping Board, etc., Corp.*, (S. D. N. Y. 1919) 261 Fed. 716, where the court, in holding that the Emergency Fleet Corporation was subject to suit, said: "The *Lake Monroe*, 250 U. S. 246, 39 Sup. Ct. 460, 64 L. Ed. —, seems to me finally to control both cases. In that case the vessel had been requisitioned and completed by the Fleet Corporation and chartered by the Shipping Board, under the 'emergency shipping fund' provision of the Urgent Deficiencies Act. That provision (40 Stat. 182) empowered the President to requisition any ship then being constructed and to exercise his powers through any designated agencies. The question was whether such a ship was within the liability to arrest of section 9 of the Shipping Act, or whether that act applied only to ships which had been built, chartered, or purchased by the Shipping Board under section 5 of the Shipping Act. It was held that, though the President was free to select other agencies, Congress showed that it contemplated the probability that he would in fact choose the Shipping Board and the Fleet Corporation, and that if he did choose them the general administrative provisions of the Shipping Act should apply, among them the liability of all vessels to be arrested on civil process. Therefore the court thought it an irrelevant consideration whether the Shipping Board had chartered the *Lake Monroe* under its powers derived from the Shipping Act or as a delegate of the President. In either case section 9 applies to such vessels.

"Now, in these cases it appears to me too clear for dispute that the Fleet Corporation is in general capable of being sued. Section 11 of the Shipping Act provides that the corporation shall be chartered under the laws of the District of Columbia, and no one disputes that this means under its general corporations laws. The corporation was so formed under Code of Law D. C. c. 18, subchapter 4, which authorized actions by and against any corporation so organized. The Fleet Corporation was therefore meant to be a legal person without immunity quite as much as any other corporation. In view of these provisions it is unnecessary to consider any of the cases touching the general

liability to process of corporations in which the United States may be a stockholder or which it may organize for governmental purposes.

"If so, then this process would have been legal if these actions had concerned any activities authorized by the Shipping Act. But the objection raised is to process in suits which arose out of the execution of duties imposed upon the Fleet Corporation by the President under the Emergency Shipping Fund provision of the Urgent Deficiencies Act. That provision (a) authorized the President to place any order for ships or materials as he might think necessary, and it is to be assumed apparently on this motion that it was such an order that is the subject of the larger of the claims at bar. The other claim arises as a necessary incident to the construction of ships, and may properly be thought to fall within the same power. When the President chose the Fleet Corporation as his agent to discharge the duties so imposed upon him, it may of course be argued, as the defendant does, that the agent retained the same immunity as the President would have had, had he deputed it to an individual immediately under his control. Nevertheless, by a precise parity of the reasoning which the Supreme Court adopted in *The Lake Monroe*, *supra*, it must follow that in choosing the Fleet Corporation he chose it with all its limitations upon its head. In other words, Congress contemplated that possibility, and expected that in so delegating his powers he must subject their exercise to the scrutiny and determination of the customary tribunals, precisely as the Fleet Corporation's other activities were subject.

"To draw a distinction between ships and the contracts under which they were made would be a capricious rule. If all ships operated by the Board are subject to arrest, whether or not they are operated under the President's powers, it is hard to see why disputes should be justiciable arising under contracts made to build one class of ships and not under those made to build the other. No possible ground appears to me for distinguishing between the agents selected by the President when discharging one of his duties and when discharging any other.

"Moreover, it is in general highly desirable that, in entering upon industrial and commercial ventures, the governmental agencies used should, whenever it can fairly be drawn from the statutes, be subject to the same liabilities and to the same tribunals as other persons or corporations similarly employed. The immunity of the sovereign may well become a serious injustice to the citizen, if it can be claimed in the multitude of cases arising from governmental activities which are increasing so fast. At least I have no disposition to strain the point in their favor, where they fall clearly within the principle of authoritative decisions."

See also *Haines v. Lone Star Shipbuilding Co.*, (Pa. 1920) 110 Atl. 788, wherein it was

held that the Emergency Fleet Corporation organized under this section was held not immune from a writ of garnishment levied against it by a state court. The court said: "If it was the intent of Congress that the Fleet Corporation should be immune from civil process, it would have been very easy to have written it into the act; but nowhere is such language found, nor can it be reasonably inferred therefrom. If the Fleet Corporation was to be immune from civil process of any nature whatever, why the necessity of a Fleet Corporation at all? The United States government, acting through the Shipping Board as such, was immune from such process. It possessed the power and authority to do all the corporation could do. What was the intent of Congress when it authorized the creation of the Fleet Corporation, if it was not for the purpose of conducting a business corporation and assuring to those with whom it dealt that they would have a speedy adjustment of their claims; if not so adjusted, they had a debtor responsible in a court of law for the contracts and obligations undertaken, and when its contractors incurred debts a way was at hand, as in this case, to compel payment. Where would this immunity cease, considering the language of the delegation and the sundry subsequent delegation of the same subject-matter, as the corporation was empowered to and did make?"

"It must be further borne in mind that at this time the enforcement of the present attachment does not interfere with the construction of ships, nor does it endanger the public welfare in the slightest degree, nor is it capable of doing any act that would jeopardize the interests of the government. Courts will not close their doors to the relief of honest claimants (who have dealt with concerns such as herein discussed), for the reason that at one time they were engaged in and had for their immediate purpose the preparation of the United States

government for its successful entry into and conclusion of the war with Germany.

"We might, then, safely rest the case on the general rule that it, as a corporation doing business in Pennsylvania, is amenable to the processes of this court. As a corporation, chartered in the District of Columbia, there is no doubt the federal courts have concurrent jurisdiction with the state courts; it being a creature of the United States government. It has been held that corporations organized under the laws of the District of Columbia may be sued in the state courts. *Scheffer v. National Life Insurance Co.*, 25 Minn. 534. Generally speaking, whenever the legal right arises, and the state court is competent to administer justice, the right may be asserted in such court, although the federal court may have concurrent jurisdiction, unless the jurisdiction is limited by law to the federal courts. State courts have, therefore, been held to have jurisdiction of the suit against a federal officer or an officer of the general government, except where exclusive jurisdiction is given to the federal courts. *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126, affirming *Scranton v. Wheeler*, 113 Mich. 565, 71 N. W. 1091, 67 Am. St. Rep. 484; *Crawford v. Waterson*, 5 Fla. 472, 474; *Smith v. Berman*, 8 Ga. App. 262, 273, 68 S. E. 1014; *Ward v. Henry*, 19 Wis. 76, 80, 88 Am. Dec. 672; *Teall v. Felton*, 1 N. Y. 537, 543, 49 Am. Dec. 352; *Polack v. Mansfield*, 44 Cal. 36, 40, 13 Am. Rep. 151; *Louis v. Buck*, 7 Minn. 104, 112 (Gil. 71), 82 Am. Dec. 73. In *Kneedler v. Lane*, 45 Pa. 238, 249, Judge Lowrie has an interesting discussion as to the right of the state courts to exercise jurisdiction over questions emanating from federal laws, but no right is here raised as to the right to sue in the state court because the garnishee is a corporation of the District of Columbia. We conclude, therefore, that the attachment was proper and a valid process against the garnishee."

SOLDIERS' AND SAILORS' CIVIL RELIEF

1918 Supp., p. 812, sec. 100.

Constitutionality.—To same effect as 1919 Supplement annotation, see *Kuehn v. Neugebauer*, (Tex. Civ. App. 1919) 216 S. W. 259.

Purpose of Act.—In *Bassham v. Evans*, (Tex. Civ. App. 1919) 216 S. W. 446, an action for damages for the wrongful sequestration of land belonging to a person in the military service, the court said: "It appears to have been the purpose of Congress to place the civil rights of the person in the service under the supervision of the courts. It evidently was not the purpose to permit parties holding claims or obligations affecting such rights to act arbitrarily, or to en-

force liens without those rights being considered by the court, or to seize the property of the soldier by ancillary or harsh writs, and to dispossess the soldiers, or their agents, without giving the courts which Congress had constituted and authorized an opportunity to protect, and prevent prejudice to such rights. We think all these matters may be looked to in ascertaining the motive and animus of appellants in this case."

Effect on state acts.—A state statute suspending mortgage foreclosures during the military service of the mortgagor is not superseded by the federal act. *Pierrard v. Hoch*, (Ore. 1919) 184 Pac. 494.

1918 Supp., p. 814, sec. 200 (1).

Effect of failure to file affidavit.—"Section 200 . . . declares that, in any action or proceeding commenced in any court, if there shall be a default of an appearance by the defendant, the plaintiff before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. But the act does not anywhere declare that a judgment rendered on default and without such affidavit shall be absolutely null. On the contrary, there are several provisions that indicate that the judgment in such case would be voidable only at the instance of a defendant in military service. For example, the third sentence in section 200 declares that, if an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment. . . . The fourth sentence declares that, unless it appears that the defendant is not in the military service, the court may require as a condition before judgment is entered that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the fifth sentence authorizes the court to make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this act. All of which is in accord with the general provision in section 102 of the act that its provisions shall be enforced through the usual forms of procedure obtaining in the court in which the proceeding is commenced, or under such regulations as may be prescribed by that court, which court may be any court of the United States, or of one of the states or territories, or of the District of Columbia, or of any territory subject to the jurisdiction of the United States.

"The fourth paragraph of section 200 makes it quite plain that the final judgment of a court of competent jurisdiction shall be prima facie evidence that the person against whom it was rendered was not in the military service. The paragraph declares that, if any judgment shall be rendered against any person in military service during the period of such service, or within 30 days thereafter, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his

legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. And the concluding sentence of the paragraph declares that the vacating, setting aside, or reversing of any judgment because of any of the provisions of this act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment. Hence it follows that a judgment rendered on default of an appearance by defendant, and without the affidavit referred to in section 200, is not an absolute nullity." *Eureka Homestead Soc. v. Clark*, (1919) 145 La. 917, 83 So. 190.

So a default judgment entered without the affidavit required by this section will not be set aside at the instance of one who was not in the military service. *Alzugaray v. Onzures*, (1920) 25 N. M. 662, 187 Pac. 549. See to the same effect *Wells v. McArthur*, (1920) 77 Okla. 279, 188 Pac. 322.

An affidavit filed after interlocutory judgment but before final judgment is a sufficient compliance with the Act. *Woytek v. King*, (Tex. Civ. App. 1920) 218 S. W. 1081.

1918 Supp., p. 814, sec. 200 (4).

Opening of default judgment for failure to file affidavit.—A default judgment cannot be opened for failure to file the affidavit provided for by this section, unless it appears from the record that the person against whom the judgment was rendered is as a matter of fact in the military service. *Harrell v. Shealey*, (Ga. App. 1919) 100 S. E. 800.

1918 Supp., p. 815, sec. 201.

A witness in military service is ground for a continuance of a case where he is practically a defendant. *Ilderton v. Charleston Consol. Ry., etc., Co.*, (S. C. 1919) 101 S. E. 282.

1918 Supp., p. 815, sec. 203.

Conflict with state law.—In *Granger v. Luther*, (S. D. 1920) 176 N. W. 1019, wherein it was held that a state "moratorium law" violated the contract clause of the Federal Constitution, the court said:

"Appellant has not raised the question as to whether a state 'moratorium' law based upon existence of war can exist and be in force in favor of those in the federal service when there is also in existence a federal law covering the same subject matter. We do not intend by deciding the constitutionality of our state law to imply that, so far as it merely suspends remedies, it is in force and effect together with the federal law. Upon this we express no opinion."

Additional time to pay costs on appeal.—Under this section an Appellate Court may excuse noncompliance with the terms of a statute requiring costs on appeal to be paid within one year if a mandate is to be issued, where the party requesting the mandate was

in the military service during the year allowed for the payment of costs. *Kuehn v. Neugebauer*, (Tex. Civ. App. 1919) 216 S. W. 259.

1918 Supp., p. 817, sec. 301 (2).

Does not fix measure of damages.—This section does not apply to an action for wrongful sequestration of property in the attempt to foreclose a contract of sale while the vendee was in military service, and the payments previously made cannot be recovered. *Bassham v. Evans*, (Tex. Civ. App. 1919) 216 S. W. 446.

1918 Supp., p. 817, sec. 302 (1).

Scope of provision.—This provision is confined to the obligations therein referred to, and does not apply to the other classes of obligations which are provided for in other sections of article III of the Act. *Bassham v. Evans*, (Tex. Civ. App. 1919) 216 S. W. 446.

1918 Supp., p. 818, sec. 302 (3).

Foreclosure of mortgages by equity courts.—In *John Hancock Mut. L. Ins. Co. v. Lester*, (Mass. 1920) 125 N. E. 594, it was held that the existence of the Soldiers' and Sailors' Civil Relief Act is a special circumstance which is sufficient to give the equity courts of Massachusetts jurisdiction to foreclose mortgages within the time specified in the act. It was further held that the fact that the defendants were trustees and that they held the legal title to the mortgaged property for numerous shareholders, some of whom were in the military service, did not make it necessary to join the shareholders as parties. The court said:

"The petition in this case was filed July 16, 1919. In addition to service on the trustees, a general order of notice has been published. The trustees only have appeared. Under the trust instrument, the trustees who 'take charge of and manage the property . . . as they . . . deem for the interest of the shareholders,' do not present to the court any reason why the mortgages should not be foreclosed, apart from the fact that persons who are 'owners' under the statute are in military service. It is not urged that the mortgagee's interests do not require a fore-

closure, or that a foreclosure would inequitably affect the interests of those in military service. Interest and taxes form a rapidly increasing burden on the property. The trustees do not claim that foreclosure is unwarranted, because of impaired ability of certificate holders to comply with their obligations because of military service, and no such representation has been made by any person in their behalf. It is nearly fourteen months since the signing of the armistice. Free course of mails between this country and Europe has existed for many months. Here the activities and sacrifices of war no longer engage the minds of men or forbid attention to business. It is clear that the ability of shareholders to comply with the terms of the mortgages is not now materially affected by reason of such service.

"The plaintiffs are entitled to a decree authorizing the foreclosures in accordance with clause 3 of § 302 of the act. The form of the decree is to be settled by a single justice, but it is to provide for a sale or sales, without the intervention of a commissioner or special master, substantially in accordance with the powers of sale contained in the mortgages, and without further notice than that required by said powers, unless in the discretion of the single justice it is deemed necessary or advisable to provide for additional notice, or for an extension of the time required for notice of sale under the powers, or required by R. L. c. 187, § 14, as amended by St. 1906, c. 219."

Foreclosure of real estate mortgage by advertisement.—The Soldiers' and Sailors' Civil Relief Act was designed and intended to authorize and require in particular instances the restraint and stay of judicial proceedings commenced in any state or federal court for the enforcement of pecuniary obligations against those in the military service of the United States; but it had no application to the nonjudicial proceeding for the foreclosure of a real estate mortgage by advertisement, as authorized by state statutes, which was fully completed by a sale of the mortgaged property prior to the commencement of the military service of the soldier affected, though the period of redemption had not then expired. *Taylor v. McGregor State Bank*, (1919) 144 Minn. 249, 174 N. W. 893.

STATE DEPARTMENT

Vol. IX, p. 376, sec. 205. [First ed., vol. VII, p. 116.]

Publication as essential to validity.—The publication of a constitutional amendment under this section is not essential to its validity. *Ex p. Dillon*, (N. D. Cal. 1920) 262 Fed. 563, wherein the court said: "The promulgation of a constitutional amendment under section 205 is no more essential to its validity than is the promulgation of an act of Congress under the preceding section, and the former is no more the beginning of the amendment than the latter is the begin-

ning of the law; for, notwithstanding the requirement for promulgation, it is universally recognized that an act of Congress takes effect and is in force from the date of its passage and approval, and a constitutional amendment is likewise in full force and effect from and after its ratification by the requisite number of states. In other words, the promulgation by the Department of State only affords prima facie evidence of ratification, and the promulgation, when made, relates back to the last necessary vote by a state Legislature."

STATUTES

Vol. IX, p. 393, sec. 13. [First ed., vol. VII, p. 136.]

Construction.—To same effect as original annotation, see *De Four v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 596, 171 C. C. A. 360.

This section is still in force, as it was not

included in the express repealing provisions in the Criminal Code, Penal Laws, sec. 341 (7 Fed. Stat. Ann. (2d ed.) 989), and there is no repealing clause in any subsequent act which conflicts with the general rule of this section, nor is the latter superseded by Penal Laws, sec. 343 (7 Fed. Stat. Ann. (2d ed.) 997). *Goublin v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 5, 171 C. C. A. 601.

STEAM VESSELS

Vol. IX, p. 464, sec. 4487. [First ed., vol. VII, p. 97.]

Violation of statute as contributory negligence.—Where those in control of a vessel violate this section and the vessel is injured

in consequence, the defense of contributory negligence may be set up by persons against whom an action is brought to recover damages for such injuries. *Watson v. Mississippi River Power Co.*, (1920) 176 N. W. 624.

TELEGRAPHS, TELEPHONES AND CABLES

1918 Supp., p. 834. [*Government control, etc.*]

Regulation of intrastate rates.—To the same effect as 1919 Supplement annotation, see *State v. Burleson*, (Ala. 1919) 82 So. 458.

The Postmaster General, by virtue of this joint resolution, had authority to prescribe local telephone rates applicable only to a municipality without reference to the laws of the state. *State v. Tri-State Telephone, etc., Co.*, (1919) 143 Minn. 141, 173 N. W. 856.

Liability of telegraph company for negligence.—A telegraph company is not liable

for the negligent transmission of a message during the period of federal control. *Western Union Tel. Co. v. Davis*, (Ark. 1920) 218 S. W. 833.

Likewise, it is not liable for delay in transmission of a message during the period of federal control. *Foster v. Western Union Tel. Co.* (Mo. App. 1920) 219 S. W. 107.

Nor does its liability extend to a negligent injury to a servant during the period of federal control. *Mitchell v. Cumberland Telephone, etc., Co.*, (Ky. 1920) 221 S. W. 547.

Government control as defense to action.—It is no defense to an action against a cable company for damages, alleged to have been

caused by delay in delivering a cable, that its lines are being operated by the Postmaster General on behalf of the United States. *Witherspoon v. Postal Tel., etc., Co.*, (E. D. La. 1919) 257 Fed. 758, wherein Foster, J., said:

"Neither in the joint resolution nor the proclamation of the President is there a provision similar to section 10 of the Act of March 21, 1918, c. 25, 40 Stat. 456, taking over the railroad systems of the country. It seems to me, however, that it was the intention of Congress, in authorizing the President to take over the lines, that the companies should go ahead with private business the same as theretofore. This would contemplate the institution and defense of suits. If the company is allowed to take and send private messages, there should be some method of holding it liable for dam-

ages occasioned through negligence, notwithstanding the Postmaster General had the direction and control of the company. See *Postal Tel. & Cable Co. v. Call*, Dist. Judge, 255 Fed. 850, — C. C. A. —.

"The joint resolution provides for just compensation to the companies and the method of settling disputes as to same between them and the government. If the companies are held for damages occasioned while under government control, compensation will certainly extend to reimbursement. In the meantime litigants should not be delayed in liquidating their claims. Therefore I think it proper that the plaintiff in this case should be allowed to establish his liability against the company, if there is any. Delay in the trial of the case may result in hardship to either side."

TERRITORIES

Vol. IX, p. 548, sec. 1860. [First ed., vol. VII, p. 258.]

Virgin Islands.—The prohibition in the latter part of this section is not applicable to the Virgin Islands, and the President may nominate a naval officer for the position of judge of those islands. (1917) 31 Op. Atty.-Gen. 118.

Vol. IX, p. 561, sec. 4. [First ed., 1912 Supp., p. 389.]

School district—Generally.—To same effect as original annotation, see *Van Arsdale Brokerage Co. v. School Dist. No. 16*, (1920) 77 Okla. 233, 188 Pac. 333.

TIMBER LANDS AND FOREST RESERVES

Vol. IX, p. 587, sec. 1 (H). [First ed., vol. VII, p. 314.]

For decisions relating to the selection of lieu lands see *Washburn v. Lane*, (App. Cas. D. C. 1919) 258 Fed. 624; *Sandpoint Lumber, etc., Co. v. Anderson*, (1919) 32 Idaho 571, 186 Pac. 254.

Vol. IX, p. 595. [*Money received from forests, etc.*] [First ed., 1909 Supp., p. 666.]

Expenditure of money by states.—This Act creates an express trust, of which the several school districts and road districts are the cestuis que trust. Under its provisions the fund is to be expended as the state or territorial legislatures may prescribe, but their discretion may not be delegated. Accordingly, the county commissioners of a county have no authority under state statute to direct the manner in which the money shall be expended. *Everett School Dist. No. 24 v. Pearson*, (W. D. Wash. 1918) 261

Fed. 631. Regarding the expenditure of money paid to the states under the provisions of this Act, the court said:

"The act of Congress creating the trust for the schools and roads provided that the fund is 'to be expended as the state or territorial Legislature may prescribe.' The Legislature could not delegate any discretionary power reposed in it with relation to such fund. This is a discretion which must be exercised by the trustee provided by the act of Congress (*Singleton v. Scott*, 11 Iowa, 589), and in so far as this act, if it may be so held, seeks to delegate discretion, must be inoperative; but such issue is not in this case, as this matter must be determined upon the rights of the parties in the particular fund.

"Schools have ever received the special consideration of Congress, and many grants to states in trust for various objects are on the statute books, and no diversion from the purpose is countenanced without the approval of Congress. Act March 4, 1907, c. 2934, 34 Stat. 1414. A distinction between grants for a specific purpose and grants to a state gen-

erally is recognized by Congress. Act Sept. 4, 1841, c. 16, § 5 Stat. 453. Particular localities have been made the beneficiaries from the sale of lands located in such communities. Act March 6, 1820, c. 22, § 6, 3 Stat. 547; Act March 3, 1845, c. 75, § 5 Stat. 788. The same policy evidently actuated the congressional mind by the act in issue, when it granted to the schools and roads in such counties 25 per cent. of the net proceeds received for the sale of timber from the forest reserve located in such county.

"It is contended by the plaintiff that the history of congressional grants is conclusive that each fund should receive an equal share. In the consideration of the act in issue, aside from the congressional policy gleaned from the legislative history which should be considered (*United States v. Sweet, Adm'r* [decided Jan. 28, 1918] 245 U. S. 563, 38 Sup. Ct. 193, 62 L. Ed. 473), it would seem that the general rule applicable to the construction of gifts, wills, and deeds should apply, where it is established that when bequests, gifts, or grants are made to two or more persons, each is presumed to take an equal share, in the absence of limitations to the contrary.

"The power which was given by the state Legislature, *supra*, to the board of county commissioners to expend the moneys for the benefit of the public schools and the public roads, was only a power to expend the funds in the manner authorized by the laws of the state relating to roads and schools. There are many ways in which money available may be expended for roads or for schools. The money having been paid to the county treasurer for roads and schools, he had no authority to disperse the fund in any other proportion than directed by the act of Congress, which language was repeated by the state Legislature; and the defendants, being

the custodians of the trust funds, are liable for any misappropriation, and must account to the fund for the sums diverted. The evident purpose of the Congress, by the act, *supra*, was to have the schools and roads participate in the funds in equal shares."

Vol. IX, p. 606. [*Construction of summer homes, etc.*] [First ed., 1916 Supp., p. 266.]

Rainier National Forest.—The authority to lease for summer recreation purposes land around Bumping Lake withdrawn for irrigation uses but not required for the irrigation project, which land constituted part of the area previously withdrawn for the Rainier National Forest, is in the Department of Agriculture, and the rentals should be covered into the Treasury as miscellaneous receipts. But in recognition of the needs of the reclamation service, and to forestall any contracts detrimental to the reclamation project, all leases should be subject to the prior approval of the Secretary of the Interior. (1916) 31 Op. Atty.-Gen. 56.

Vol. IX, p. 606, sec. 1. [*Timber and Stone Lands Act.*] [First ed., vol. VII, p. 300.]

Increase of price.—The fixing of a "minimum price" of \$2.50 per acre by this section does not prevent the General Land Office from increasing the price. "The words 'minimum price,' used in this section, mean the lowest price, and not a fixed price of \$2.50 per acre. To hold otherwise would be to say that the words 'minimum price' were superfluous and meant nothing." *Brown v. Baker*, (1919) 108 Wash. 161, 183 Pac. 89.

TIME

1918 Supp., p. 843, sec. 2.

Effect on time for presenting bill of exception which by state law could be pre-

sented within ninety days after judgment entered, see *Ellard v. Goodall*, (Ala. 1919) 83 So. 568.

TRADE COMBINATIONS AND TRUSTS

Vol. IX, p. 644, sec. 1. [First ed., vol. VII, p. 336.]

III. Construction of Act, 789.

1. In general, 789.

IV. Mode of determining question of violation, 789.

2. Intention or motives, 789.

V. Application of Act, 789.

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a. Combinations and contracts to affect prices and terms of sale, 789.

a. Coal companies and producers, 790.

f. Miscellaneous cases, 790.

VI. Proceedings under Act, 792.

1. In general, 792.

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III. CONSTRUCTION OF ACT

1. In General (p. 647)

Interstate character of combination.—Where the object of a combination was to prevent interstate transportation of switchboards, it was held that the mere fact that the means by which this object was to be accomplished was limited to interference with their installation after they had reached their destination, did not relieve the transaction of its interstate character. *Boyle v. U. S.*, (C. C. A. 7th Cir. 1919) 259 Fed. 803, 170 C. C. A. 603.

So contracts which are part of an illegal combination to secure control of a product and raise the price of the same to all buyers in the United States are within the prohibition of the Anti-trust Act, although to be performed wholly within one state. *McNear v. American, etc., Mfg. Co.*, (R. I. 1919) 107 Atl. 242.

IV. MODE OF DETERMINING QUESTION OF VIOLATION

2. Intention or Motives (p. 655)

Effect and not intention controls.—The Sherman Anti-trust Act is directed against monopoly; not against an expectation of it, but against its realization. *U. S. v. United States Steel Corp.*, (1920) 251 U. S. 417, 40 S. Ct. 293, 64 U. S. (L. ed.) —, 8 A. L. R. 1121, *affirming* (D. C. N. J. 1915) 223 Fed. 55.

Size of corporation as controlling.—The mere size of a corporation, or the existence of unexercised power unlawfully to restrain competition, does not of itself make such a corporation a violator of the Sherman Anti-trust Act. *U. S. v. United States Steel Corp.*, (1920) 251 U. S. 417, 40 S. Ct. 293, 64 U. S. (L. ed.) —, 8 A. L. R. 1121, *affirming* (D. C. N. J. 1915) 223 Fed. 55.

V. APPLICATION OF ACT

2. Application in Particular Instances

a. Combinations and Contracts to Affect Prices and Terms of Sale (p. 660)

Fixing prices and terms of sale.—A manufacturer of patented automobile tire accessories violates the Sherman Anti-trust Act when it requires all tire manufacturers and jobbers to whom it sells to execute uniform contracts which obligate them to observe certain fixed resale prices; it would be otherwise if the manufacturer had merely specified the resale prices and refused to deal with anyone who failed to observe them, but had not entered into any contract or combination which would obligate the vendees to maintain such prices. *U. S. v. Schrader*, (1920) 252 U. S. 85, 40 S. Ct. 251, 64 U. S. (L. ed.) — (*following* *Dr. Miles Medical Co. v. John D. Park, etc., Co.*, (1911) 220 U. S. 373, 31 S. Ct. 376, 55 U. S. (L. ed.) 502, and *explaining* *U. S. v. Colgate*, (1919) 250 U. S. 300, 39 S. Ct. 465, 63 U. S. (L. ed.) 992, 7 A. L. R. 443, 373, 31 S. Ct. 376, 55 U. S. (L. ed.) 502).

An injunction will lie to restrain a retailer of watches from cutting prices on watches manufactured by complainant and sold at retail by defendant where the watches were sold to the defendant subject to notice that they must not be resold at less than the fixed retail price without first removing the notice, the name, the trademark and guaranty which every watch had upon it. Such an agreement between the two was not prohibited by the Sherman and Clayton Acts. *Ingersoll v. Hahne*, (N. J. 1918) 108 Atl. 128, wherein the court said:

"It is insisted by defendant that the contract against price-cutting evidenced by the notice is contrary to public policy and to the Sherman and Clayton Acts, and defendant relies upon the cases in the Supreme Court of the United States, the last of which is *Boston Store of Chicago v. American Graphophone Co.*, et al., 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447.

"On the motion to strike out the bill (88 N. J. Eq. 222, 101 Atl. 1039), I contented myself with holding that I was dealing with the public policy of this state and that the decisions in the Supreme Court of the United States were not controlling, as the subject-matter of the legislation was within the police power of the state. Since the final hearing I have re-examined the cases in the Supreme Court of the United States in the light of counsel's briefs, and have come to the conclusion that the restrictions upon the resale of the article would be valid at common law, and their validity is not affected by either the Sherman or Clayton Acts, and that the Supreme Court of the United States

has not yet dealt with the precise situation presented here. As Mr. Justice Hughes said, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, at page 406, 31 Sup. Ct. 376, at page 384, 55 L. Ed. 502, at page 518:

"With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy."

"If the distinguished justice meant that all restraints were void at common law, I think he was mistaken; but, be that as it may be, it is now well settled that restraints which are reasonable in the absence of statute are valid. It is also well recognized that a person has a property interest in his trade-name and good will, and will, even in the absence of statute, be protected against injury to that trade-name and good will. This right has in this state been as above indicated recognized by statute."

A lumber dealers' association which employed a secretary and circulated information as to prices obtained on sales by members, and similar information designed to keep up prices, was held to be within the Act in *U. S. v. American Column, etc., Co.*, (W. D. Tenn. 1920) 263 Fed. 147.

Fixing selling price of potash.—Where the owners of potash mines in Germany entered into an agreement, the effect of which is to place all the potash mines in Germany, with one exception, under the control of a syndicate which fixes the selling price of potash for every mine, and the syndicate established connections with an American corporation for the sale of its potash shipped into the United States, such facts are subject to the provisions of the Act of August 27, 1894 (see vol. IX, p. 726), prohibiting combinations in restraint of import trade; and such facts also establish a violation of the provisions of the Sherman Anti-trust Act, as constituting a "contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . with foreign nations." (1910) 31 Op. Atty-Gen. 545.

c. Coal Companies and Producers (p. 663)

Lease of railroad by coal company with covenant to ship coal over road.—A covenant in a lease by a coal company of a railway owned by it to another railway company, which may be construed to require the coal company to ship to market over the leased line three-fourths of all the coal it produces, cannot be said to impose an undue restriction upon the coal company in select-

ing its markets and in shipping its coal, in violation of the Sherman Anti-trust Act, where the lines of the two railway companies are in no sense competitive, the leased line serving as a natural extension of the lessee railway company's lines to the great tonnage-producing coal districts, and where the rental to be paid is one-third of the gross earnings of the railway. *U. S. v. Reading Co.*, (1920) 253 U. S. 26, 40 S. Ct. 425, 64 U. S. (L. ed.) —, *affirming* in part and *reversing* in part (E. D. Pa. 1915) 226 Fed. 229.

Lease for operation of coal-producing lands containing covenant for shipment of coal by certain rail routes.—Attempts to enforce a covenant in leases for the operation of coal-producing lands that the lessee shall ship all coal mined by rail routes which are named, or which are to be designated, are properly enjoined where such covenant was resorted to as part of a scheme in contravention of the Sherman Anti-trust Act to control the minings and transportation of coal. *U. S. v. Reading Co.*, (1920) 253 U. S. 26, 40 S. Ct. 425, 64 U. S. (L. ed.) —, *affirming* in part and *reversing* in part (E. D. Pa. 1915) 226 Fed. 229.

Holding company controlling two competing railroads and two competing coal companies.—An undue and unreasonable restraint of interstate trade and commerce in anthracite coal, and an attempt to monopolize and a monopolization of such trade and commerce, forbidden by the Sherman Anti-trust Act, and calling for dissolution of the combination, results from a scheme whereby a holding company was created and placed by stock control in a position to dominate, not only two great competing interstate railway carriers, but also two great competing coal companies engaged extensively in mining and selling anthracite coal which must be transported to interstate markets over the controlled interstate railway lines, which power of control was actually used, once successfully, to suppress the building of a prospective competitive railway line, and a second time successfully, until the federal Supreme Court condemned certain percentage coal contracts as illegal, to suppress the last prospect of competition in anthracite production and transportation, the holding company continuing, up to the time the present dissolution suit was begun, in active dominating control of the carriers and coal companies, thus effectually suppressing all competition between the four companies and pooling their earnings. *U. S. v. Reading Co.*, (1920) 253 U. S. 26, 40 S. Ct. 425, 64 U. S. (L. ed.) —, *affirming* in part and *reversing* in part (E. D. Pa. 1915) 226 Fed. 229.

f. Miscellaneous Cases (p. 669)

Steel corporation.—A holding corporation which by its formation united, under one control, competing companies in the steel industry, but which did not achieve monopoly,

and only attempted to fix prices through occasional appeals to and confederation with competitors, whatever there was of wrongful intent not having been executed, and whatever there was of evil effect having been discontinued before suit was brought, should not be dissolved nor be separated from some of its subsidiaries at the suit of the government, asserting violations of the Sherman Anti-trust Act—especially where the court cannot see that the public interest will be served by yielding to the government's demand, and does see in so yielding a risk of injury to the public interest, including a material disturbance of, and, perhaps, serious detriment to, the foreign trade. *U. S. v. United States Steel Corp.*, (1920) 251 U. S. 417, 40 S. Ct. 293, 64 U. S. (L. ed.) —, 8 A. L. R. 1121 (*affirming* (D. C. N. J. 1915) 223 Fed. 55) wherein the court said: "But let us see what guide to a procedure of dissolution of the corporation and the dispersion as well of its subsidiary companies, for they are asserted to be illegal combinations, is prayed. And the fact must not be overlooked or underestimated. The prayer of the government calls for not only a disruption of present conditions, but the restoration of the conditions of twenty years ago; if not literally, substantially. Is there guidance to this in the *Standard Oil Co. Case* and the *American Tobacco Co. Case* 221 U. S. 106, 55 L. ed. 663, 31 Sup. Ct. Rep. 632? As an element in determining the answer we shall have to compare the cases with that at bar, but this can only be done in a general way. And the law necessarily must be kept in mind. No other comment of it is necessary. It has received so much exposition that it and all it prescribes and proscribes should be considered as a consciously directing presence.

"The *Standard Oil Company* had its origin in 1882, and through successive forms of combinations and agencies it progressed in illegal power to the day of the decree, even attempting to circumvent by one of its forms the decision of a court against it. And its method in using its power was of the kind that Judge Woolley described as 'brutal,' and of which practices, he said, the *Steel Corporation* was absolutely guiltless. We have enumerated them, and this reference to them is enough. And of the practices this court said, no disinterested mind could doubt that the purpose was 'to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view.' It was further said that what was done and the final culmination 'in the plan of the *New Jersey corporation*' made 'manifest the continued existence of the intent . . . and impelled the expansion of the *New Jersey corporation*.' It was to this corporation, which represented the power and purpose of all that preceded, that the suit was addressed and the decree of the court was to apply. What we have quoted contrasts that

case with this. The contrast is further emphasized by pointing out how in the case of the *New Jersey corporation* the original wrong was reflected in and manifested by the acts which followed the organization as described by the court. It said: "The exercise of the power which resulted from that organization fortifies the foregoing conclusions [as to monopoly, etc.] since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow but resistless methods which followed by which means of transportation were absorbed and brought under control, the system of marketing which was adopted, by which the country was divided into districts and the trade in each district in oil was turned over to the designated corporation within the combination and all others were excluded, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention."

"The *American Tobacco Co. Case* has the same bad distinctions as the *Standard Oil Co. Case*. The illegality in which it was formed (there were two *American Tobacco Companies*, but we use the name as designating the new company, as representing the combinations of the suit) continued, indeed progressed in intensity and defiance to the moment of decree. And it is the intimation of the opinion, if not its direct assertion, that the formation of the company (the word 'combination' is used) was preceded by the intimidation of a trade war, 'inspired by one or more of the minds which brought about and became parties to that combination.' In other words, the purpose of the combination was signaled to competitors, and the choice presented to them was submission or ruin,—to become parties to the illegal enterprise or be driven 'out of the business.' This was the purpose and the achievement, and the processes by which achieved this court enumerated to be the formation of new companies, taking stock in others to 'obscure the result actually attained, but always to monopolize and retain power in the hands of the few and mastery of the trade; putting control in the hands of seemingly independent corporations as barriers to the entry of others into the trade; the expenditure of millions upon millions in buying out plants, not to utilize them, but to close them; by constantly recurring stipulations by which numbers of persons, whether manufacturers, stockholders, or employees, were required to bind themselves, generally for long periods, not to compete in the future. In the *American Tobacco Co. Case*, therefore, as in the *Standard Oil Co. Case*, the court had to deal with a persistent and systematic law-breaker, masquerading under legal forms, and which not only had to be stripped of its disguises, but arrested in its illegality. A decree of dissolution was the manifest

instrumentality, and inevitable. We think it would be a work of sheer supererogation to point out that a decree in that case or in the Standard Oil Co. Case furnishes no example for a decree in this."

Restraint of foreign trade in munitions.—A conspiracy to restrain the export of munitions to Europe by fomenting strikes among workers in munition factories, is a violation of this Act. *Lamar v. U. S.*, (C. C. A. 2d Cir. 1919) 260 Fed. 61, 171 C. C. A. 345. Regarding the legality of the defendant's acts, the court said:

"It is further contended that, assuming everything covered by the evidence as proven and all the legal rules above adverted to as correct, it still remains true that the only suggested means or method of restraining trade was to strike—to induce laborers to peacefully quit work; and such acts are lawful under the statute of October 15, 1914, commonly known as the Clayton Act (38 Stat. 730, c. 323). It is said to follow that, if doing this lawful act should produce restraint of trade, the later statute prevents the operation of the earlier.

"Whether the Clayton Act has to the extent indicated nullified the Sherman Act is a question that need not be discussed; but we do hold it as clear that no change has been wrought in the law of conspiracy as applicable to this case. It may be that, where the intent of those who foment strikes or themselves quit work after and as a result of agreement with their fellow workmen is to advance their own wage interests, or otherwise improve their conditions of life, the Clayton Act produces legality by forbidding legal interference with their doings. This may be admitted for argument's sake, without expressing opinion. But we do hold that where it is charged (as here) that the intent was solely to restrain foreign trade, and where it is proved (as here) that the proposed instigation of strikes bore no relation whatever to the welfare of the strikers, then at most and best the strike becomes nothing more than an instrument or means, legal in itself, but used only for an illegal end.

"The argument for plaintiffs in error confounds the means with the end. The end or object of the proven conspiracy was not to call strikes, but to restrain or rather suppress foreign trade. That object is as illegal as ever; the Clayton Act assuredly does not legalize it. If that be granted, the elementary rules of law apply, and legality of means cannot excuse illegality of purpose or object."

Fish dealers.—Where the result of the combined action of certain fish dealers in a city is that a large percentage of all the fish brought to the city is landed at a certain pier controlled by the dealers, which gives them the predominating control of all the fish dealt in throughout the adjacent states and renders it impossible for an outside dealer to build up a business in inter-

state trade, such combination is a violation of this section. *U. S. v. New England Fish Exch.*, (D. C. Mass. 1919) 258 Fed. 732.

Tile dealers.—The conduct of members of a tile dealers' association, composed of nearly all the tile dealers in a certain city, in excluding trade competitors from membership in the association, in the refusal of association dealers to buy tiles from manufacturers that sold tiles to non-member dealers, and in entering into agreements with a tile setters' labor union, whereby association dealers obtained from the union, first, a preference over non-member dealers in the employment of union tile setters, and, second, a promise by the union to supply no tile setters to tile dealers outside of the association, thereby creating a boycott of non-member tile dealers by making it impossible for them to get materials for their business and labor with which to carry it on, constitutes a combination in restraint of interstate commerce in violation of this section. *Belf v. U. S.*, (C. C. A. 3d Cir. 1919) 259 Fed. 822, 170 C. C. A. 622.

Plan by Department of Commerce for stabilizing prices in basic industries.—The proposed plan of the Industrial Board of the Department of Commerce to stabilize prices in the so-called basic industries by means of agreements with the leading manufacturers and producers, not being authorized by statute, would be in violation of the anti-trust laws. (1913) 31 Op. Atty-Gen. 411.

VI. PROCEEDINGS UNDER ACT

1. In General (p. 677)

Limitations.—While parties entering into an unlawful combination to restrain trade in violation of this section may withdraw from such combination and thereby relieve themselves from further liability, and the statute of limitations will begin to run from the time of such withdrawal, yet it requires some affirmative act on the part of the conspirators to avoid the liability which their entry into the combination created. *Boyle v. U. S.*, (C. C. A. 7th Cir. 1919) 259 Fed. 803, 170 C. C. A. 603.

2. Indictments (p. 679)

Overt acts.—To same effect as original annotation, see *Lamar v. U. S.*, (C. C. A. 2d Cir. 1919) 260 Fed. 561, 171 C. C. A. 345.

Necessity of alleging means of accomplishing conspiracy.—Where the object of the conspiracy was unlawful, it is unnecessary in an indictment under this section to set forth the means by which the object was accomplished. *Boyle v. U. S.*, (C. C. A. 7th Cir. 1919) 259 Fed. 803, 170 C. C. A. 603.

Vol. IX, p. 687, sec. 2. [First ed. vol. VII, p. 340.]

II. PARTICULAR INSTANCES (p. 694)

Advertising contracts in periodicals.—The merely incidental relation to interstate com-

merce of transactions concerning advertising in periodicals which are to be circulated and distributed throughout the United States will not support the federal jurisdiction of a suit brought under the provisions of section 7 of this Act, creating a cause of action in favor of any person to recover by suit in any federal District Court in the district in which the defendant resides or is found threefold damages for injury to his business or property by reason of anything forbidden and declared unlawful in the Act, on the theory that defendant's conduct in respect to such matters is forbidden by that Act as a monopoly or attempted monopoly of interstate commerce. *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co.*, (1920) 252 U. S. 436, 40 S. Ct. 385, 64 U. S. (L. ed.) —, wherein the court said:

"The Anti-Trust Act, it is hardly necessary to say, derives its authority from the power of Congress to regulate commerce among the states. It declares unlawful combinations, conspiracies, and contracts, and attempts to monopolize which concern such trade or commerce. It follows that if the dealings with the defendant, which form the subject-matter of complaint, were not transactions of interstate commerce, the declaration states no case within the terms of the act.

"Commerce, as defined in the often quoted definition of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 189, 6 L. ed. 23, 65, is not traffic alone, it is intercourse.—'It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.'

"In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce.

"This case is wholly unlike *International Text-book Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L. R. A. (N. S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103, wherein there was a continuous interstate traffic in text-books and apparatus for a course of study pursued by means of correspondence, and the movements in interstate commerce were held to bring the subject-matter within the domain of Federal control, and to exempt it from the burden imposed by state legislation. This case is more nearly analogous to such cases as *Ficklen v. Taxing Dist.* 145 U. S. 1,

33 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810, wherein this court held that a broker engaged in negotiating sales between residents of Tennessee and nonresident merchants of goods situated in another state was not engaged in interstate commerce; and within that line of cases in which we have held that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inter. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *New York L. Ins. Co. v. Deer Lodge County*, 231 U. S. 495, 58 L. ed. 332, 34 Sup. Ct. Rep. 167. We held in *Hopkins v. United States*, 171 U. S. 579, 43 L. ed. 290, 19 Sup. Ct. Rep. 40, that the buying and selling of live stock in the stockyards of a city by members of the stock exchange was not interstate commerce, although most of the live stock was sent from other states. In *Williams v. Fears*, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128, we held that labor agents engaged within the state of Georgia in hiring persons to be employed outside the state were not engaged in interstate commerce. In *Ware v. Mobile Co.* 209 U. S. 405, 52 L. ed. 855, 28 Sup. Ct. Rep. 526, 14 Ann. Cas. 1031, we held that brokers taking orders and transmitting them to other states for the purchase and sale of grain or cotton upon speculation were not engaged in interstate commerce; that such contracts for sale or purchase did not necessarily result in any movement of commodities in interstate traffic, and the contracts were not, therefore, the subjects of interstate commerce. In the recent case of *United States Fidelity & G. Co. v. Kentucky*, 231 U. S. 394, 58 L. ed. 283, 34 Sup. Ct. Rep. 122, we held that a tax upon a corporation engaged in the business of inquiring into and reporting upon the credit and standing of persons in the state was not unconstitutional as a burden upon interstate commerce as applied to a nonresident engaged in selecting and distributing a list of guaranteed attorneys in the United States, and having a representative in the state. The contention in that case, which this court denied, was that the service rendered through the representatives in Kentucky, and other representatives of the same kind, acting as agents of merchants engaged in interstate commerce, to furnish them with information through the mails, or by telegraph, or telephone, as a result of which merchandise might be transported in interstate commerce, or withheld from such transportation, according to the character of the information reported, was so connected with interstate commerce as to preclude the state of Kentucky from imposing a privilege tax upon such business.

"Applying the principles of these cases, it is abundantly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subse-

quently distributed in interstate commerce, are contracts which directly affect such commerce. Their incidental relation thereto cannot lay the groundwork for such contentions as are undertaken to be here maintained under § 7 of the Sherman Anti-trust Act. The court was right in dismissing the suit."

Vol. IX, p. 701, sec. 4. [First ed., vol. VII, p. 344.]

IV. REMEDIES AND RELIEF (p. 704)

Dissolution of combination.—Where a majority of the individual defendants in a suit to dissolve a combination found to contravene the Sherman Anti-trust Act have died since the suit was instituted, and their successors in office have not been made parties, and the conclusion to be announced can be given full effect by an appropriate decree against the corporate defendants, the case as against the remaining individual defendants need not be considered, and as to them the bill will be dismissed without prejudice. *U. S. v. Reading Co.*, (1920) 253 U. S. 26, 40 S. Ct. 425, 64 U. S. (L. ed.) —, *affirming* in part and *reversing* in part (E. D. Pa. 1915) 226 Fed. 229.

A combination of competing interstate railway carriers and competing coal companies, found to violate both this section and the commodities clause of the Act of June 29, 1906 (see vol. IV, p. 363), must be so dissolved as to give each of such companies its entire independence, free from stock or other control. *U. S. v. Reading Co.*, (1920) 253 U. S. 26, 40 S. Ct. 425, 64 U. S. (L. ed.) —, *affirming* in part and *reversing* in part (E. D. Pa. 1915) 226 Fed. 229.

Vol. IX, p. 713, sec. 7. [First ed., vol. VII, p. 345.]

III. Pleading, practice and procedure.

IV. Evidence.

III. PLEADING, PRACTICE AND PROCEDURE (p. 719)

Pleading in general.—In *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co.*, (1920) 252 U. S. 436, 40 S. Ct. 385, 64 U. S. (L. ed.) —, the court said:

"The Sherman Anti-Trust Act (section 7) created a cause of action in favor of any person to recover by suit in any District Court of the United States, in the district in which the defendant resides or is found, threefold damages for injury to his business or property by reason of anything forbidden and declared unlawful in the act. In order to maintain a suit under this act the complaint must state a substantial case arising thereunder. The action is wholly statutory, and can only be brought in a District Court of the United States, and it is essential to the jurisdiction of the court in such cases that a substantial cause of action within the statute be set up.

"In some cases it is difficult to determine whether a ruling dismissing the complaint involves the merits of the cause of action attempted to be pleaded, or only a question of the jurisdiction of the court. In any case alleged to come within the Federal jurisdiction it is not enough to allege that questions of a Federal character arise in the case, it must plainly appear that the averments attempting to bring the case within Federal jurisdiction are real and substantial. *Newburyport Water Co. v. Newburyport*, 193 U. S. 562, 576, 48 L. ed. 795, 799, 24 Sup. Ct. Rep. 553.

"In cases where, as here, the controversy concerns a subject-matter limited by a Federal law, for which recovery can be had only in the Federal courts, the jurisdiction attaches only when the suit presents a substantial claim under an act of Congress."

IV. EVIDENCE (p. 724)

Value of plaintiffs' property.—In an action under this section evidence of the value of leases held by the plaintiffs, and which, by reason of the unlawful acts of the defendants, are shown to have been forfeited, is clearly a part of the damage sustained, and admissible for the purpose of enabling the jury to determine the losses and damages of the plaintiffs. *United Mine Workers v. Coronado Coal Co.*, (C. C. A. 8th Cir. 1919) 258 Fed. 829, 169 C. C. A. 549. The court said:

"Section 7 of the Sherman Act provides for threefold damages sustained by reason of violations of the provisions of that act. A lease may be as valuable as any other species of property, and they are sold and transferred for valuable considerations in the same manner as any other species of property. It is almost an everyday occurrence that oil, coal, and other mining leases are sold for large sums of money. The court in its charge to the jury submitted that question fairly, and no exceptions were taken to that part of the charge. All damages which are the natural and proximate results of a tort are recoverable."

Vol. IX, p. 726, sec. 8. [First ed., vol. VII, p. 346.]

The word "associations."—To same effect as original annotation, see *United Mine Workers v. Coronado Coal Co.*, (C. C. A. 8th Cir. 1919) 258 Fed. 829, 169 C. C. A. 549.

Vol. IX, p. 730, sec. 1. [First ed., 1916 Supp., p. 268.]

Construction.—"The mere fact that Congress enacted the Clayton Act after numerous courts had held similar or analogous restrictions not obnoxious to the Sherman Act July 2, 1890, c. 647, 26 Stat. 209, or invalid at common law, or under state anti-trust statutes, grounds an inference that the Legislature intended in the light of ac-

tual experience to change the law." *Standard Fashion Co. v. Magrane Houston Co.*, (C. C. A. 1st Cir. 1919) 259 Fed. 793, 170 C. C. A. 593, *affirming* on rehearing (C. C. A. 1st Cir. 1918) 251 Fed. 559, 163 C. C. A. 553, which *affirmed* (D. C. Mass. 1918) 254 Fed. 493.

Vol. IX, p. 733, sec. 3. [First ed., 1916 Supp., p. 269.]

Sale of patterns.—To same effect as 1919 Supplement annotation, see *Standard Fashion Co. v. Magrane Houston Co.*, (C. C. A. 1st Cir. 1919) 259 Fed. 793, 170 C. C. A. 593, *affirming* on rehearing (C. C. A. 1st Cir. 1918) 251 Fed. 559, 163 C. C. A. 553, which *affirmed* (D. C. Mass. 1918) 254 Fed. 493.

Vol. IX, p. 738, sec. 7. [First ed., 1916 Supp., p. 272.]

Acquiring stock of competing corporations.—Where a company acquires the stock and business of various corporations and partnerships engaged in interstate commerce in a certain business and stifles competition between them, it is guilty of a violation of this section. And the fact that certain of the corporations whose stock is taken over were organized under the laws of one state, to whom corporations organized in another state and bearing the same names conveyed their businesses and assets, does not change the situation. *U. S. v. New England Fish Exch.*, (D. C. Mass. 1919) 258 Fed. 732.

Vol. IX, p. 739, sec. 8. [First ed., 1916 Supp., p. 273.]

State banks do not by joining the Federal Reserve System become subject to this section which imposes restrictions relating to interlocking directorates. (1917) 31 Op. Atty-Gen. 153, wherein it was said:

"The prohibitions of this section relate to banks which are 'organized or operating under the laws of the United States.' Obviously, the section does not apply to state banks merely as state banks, but applies to them, if at all, only in consequence of membership in the Federal Reserve System. . . .

"State banks which join the Federal Reserve System do not, however, operate under the laws of the United States as the laws of their existence, nor in territory over which the United States exercises exclusive legislation. These banks have merely voluntarily accepted the terms and provisions of the Federal Reserve Act (including regulations

made pursuant thereto) in becoming members of the Federal Reserve System, from which they are at liberty to withdraw. Yet, since upon being admitted they become subject to the terms and provisions of the Federal Reserve Act, they may also be aptly described as 'operating under the laws of the United States.' Accordingly, section 8 of the Clayton Act standing alone might reasonably be construed to include state member banks within its prohibitions.

"Section 8 of the Clayton Act must be considered, however, in the light of the provisions of section 9 of the Federal Reserve Act relating to membership of state banks. Unlike national banks, state banks are not compelled, but in effect are invited, to join the Federal Reserve System. In section 9 as originally enacted Congress specified the provisions of law to which state banks must conform as conditions of membership, including in the specification certain provisions of pre-existing law. The conditions of membership for state banks having thus been specified it could be argued not without reason that if Congress had intended by section 8 of the Clayton Act to prescribe further conditions of membership it would have affirmatively expressed that intention, which it has not done.

"But, whatever the original intention of Congress may have been in this respect, the present intention seems plainly to appear from the following provisions of section 9 of the Federal Reserve Act as amended and re-enacted by the act of June 21, 1917 (40 Stat. 232, 234), after the passage of the Clayton Act. . . . As thus amended, state member banks are made 'subject to the provisions of this section and to those of this act which relate specifically to member banks.' Accordingly, they would appear not to be subject to the prohibitions of section 8 of the Clayton Act under the rule of construction embodied in the maxim, 'The express mention of one thing impliedly excludes all others.'

"The intention of Congress, however, is not left to appear by implication alone. Section 9 as amended goes further, and by positive provision declares that state member banks shall retain their 'full charter and statutory rights' as state banks, 'subject to the provisions of this act and to the regulations of the board made pursuant thereto.' Since the rights existing under state laws as to selection of directors seem clearly among the 'charter and statutory rights' thus retained in full by state member banks, they must be held free in that regard from the restrictions imposed by section 8 of the Clayton Act."

TRADEMARKS

Vol. IX, p. 747, sec. 1. [First ed., 1909 Supp., p. 676.]

Purpose and effect of act.—"The Registration Act of 1905 . . . without changing the substantive law of trademarks, provided, in the manner prescribed, for the registration of marks (subject to special exceptions) which without the statute would be entitled to legal and equitable protection." *Beckwith v. Commissioner of Patents*, (1920) 252 U. S. 538, 40 S. Ct. 414, 64 U. S. (L. ed.) —, *reversing* (1918) 48 App. Cas. (D. C.) 110.

Rights conferred by trademark.—"A trade-mark confers no monopoly whatever in a proper sense, but is merely a convenient means for facilitating the protection of one's good will in trade by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold.

"It results that the adoption of a trade-mark does not, at least in the absence of some valid legislation enacted for the purpose, project the right of protection in advance of the extension of the trade, or operate as a claim of territorial rights over areas into which it thereafter may be deemed desirable to extend the trade." *Ammon v. Narragansett Dairy Co.*, (C. C. A. 1st Cir. 1919) 262 Fed. 880, *following* *United Drug Co. v. Theodore Rectanus Co.*, (1918) 248 U. S. 90, 39 S. Ct. 48, 63 U. S. (L. ed.) 141, *affirming* (C. C. A. 6th Cir. 1915) 226 Fed. 545, 141 C. C. A. 301.

"Owner."—"One who has the exclusive right to use a trademark in the United States has such a special ownership therein as entitles him to its registration during the period of his exclusive use. *Scandinavia Belting Co. v. Asbestos, etc., Works*, (C. C. A. 2d Cir. 1919) 257 Fed. 937, 169 C. C. A. 87, wherein the court, in holding that an agent who had the exclusive sale in the United States of the products of an English company, had the right to register the trademark of the company, said:

"Ownership" is the right by which a thing belongs to some one in particular to the exclusion of all others. And the right to the exclusive use of this trade-mark in this country was in this plaintiff for a period of 27 years or 7 years beyond the registration period fixed by the statute. To say that the relation which existed between the English and the American company was that of agency does not help the defendant, for if it be conceded that the relation is that of agency it must also be conceded that it is an agency coupled with an interest, and the right to the exclusive use is one which cannot be withdrawn, and an interest sufficient to prevent revocation is sufficient to make the plaintiff such a special 'owner'

of the trade-mark as entitled it to register the same under the provisions of the act. To hold that one who has the exclusive right to use a trade-mark has no right to have it registered under the act would be, in our opinion, subversive of the policy and intent of the statute."

Territorial extent of trademark rights.—To same effect as original annotation, see *Scandinavia Belting Co. v. Asbestos, etc., Works*, (C. C. A. 2d Cir. 1919) 257 Fed. 937, 169 C. C. A. 87.

Where two companies selling the same product under similar trademarks do not invade each other's commercial territory to any substantial degree, one company may not enjoin the other from using the trademark in its own territory. *Ammon v. Narragansett Dairy Co.*, (C. C. A. 1st Cir. 1919) 262 Fed. 880.

Disclaimer.—"While there is no specific provision for disclaimers in the trademark statute, the practice of using them is commended to our judgment by the statement of the Commissioner of Patents that, so far as known, no harm came to the public from the practice of distinguishing, without deleting, nonregisterable matter in the drawing of the mark as registered, when a statement, forming a part of the record, was required, that the applicant was not making claim to an exclusive appropriation of such matter except in the precise relation and association in which it appeared in the drawing and description.

"It seems obvious that no one could be deceived as to the scope of such a mark, and that the registrant would be precluded by his disclaimer from setting up in the future any exclusive right to the disclaimed part of it. It seems obvious also that to require the deletion of descriptive words must result often in so changing the trademark sought to be registered from the form in which it had been used in actual trade that it would not be recognized as the same mark as that shown in the drawing, which the statute requires to be filed with the application, or in the specimens produced as actually used, and therefore registration would lose much, if not all, of its value. The required omission might so change the mark that in an infringement suit it could be successfully urged that the registered mark had not been used,—and user is the foundation of registry (§ 2)." *Beckwith v. Commissioner of Patents*, (1920) 252 U. S. 538, 40 S. Ct. 414, 64 U. S. (L. ed.) —, *reversing* (1918) 48 App. Cas. (D. C.) 110.

Reissuance or amendment.—There is no provision in this Act for the reissuance of trademarks or their amendment after issuance. *L. P. Larson, Jr., Co. v. Lamont*. (C. C. A. 7th Cir. 1919) 257 Fed. 270, 168 C. C. A. 354.

Vol. IX, p. 753, sec. 5. [First ed., 1914 Supp., p. 400.]

- I. In general, 797.
- II. Particular words, names, marks or symbols, 797.
 1. Arbitrary or fanciful names, 797.
 2. Personal and corporate names, 797.
 3. Descriptive words, 798.
 5. Geographical names, 798.
 7. Similar names, 799.
 8. Name of periodical, 800.

I. IN GENERAL (p. 755)

Effect of proviso.—To same effect as second paragraph of original annotation, see *Scandinavia Belting Co. v. Asbestos, etc., Works*, (C. C. A. 2d Cir. 1919) 257 Fed. 937, 169 C. C. A. 87, holding that the plaintiff and its predecessors from whom it derived title made actual and exclusive use of the word "Scandinavia" as a trademark, in regard to belting sold by it in this country, for ten years next preceding the enactment of this section, and was entitled to have the word protected under this section as a valid trademark.

Effect of abandonment.—Where two companies are using the same trademark on their products in separate commercial territories, and one of them abandons it, such abandonment does not justify a third company in using the trademark in the abandoned territory when it is in part occupied by the other one of the original companies and the latter's business is expanding. *Ammon v. Narragansett Dairy Co.*, (C. C. A. 1st Cir. 1919) 262 Fed. 880.

II. PARTICULAR WORDS, NAMES, MARKS OR SYMBOLS

1. *Arbitrary or Fanciful Names* (p. 758)

Illustrations.—In *Scandinavia Belting Co. v. Asbestos, etc., Works*, (C. C. A. 2d Cir. 1919) 257 Fed. 937, 169 C. C. A. 87, the court held that the term "Scandinavia" was not entitled to protection as a trademark as having been used in a fanciful sense, even though it should appear from the evidence that the word was not adopted to signify the place of manufacture, or the place from which the materials were brought, or any process of manufacture peculiar to Scandinavian countries.

In *Alaska Packers' Assoc. v. Getz*, (App. Cas. D. C. 1919) 258 Fed. 527, it was held that the fact a company used several different flags as trademarks on canned salmon packed by it, did not prevent another company engaged in the same business from registering the words "Our Flag" as a trademark for canned salmon and canned oysters. The court said:

"In *Alaska Packers' Association v. Admiralty Trading Co.*, 43 App. D. C. 198, the Trading Company applied for registration

of a flag 'having a blue background,' etc., with the red monogram 'A. T. Co.' to be used as a mark on canned salmon, and was opposed by the Packing Association, appellant herein, on the ground that the use of the flag by the Trading Company would be likely to produce confusion in trade. We ruled that since the Packing Association used several different flags in the sale of different brands of its goods it was hardly in a position 'to contend that the mark of the applicant will be likely to cause confusion in trade, since that mark differs from each of its marks as much as they differ from one another.' Applying this decision to the case at bar when it was before him, the Commissioner said:

"I do not see why this holding does not apply in the present case. It certainly decided that the Admiralty Trading Company could not be stopped by the Alaska Packers' Association, the present opposer, in its use of a flag as a trade-mark. If, then, the Admiralty Trading Company can use its flags as a trade-mark, it is drawing pretty fine distinctions to say that the present applicant is not entitled to use the words "Our Flag" as its mark. The distinction is entirely too fine to be noticed by the purchasing public."

"We believe that the Commissioner was right, and for that reason his decision is affirmed."

2. *Personal and Corporate Names* (p. 759)

Individual name.—While a person has a right to use his surname as a trademark, without being guilty of an infringement he must use it in a manner which does not tend to mislead and must make it appear clearly that the goods are his own and not those of a prior registrant of the same name. In such case it is immaterial that he does not use the registrant's trademark in its entirety, if what he does use is misleading and likely to cause confusion. *Stark v. Stark Bros. Nurseries, etc., Co.*, (C. C. A. 8th Cir. 1919) 257 Fed. 9, 168 C. C. A. 221, *modifying* (W. D. Mo. 1918) 248 Fed. 154. The court said: "If, however, the name has previously become well-known in trade, the second comer uses it subject to three important restrictions: (1) He may not affirmatively do anything to cause the public to believe that his article is made by the first manufacturer. (2) He must exercise reasonable care to prevent the public from so believing. (3) He must exercise reasonable care to prevent the public from believing that he is the successor in business of the first manufacturer."

Corporate name—Generally.—To same effect as original annotation, see *In re American Steel Foundries*, (App. Cas. D. C. 1919) 258 Fed. 160, wherein the word "Simplex" was refused registration as a trade-mark for brake rigging, on the ground that it was the name of a corporation.

3. Descriptive Words (p. 762)

Descriptive words part of fanciful design.—The words "Moistair Heating System," though descriptive, may not be denied registration when combined with the words "Round Oak" as a part of a purely fanciful and arbitrary trademark design, where claim to exclusive use of these descriptive words apart from the mark shown in the drawing filed is disclaimed on the record. Such a case does not fall within the prohibition of the proviso in the Trademark Registration Act against the registration of any mark which consists merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, but is governed by the equally imperative language of the statute that no mark not within its prohibitions or provisos shall be denied registration. *Beckwith v. Commissioner of Patents*, (1920) 252 U. S. 538, 40 S. Ct. 414, 64 U. S. (L. ed.) —, (*reversing* (1918) 48 App. Cas. (D. C.) 110) wherein the court said: "It was settled long prior to the Trademark Registration Act that the law would not secure to any person the exclusive use of a trademark consisting merely of words descriptive of the qualities, ingredients, or characteristics of an article of trade. This for the reason that the function of a trademark is to point distinctively, either by its own meaning or by association, to the origin or ownership of the wares to which it is applied, and words merely descriptive of qualities, ingredients, or characteristics, when used alone, do not do this. Other like goods, equal to them in all respects, may be manufactured or dealt in by others, who, with equal truth, may use, and must be left free to use, the same language of description in placing their goods before the public. . . .

"Thus the proviso quoted, being simply an expression in statutory form of the prior general rule of law that words merely descriptive are not a proper subject for exclusive trademark appropriation, if the application in this case had been to register only the words 'Moistair Heating System,' plainly it would have fallen within the terms of the prohibition, for they are merely descriptive of a claimed property or quality of the petitioner's heating system,—that by it moisture is imparted to the air in the process of heating. But the application was not to register these descriptive words 'merely,' alone and apart from the mark shown in the drawing, but in a described manner of association with other words, 'Round Oak' which are not descriptive of any quality of applicant's heating system, and as a definitely positioned part of an entirely fanciful and arbitrary design or seal, to which the Commissioner found the applicant had the exclusive right.

"Since the proviso prohibits the registration not of merely descriptive words, but of a trademark which consists . . . merely' (only) of such words,—the distinction is

substantial and plain,—we think it sufficiently clear that such a composite mark as we have here does not fall within its terms. In this connection it must be noted that the requirement of the statute that no trademark shall be refused registration, except in designated cases, is just as imperative as the prohibition of the proviso against registration in cases specified."

Generic name.—The word "Vogue," in the name of a magazine, see *infra*, this annotation, "8. Name of Periodical," p. 800.

"Lava," as applied to soap, is not descriptive. *Waltke v. Schafer*, (App. Cas. D. C. 1920) 263 Fed. 650.

The word "Unit," as applied to roller brackets for belt conveyors, is not descriptive and is entitled to registration as a trademark. *Stephens-Adamson Mfg. Co.'s Application*, (App. Cas. D. C. 1920) 262 Fed. 635.

The words "Safe T Seal" as applied to envelopes, are descriptive, and are not, therefore, a proper subject of a valid trademark. *In re Alvah Bushnell Co.*, (App. Cas. D. C. 1919) 261 Fed. 1013.

The words "Slo Flo" may not be registered as a trademark for lubricating grease for high speed machines, since they are descriptive of character or quality. *In re Swan, etc., Co.*, (App. Cas. D. C. 1919) 259 Fed. 991.

The word "Textul" as a trademark for an oil for cleaning textiles is descriptive and not registrable. *In re Swan, etc., Co.*, (App. Cas. D. C. 1919) 259 Fed. 990.

The word "Service" as applied to rubber and fabric belts, is descriptive and not entitled to registration as a trademark under this section. *In re Link-Belt Co.*, (App. Cas. D. C. 1919) 258 Fed. 987.

5. Geographical Names (p. 764)

General rule.—To same effect as original annotation, see *Scandinavia Belting Co. v. Asbestos, etc., Works*, (C. C. A. 2d Cir. 1919) 257 Fed. 937, 169 C. C. A. 87, wherein it was held that the geographical term "Scandinavia" was an invalid trademark. The court said:

"The objection to the use of a geographical name as a trade-mark is twofold:

"(1) It does not indicate the origin, manufacture, or ownership of the goods.

"(2) There can be no exclusive right to make use of it, as any other manufacturer or trader from the same country or section of the country has an equal right to use it.

"Thus in the English Court of Chancery Vice Chancellor Wood declared that if the first importer of wine from Burgundy called it 'Burgundy,' he could not prevent anybody else from calling a wine produced in Burgundy by the name of the place from which it was imported, although he had stamped 'Burgundy' on his corks for 20 years. *McAndrew v. Bassett*, 4 De G. J. & S., 380. This rests upon the principle that no person has the right to the exclusive use of a

mark which is of such a character that others may employ it with equal truth. It was for that reason that the word 'Lackawanna' as applied to coal was not a good trade-mark, for any one whose coal came from the 'Lackawanna Valley' could truthfully designate and sell his coal as 'Lackawanna coal.'

"That there may be exceptions to the rule that a geographical word cannot be a valid trade-mark is conceded. If one should own the only coal mine situated in a place and should give his coal the name of that place, there is no reason why the name should not be recognized as a valid trade-mark. *Newman v. Alvord*, 51 N. Y. 189, 193, 10 Am. Rep. 588. Upon that principle was decided *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291, 6 Am. Rep. 82, as the plaintiff owned the sole place where the water was found so that none other could use the trade-mark with truth. And this doctrine was recently recognized in *Manitou Spring Mineral Water Co. v. Schueler*, 239 Fed. 593, 152 C. C. A. 427 (1917).

"The courts, too, have sometimes justified a purely arbitrary use of a geographical name where such use could not possibly mislead or deceive any one. Thus in *Fleischman v. Shuckmann*, 62 How. Prac. (N. Y.) 92 (1881) Judge Van Vorst sitting in the Supreme Court of New York, Special Term, held that a manufacturer of bread in New York City had clearly a right to call it by way of distinction 'Vienna Bread' and an injunction was ordered restraining the defendant from applying the word 'Vienna' to baked articles. The argument was advanced by the defendant that the plaintiff could have no exclusive right to the use of the name of the capital of Austria, as a trade-mark. But the court rejected it, saying that as a mark for bread it was purely arbitrary and in no manner descriptive either of the ingredients or quality of the article. . . . That geographical names, primarily indicative of place, often acquire a secondary signification indicative of the name of the manufacturer or seller, and the excellence of the thing manufactured or sold, and which enables the manufacturer or seller to assert an exclusive right, is familiar learning supported by a long line of decisions. And that the trade-mark herein involved has acquired such a secondary meaning cannot be disputed upon this record. But the fact that the geographical term has come to have a secondary meaning does not, in the opinion of the court, constitute it a valid trade-mark at common law. The writer understands the law to be that geographical names do not constitute a valid trade-mark at common law unless they have been selected, used, and appropriated under such special circumstances as to point distinctively to origin or ownership. In *Baglin v. Cusenier Co.*, *supra*, the trade-mark 'Chartreuse' was not merely a regional

name, but it was peculiarly the designation of the monks (221 U. S. 592, 31 Sup. Ct. 669, 55 L. Ed. 863), and the term pointed to the liqueur manufactured by the monks. This led the court to say that the term as applied to the liqueur could not be regarded in a proper sense as geographical. We may observe in passing that the court in its opinion, written by Mr. Justice Hughes, mentions the fact that it was insisted at the argument that the word did not constitute a valid trade-mark so that at the most the question could be one only of unfair competition. The court did not say that such a conclusion would not follow from such a premise, but denied the premise. If it had denied the conclusion, the claim that a geographical term becomes a valid technical trade-mark at common law when it acquires a secondary meaning indicating origin or ownership would have become the established law as far as the federal courts are concerned, but we are unable to find any such doctrine enunciated in any decision that court has made. In the absence of any such authoritative statement, the court holds that the geographical term 'Scandinavia' is an invalid trade-mark at common law as indicating the notion of place and not that of origin and ownership. And see *Manitou Springs Mineral Water Co. v. Schueler*, 239 Fed. 593, 152 C. C. A. 427."

When name has secondary meaning.—To same effect as original annotation, see *Scandinavia Belting Co. v. Asbestos, etc., Works*, (C. C. A. 2d Cir. 1919) 257 Fed. 937, 169 C. C. A. 87.

7. Similar Names (p. 766)

Similarity — Illustrations. — "Lava" and "U Lavo" as applied to soap held so similar that registration of the latter term will be denied because of prior use of the former. *Waltke v. Schafer*, (App. Cas. D. C. 1920) 263 Fed. 650.

So in *American Feed Milling Co. v. M. C. Peters Mills Co.*, (App. Cas. D. C. 1919) 261 Fed. 1011, an application to register the words "Big Chief," associated with the representation of a man on horseback, as a trademark on burlap sacks containing horse feed, was denied because of the prior use by another company of a similar trademark and the word "Arab" for the same purpose.

Likewise in *Getz v. Alaska Packers' Assoc.*, (App. Cas. D. C. 1919) 258 Fed. 526, registration of the word "Premium" as a trademark for canned salmon was denied because of its similarity to word "Premier," used as a registered trademark by another company in the same business.

And in *La re Maclin, etc., Co.*, (App. Cas. D. C. 1920) 262 Fed. 636, registration of the words "El Gallo," as a trademark for tobacco was denied because it was the Spanish translation for "The Rooster," and the words "Our Rooster" had previously

been registered as a trademark by another firm in the same business.

But in *Paul F. Beich Co. v. Kellogg Toasted Corn Flakes Co.*, (App. Cas. D. C. 1920) 262 Fed. 640, it was held that the trademark "Golden Crumbles," applied to candy, was not subject to cancellation because of its similarity to the word "Krumbles," used by another firm as a trademark for a cereal breakfast food.

And in *Otzen v. J. K. Armsby Co.*, (App. Cas. D. C. 1919) 261 Fed. 1014, it was held that the trademarks "From the Land of Sunshine" and "Blossom and Sunshine," used on identical goods, were not so similar as to justify the cancellation of the former, especially where the registrant thereof showed a prior use of the word "Sunshine" alone.

8. Name of Periodical (p. 774)

The word "Vogue" as applied to the name of a magazine, and in view of the contents of the magazine offered in evidence, was held not to be so descriptive as to preclude its use as a trademark at common law. *Vogue Co. v. Brentano's*, (S. D. N. Y. 1919) 261 Fed. 420, granting a preliminary injunction against an infringing magazine.

Vol. IX, p. 775, sec. 6. [First ed., 1909 Supp.; p. 675.]

Amendment of application.—Where an application to have the words "Unit Carrier" registered as a trademark for roller brackets for belt conveyors was denied on the ground that the words were descriptive, it was held that the denial of a motion for leave to strike out the word "Carrier" while the application was pending, was error. *Stephens-Adamson Mfg. Co.'s Application*, (App. Cas. D. C. 1920) 262 Fed. 635.

Vol. IX, p. 780, sec. 16. [First ed., vol. X, p. 413.]

Test of infringement.—To same effect as original annotation, see *Start v. Stark Bros. Nurseries, etc., Co.*, (C. C. A. 8th Cir. 1919) 257 Fed. 9, 168 C. C. A. 221, *modifying* (W. D. Mo. 1918) 248 Fed. 154.

Recovery of profits.—*Generally.*—Where it appears that the defendants infringed the plaintiff's trademark, by refilling tanks bearing such trademark with acetylene gas manufactured by them, and selling them to automobile supply dealers, the plaintiff is entitled to an accounting of the profits realized by the defendants. *Prest-O-Lite Co. v. Bournonville*, (D. C. N. J. 1915) 260 Fed. 442.

Burden of proof.—In an action for infringement of a trademark the burden is upon the plaintiff to prove that the defendant has made profits attributable, in whole or in part, to its trademark. *Ammon v.*

Narragansett Dairy Co., (C. C. A. 1st Cir. 1919) 262 Fed. 880.

Where in an infringement suit the profits on infringing sales is shown, and it is inherently impossible for the plaintiff to show what part of them was attributable to the use of the trademark, and what part, if any, to other causes, the burden is then cast upon the defendants to show what part, if any, was due to causes other than the use of the trademark. *Prest-O-Lite Co. v. Bournonville*, (D. C. N. J. 1916) 260 Fed. 446.

Liability of stockholders for profits.—In a suit against a corporation for infringement, stockholders are liable to account for such profits only as have accrued to themselves, and not for those which have accrued to another, and in which they have had no participation. *Prest-O-Lite Co. v. Bournonville*, (D. C. N. J. 1916) 260 Fed. 446.

Vol. IX, p. 787, sec. 19. [First ed., vol. X, p. 414.]

Power of court to grant injunctions.—In *Scandinavia Belting Co. v. Asbestos, etc., Works*, (C. C. A. 2d Cir. 1919) 257 Fed. 937, 169 C. C. A. 87, regarding the power of federal courts to issue injunctions in trademark cases, the court said:

"It is now and for many years has been well-established doctrine that the exclusive property of a proprietor of a trade-mark by virtue of the manufacture or offering for sale of his goods is entitled to the protection which the highest powers of the courts can afford. And the power of the court in such cases is exercised, not only to do individual justice, but to safeguard the interests of the public by preventing one's passing off his goods as the goods of another. The right of property in trade-marks has come to be recognized as of immense and incalculable value. Trade-marks, it has been truthfully said, are the only means by which the manufacturer and the merchant are enabled to inspire and retain public confidence in the quality and integrity of things made and sold, and the only means by which the public is protected against the frauds and impositions of the crafty and designing who are always alert to appropriate to themselves the fruits of the reputation of others.

"The jurisdiction of an equity court to restrain by injunction the passing off by A. of his own goods as being the goods of B. is in aid of the legal right and is founded on the equity of protecting property from irreparable damage. In such a case, the court acts on the same principles upon which it interferes in other cases in protecting legal rights to property."

Judgment.—To same effect as original annotation, see *Start v. Stark Bros. Nurseries, etc., Co.*, (C. C. A. 8th Cir. 1919) 257 Fed. 9, 168 C. C. A. 221, *modifying* (W. D. Mo. 1918) 248 Fed. 154.

Vol. IX, p. 789, sec. 28. [First ed., vol. X, p. 415.]

Effect of failure to give notice.—Where, in an action for infringement, no notice is given by the plaintiff to the defendants of the infringement until a few days before the

institution of the action, this section prohibits the recovery of damages for infringement before that date. *Stark v. Stark Bros. Nurseries, etc., Co.*, (C. C. A. 8th Cir. 1919) 257 Fed. 9, 168 C. C. A. 221, *modifying* (W. D. Mo. 1918) 248 Fed. 154.

TRADING WITH THE ENEMY

1918 Supp., p. 847, sec. 1.

Purpose of act.—The Trading with the Enemy Act was not for confiscation of property. It was rather for conservation of property. While if the President so directed, the money or property of an alien enemy might be taken by the government for its own purposes the owner did not part absolutely with it, for after the end of the war his claim to it was in accordance with section 12 to be settled as Congress should direct. *In re Gregg*, (1920) 266 Pa. 189, 109 Atl. 777.

Constitutionality of Act.—In *Fischer v. Palmer*, (M. D. Pa. 1919) 259 Fed. 355, the court, in holding this act constitutional, said:

"Without regard to complainant's ability or standing to question, it is not doubted that the action of Congress enacting the Trading with the Enemy Act was a legitimate exercise of its war power. The declaration of war placed the nations concerned in a state of hostility, producing a state of war, and conferred those rights which war confers; some of them being, as conferred by the Constitution upon Congress, to make rules respecting capture on land and water. As was said by Justice Strong, in *Miller v. United States*, 78 U. S. (11 Wall.) 306, 20 L. Ed. 135, speaking of the power 'to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water':

"Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy, and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right it would be set at rest by the express grant of power to make rules respecting captures on land and water."

"The subject does not call for argument. It seems sufficient to observe that the exercise of the power assumed by Congress is sanctioned by practice, dating from the American Revolution, and has been upheld by a long line of decisions, as disclosed in

Brown v. United States, 8 Cranch, 110, 3 L. Ed. 504; *Miller v. United States*, 11 Wall. 268, 20 L. Ed. 135, and *Salamandra Ins. Co. v. N. Y. Life Ins. & Trust Co.* (D. C.) 254 Fed. 852."

In *Kahn v. Garvan*, (S. D. N. Y. 1920) 263 Fed. 909, in upholding the constitutionality of the Act, the court said:

"There remains only the question of the constitutionality of the act, about which I shall say little. As between the Custodian and citizens, section 9 is enough, for the reasons I have given; so far as they may suffer injury, which that section does not meet, it is a loss that cannot be cured without undue impediment to the national power. As between enemies and the Custodian, if in fact enemies, they are subject to the exercise of that power without any legal limitations. Up to the present time in any case it has not been exercised to the full extent of confiscation, as might have been done. *Miller v. U. S.*, 11 Wall. 268, 20 L. Ed. 135. It is urged, however, that under *McVeigh v. U. S.*, 11 Wall. 259, 20 L. Ed. 80, they are constitutionally entitled to a hearing, and that this is the only one possible, since section 9 does not cover them. The effect of that decision has been misunderstood; it proceeded upon the ground that the claimant in a proceeding in rem had under the statute a right to appear. No one can question that necessity under that statute, since only by appearance could the claimant show that his goods were not forfeit.

"But the Trading with the Enemy Act provides an adequate remedy in section 9 to those who can maintain that they are not enemies, and who can therefore have any rights to object to the capture; under the Civil War Confiscation Act, its equivalent was included in the claimant's right to appear and contest condemnation. It is, indeed, a question whether, after peace is declared, a former enemy, then an alien friend, might not bring a suit under section 9, at least as amended on July 11, 1919; but I do not press that point. My reliance is upon the fact that it covers all who do not come in the avowed status of enemies, and that those who do can have no rights arising from capture. Theoretically it may be possible to conceive of cases, though I have not been able to imagine any, of avowed enemies who

might still protest on the ground, as I have already suggested, that the property captured was not within the act, or that the formalities of capture were not observed.

"Such supposed protests can arise, I think, only from too narrow an understanding of the scope of the act, and leave the rights denied to enemies too tenuous to impose any constitutional limitation on the powers of Congress. The purpose was to accomplish a swift, certain, and final reduction to possession of vast quantities of property involved in incredible complication of ownership and interest. That purpose could be accomplished only at the sacrifice of much that custom had made sacred; with its propriety courts have nothing to do; they may only learn what it was, and consider whether the constitutional limitations were observed. In the latter consideration it is legitimate to remember that any initial hearing of an enemy would have been a fatuous procedural requirement in practice. That the statute is invalid, because there was no eventual equivalent, seems to me a contention which subjects the nation's powers to unreal and scholastic limitation."

1918 Supp., p. 847, sec. 2.

Void marriage to enemy.—A woman who has contracted a void marriage with an alien enemy, he having another wife then living, is not within the Act. *Beyerle v. Bartsch*, (Wash. 1920) 190 Pac. 239.

Mere residence in a territory of a nation with which the United States was at war made the resident an enemy. *In re Gregg*, (1920) 266 Pa. St. 189, 109 Atl. 777.

1918 Supp., p. 854, sec. 7 (b).

Power of Circuit Court of Appeals to require sum recovered on affirmed money judgment to be paid over to alien property custodian.—*Birge-Forbes Co. v. Heye*, (1920) 251 U. S. 317, 40 S. Ct. 160, 64 U. S. (L. ed.) — (affirming (C. C. A. 5th Cir. 1918) 248 Fed. 636, 160 C. C. A. 536), wherein the court said: "The plaintiff had got his judgment before war was declared, and the defendant, the petitioner, had delayed the collection of it by taking the case up. Such a case was disposed of without discussion by Chief Justice Marshall, speaking for the court in *Owens v. Hanney*, 9 Cranch 180, 3 L. ed. 697; *Kershaw v. Kelsey*, 100 Mass. 561, 564, 97 Am. Dec. 124, 1 Am. Rep. 142. There is nothing 'mysteriously noxious' (*Coolidge v. Inglee*, 13 Mass. 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side. *Hanger v. Abbott*, 6 Wall. 532, 536, 18 L. ed. 939, 941; *McConnell v. Hector*, 3 Bos. & P. 113, 114, 127 Eng. Reprint, 61, 6 Revised Rep. 724. Such aid and comfort were prevented by the provision that the sum recovered should be paid over to the Alien Property Custodian, and the judgment in this respect was correct."

1918 Supp., p. 856, sec. 7 (c).

Requests to an alien enemy which accrued during the war were properly paid over to the Alien Property Custodian. The effect of war was not to make the bequests void thereby enhancing the estate of the residuary legatee. *In re Gregg*, (1920) 266 Pa. St. 189, 109 Atl. 777.

Property held by a trustee under a will for the benefit of an alien enemy comes within the purview of this paragraph. *Keppelmann v. Palmer*, (N. J. 1919) 108 Atl. 432 (reversing (1918) 89 N. J. Eq. 390, 105 Atl. 140) wherein the court said: "The manifest purpose of Congress was that the statute should operate, not only upon property the legal title to which is in the alien, but on all property held for him, or for his benefit, whether the legal title be in him or in the person who holds it for his benefit. In the present case the property is held in trust by the complainants solely for the benefit of these three daughters of the testator, and comes within the very words of the statute, for although they are not the holders of the legal title to the trust estate, they are the equitable owners thereof; the whole beneficial interest being lodged in them."

1918 Supp., p. 856, sec. 7 (e).

Duty of Alien Property Custodian to give refunding bond.—A trustee under a will required by the terms of the "Trading with the Enemy Act" to turn over to an Alien Enemy Custodian property held for the benefit of an alien enemy could not require as a condition precedent to such delivery a refunding bond even though a state statute required such a bond in other cases, for the state statute could not limit the scope and effect of the federal statute. *Keppelmann v. Palmer*, (N. J. 1919) 108 Atl. 432.

1918 Supp., p. 858, sec. 9.

Venue of suits against Alien Property Custodian.—A suit by an alien enemy against the Alien Property Custodian for an alleged illegal seizure of certain property belonging to the plaintiff, may be prosecuted only in the district where the plaintiff resides. *Fischer v. Palmer*, (M. D. Pa. 1919) 259 Fed. 355, wherein it was said:

"The act of Congress creating the office of Alien Property Custodian, in defining, regulating, and punishing trading with the enemy, and providing for the seizure and administration of such alien property, affords those aggrieved thereby a full and complete remedy and opportunity to have such grievances adjudicated. If the President, who is, by the act, invested with power over all alien enemy property, does not afford relief to a claimant, such claimant may prosecute his suits at law or in equity to establish any right, title, or interest which he may have in such money or property in the District Court of the United States for the district in which such claimant resides, or, if

a corporation, where it has its principal place of business, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the treasury of the United States, etc. That the provisions of the act were intended to afford adequate protection to the property of deserting alien enemies residing in this country, and corresponding relief when erroneously seized, is apparent, and it is not doubted but that such protection and relief is to be sought and obtained exclusively in the District Court of the habitat of the claimant.

"In the case of United States v. Congress Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 50 L. Ed. 163, wherein the question was presented to court whether or not exclusive power was vested in the court designated, under Materialmen Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811, providing action on the bond should be brought in the court of the district in which said contract was to be performed, and not elsewhere, the court held that the provision restricting the place of suit operates pro tanto to displace the provision upon that subject in General Jurisdictional Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433. The United States having provided a remedy for violated rights likely to occur in the enforcement of the provisions of the act, relative to the property of alien enemies, and having consented to be sued in a designated court, to the end that injustice may not be done, the remedy provided and the court designated must be regarded as exclusive of all others."

Parties defendant.—In a suit under this section by a trustee of the property of non-resident alien enemy heirs of a decedent to obtain reimbursement from accumulated income for advances made to them, neither the heirs nor the Secretary of the Treasury need be made parties defendants. *Spiegelberg v. Garvan*, (S. D. N. Y. 1919) 260 Fed. 302. Regarding the necessity of making the heirs parties defendant, the court said:

"In the case at bar plaintiff, prior to the enactment of the Trading with the Enemy Act, could have begun in the state court, an appropriate suit or action against the non-resident alien enemies, could have attached funds in the hands of the trustees, and could have obtained jurisdiction through the medium of an order of publication. If the nonresident defendants failed to appear, the state court would, nevertheless, have acquired jurisdiction and could have rendered its appropriate judgment or decree.

"When, however, a claimant such as plaintiff was remitted to the remedy under section 9, he lost the opportunity to begin his suit or action in a court where jurisdiction of the absent defendant could be obtained. When plaintiff was thus compelled by virtue of section 9 to bring his suit in this court, he

at once found himself in a position where jurisdiction could not be obtained; for the reason that the United States courts, at common law and in equity, cannot obtain jurisdiction by means of either attachment or publication over a defendant who is without the jurisdiction. *Big Vein Coal Co. v. Read*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053; Judicial Code, § 50 (Act March 3, 1911, c. 231, 36 Stat. 1101).

"There is not any process nor order by which this court can bring in the nonresident alien enemy as a party defendant.

"Under section 50 of the Judicial Code and Equity Rule 39, the rights of such absent defendant are safeguarded; but both section 50, *supra*, and equity rule 39 make clear that the court may proceed in the absence of a person who is a proper party to the suit.

"In a proceeding in the state court before the act, defendants would have been necessary parties to the suits; but by requiring plaintiff to go into one of the United States District Courts, and providing that the Alien Property Custodian should be a party defendant, it is quite plain that Congress intended that the Alien Property Custodian was the only necessary party defendant, because it must be assumed that Congress would not legislate in a futile way so as to require a person to be a party defendant over whom the United States courts could not acquire jurisdiction.

"In view of the foregoing, it may be repeated that, if Congress had intended that the alien enemy should be made a party defendant, it would have so stated in clear language, in view of the fact that such language would be necessary in order (if it had the power so to do) to confer jurisdiction over an absent defendant, where no such jurisdiction had ever been conferred before."

With reference to the necessity of joining the Secretary of the Treasury, as a party, it was said:

"It is, of course, presumed that public officers do their duty, and no doubt the Custodian was obligated to deposit the money forthwith in the Treasury of the United States. 'Forthwith,' however, is an elastic expression, and it is conceivable that the Alien Property Custodian may be doing his full duty, and yet for some proper reason may not immediately deposit the money with the Treasurer. On the bill as framed, the money is in the custody of defendant. If, in point of fact, it is not in his custody, then that fact should be alleged in the answer and set up by way of defense."

1918 Supp., p. 859, sec. 10 (c).

Licensing use of American patents.—The Federal Trade Commission has power, by virtue of the authority delegated to it under this section, to issue licenses to use American patents where the record title to such patents is in an enemy but the equitable title thereto rests in an American citizen. 31 Op. Atty.-Gen. 352.

1918 Supp., p. 862, sec. 12.

Sale of property to United States.—The Alien Property Custodian can, for a fair and substantial consideration, sell any property, of which he becomes possessed, to the United States, but he can not sell such property for a merely nominal consideration. The sale of an enemy-owned patent by the Alien Property Custodian to the War Department acting for the United States could hardly affect an existing claim on account of the owner of the patent against the United States for past infringements, and the matter would not seem to be one considered in computing the fair value of the patent which it is proposed shall be sold. If the United States becomes the owner of a patent it can exercise the usual proprietary rights of such an owner and can, therefore, enforce its rights against unlicensed users; can grant licenses; and can make assignments which carry with them full domination of the patent so far as rights thereunder are conveyed. (1919) 31 Op. Atty-Gen. 463.

Alien Property Custodian as "adverse party" in proceedings by nonresident alien enemies under Workmen's Compensation Acts.—In proceedings under a Workmen's Compensation Act by a widow, a nonresident alien enemy, for the death of her husband, it was held that the Alien Property Custodian was a necessary party defendant in an action by the employer to set aside an award of the Industrial Commission, which was made payable to the Custodian, since he was an "adverse party" within the meaning of the statute which provided that awards of the Commission were reviewable by action against it "in which action the adverse party shall also be made defendant." *Youghieny, etc., Coal Co. v. Lasevich*, (Wis. 1920) 176 N. W. 855.

Payment of expenses incurred in securing possession of enemy property.—The Secretary of the Treasury may lawfully comply with the request of the Alien Property Custodian for the payment of the commission

and fees incurred in securing possession of certain enemy trusts herein set forth, to the extent that money has been deposited in the Treasury of the United States to the credit of the respective trusts. (1919) 31 Op. Atty-Gen. 438.

1918 Supp., p. 865, sec. 17.

Bill by trustee of seized property.—Whatever may be the right of the trustee of property seized because the beneficiaries are alien enemies to sue under this section on the theory that the Alien Property Custodian has become beneficiary of the trust, there is no jurisdiction under this section of a bill by such a trustee against the Custodian based on a claim that the seizure was invalid. *Kahn v. Garvin*, (S. D. N. Y. 1920) 263 Fed. 909. As to the right to maintain the bill as an interpleader the court said: "There are but two grounds upon which a bill of interpleader might conceivably rest: (1) That the capture was not within the scope of the act; (2) that the statute is void. Ignoring the more fundamental question whether this court has jurisdiction in any case to entertain such a bill under section 17, I think that neither ground is good. There can be not the least doubt that the capture was within the act, because section 7 (a), third paragraph, and section 7 (c), and section 7 (d) all very clearly include equitable interests in any kind of property. The language of 7 (c) and 7 (d) is as follows:

"Property . . . held for . . . or on behalf of or for the benefit of an enemy."

"The third paragraph of 7 (a) includes all kinds of trusts, and is not limited by the language of the first paragraph:

"Trustees . . . issuing shares or certificates representing beneficial interests."

"The general terms were used to include all kinds of property, and it is scarcely likely that so common a form as trusts should have been excluded. Section 8 (a) covers only property held as security."

TREASURY DEPARTMENT

Vol. IX, p. 805. [*Salaries to be paid, etc.*] [First ed., vol. VII, p. 366.]

Statute as providing for "continuance in office" of officers under Treasury Department.—In (1919) 31 Op. Atty-Gen. 401, Attorney General Palmer commenting on this statute said:

"This statute was construed by Mr. Attorney General Moody in an opinion rendered June 27, 1906 (25 Op. 636). In his view the statute provided for the 'continuance in office' of officers under the Treasury Department. I have no reason to question this conclusion which is reinforced by the consideration that under such circumstances the

officer continues obviously to act under and by virtue of his original appointment or commission. In other words, the language must be taken to be equivalent to the phraseology of many state statutes which provide that a term of office shall continue for a specified time and thereafter until the officeholder's successor shall have been appointed and qualified."

Vol. IX, p. 845, sec. 305. [First ed., vol. VII, p. 394.]

Suit against Treasury official to establish equitable lien to fund in Treasury.—A suit against Treasury officials to establish an

equitable lien for attorney's fees upon a fund in the United States Treasury appropriated by Congress for payment to a specified person, also made a party defendant, in satisfaction of a finding of the Court of Claims, is not one against the United States, since the suit is one to compel the performance of a ministerial duty in which the party complainant has a particular interest. *Houston v. Ormes*, (1920) 252 U. S. 469, 40 S. Ct. 369, 64 U. S. (L. ed.) — (*affirming*) (1918) 47 App. Cas. (D. C.) 364, wherein the court said: "The principal contention is that, because the object of the suit and the effect of the decree were to control the action of the appellants in the performance of their official duties, the suit was in effect one against the United States. But since the fund in question has been appropriated by act of Congress for payment to a specified person in satisfaction of a finding of the Court of Claims, it is clear that the officials of the Treasury are charged with the ministerial duty to make payment on demand to the person designated. It is settled that in such a case a suit brought by the person entitled to the performance of the duty against the official charged with its performance is not a suit against the government. So it has been declared by this court in many cases relating to state officers. *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. Ed. 623; *Louisiana v. Jumel*, 107 U. S. 711, 727, 2 Sup. Ct. 128, 27 L. Ed. 448; *In re Ayres*, 123 U. S. 443, 506, 8 Sup. Ct. 164, 31 L. Ed. 216. In *Minnesota v. Hitchcock*, 185 U. S. 373, 386 22 Sup. Ct. 650, 655 (46 L. Ed. 954), while holding that a suit against officers of the United States might be in effect a suit against the United States, the court said:

"Of course, this statement has no reference to and does not include those cases in which officers of the United States are sued, in appropriate form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform. Such suits would not be deemed suits against the United States within the rule that the government cannot be sued except by its consent, nor within the rule established in the *Ayers Case*."

"And in *Parish v. MacVeagh*, 214 U. S.

124, 29 Sup. Ct. 556, 53 L. Ed. 936, the court upheld the right of a claimant, in whose favor an appropriation had been made by Congress, to have a mandamus against the Secretary of the Treasury requiring him to pay the claim. To the same effect, *Roberts, Treasurer, v. United States*, 176 U. S. 221, 231, 20 Sup. Ct. 376, 44 L. Ed. 443.

"In the present case it is conceded, and properly conceded, that payment of the fund in question to the defendant Sanders is a ministerial duty, the performance of which could be compelled by mandamus. But from this it is a necessary consequence that one who has an equitable right in the fund as against Sanders may have relief against the officials of the Treasury through a mandatory writ of injunction, or a receivership which is its equivalent, making Sanders a party so as to bind her and so that the decree may afford a proper acquittance to the government. The practice of bringing suits in equity for this purpose is well established in the courts of the District. *Sanborn v. Maxwell*, 18 App. D. C. 245; *Roberts v. Consaul*, 24 App. D. C. 551, 562; *Jones v. Rutherford*, 26 App. D. C. 114; *Parish v. McGowan*, 39 App. D. C. 184, s. c. on appeal *McGowan v. Parish*, 237 U. S. 285, 295, 35 Sup. Ct. 543, 59 L. Ed. 955. Confined, as it necessarily must be, to cases where the officials of the government have only a ministerial duty to perform, and one in which the party complainant has a particular interest, the practice is a convenient one, well supported by both principle and precedent."

Treasury officials joined with a non-resident claimant as defendants in a suit to establish an equitable lien for attorney's fees upon a fund in the United States Treasury appropriated by Congress to pay claimant, conformably to a finding of the Court of Claims, may not successfully challenge the jurisdiction of the District of Columbia courts on the ground that debts due from the United States have no situs in the District, where claimant voluntarily appeared and answered the bill without objection, since the decree will bind her, and constitute a good acquittance to the government. *Houston v. Ormes*, (1920) 252 U. S. 469, 40 S. Ct. 369, 64 U. S. (L. ed.) —, *affirming* (1918) 47 App. Cas. (D. C.) 364.

WAR DEPARTMENT AND MILITARY ESTABLISHMENT

Vol. IX, p. 925, sec. 1. [First ed., 1918 Supp., p. 921.]

Not applicable to state adjutant general.—The National Defense Act is not applicable to a state adjutant general, he not being a commissioned officer of the National Guard. *State v. Ingalls*, (Ariz. 1920) 189 Pac. 430.

Vol. IX, p. 931, sec. 16. [First ed., 1918 Supp., p. 934.]

Appointment of officers of grades of colonel and lieutenant colonel.—The Selective Service Act of May 18, 1917 (see vol. IX, p. 1136), authorized the President to appoint officers of the grades of colonel and lieutenant colonel in the Veterinary Corps, United States Army. 31 Op. Atty-Gen. 367.

Promotions.—This section does not provide for the promotion of any person then in the Army but merely renders certain veterinarians in the service eligible for appointment to a commissioned rank; a person appointed pursuant to its provisions was originally appointed and not promoted and could not have the rank and pay from the date of the approval of said act. *Jefferis v. U. S.*, (1919) 54 Ct. Cl. 177.

Vol. IX, p. 966, sec. 1. [*Field clerks.*] [First ed., 1918 Supp., p. 972.]

General construction.—This act changed the designation of clerk, Quartermaster Corps, to field clerk. No new office was created by the act and executive action was unnecessary to determine the status of its beneficiaries. It was intended that the clerks named should receive the allowances from the date of the approval of the act. *Charlebois v. U. S.*, (1919) 54 Ct. Cl. 183.

Regulations of Civil Service Commission as governing appointment of army field clerks.

—Army field clerks may be appointed by the Adjutant General, without respect to the rules and regulations of the Civil Service Commission, and from the date of their appointment they are solely within the control of the Rules and Articles of War and not subject to the rules and regulations of the Civil Service Commission. (1917) 31 Op. Atty-Gen. 133.

Vol. IX, p. 1097, sec. 1. [First ed., vol. X, p. 373.]

Appropriation of private property for army post as constituting implied promise by government to pay therefor.—When the government, without instituting condemnation proceedings, appropriates for an army post under legislative authority private property

to which it asserts no title, it impliedly promises to pay therefor. *U. S. v. North American Transp., etc., Co.*, (1920) 253 U. S. 330, 40 S. Ct. 518, 64 U. S. (L. ed.) — (affirming (1918) 53 Ct. Cl. 424), wherein it was held that the continued holding possession of a placer mining claim as part of an army post after the announcement by the Secretary of War that the tract of which it formed a part was a public reservation under control of the War Department, and the erection of buildings thereon by his authority, is such an appropriation as gives a right of action to the owner against the United States to recover compensation as upon implied contract.

Vol. IX, p. 1136, sec. 1. [First ed., 1918 Supp., p. 1010.]

I. CONSTRUCTION OF SELECTIVE SERVICE ACT

4. *Determination of Liability to Conscription* (p. 1141)

Review by courts—Generally.—To same effect as original annotation, see *Arbitman v. Woodside*, (C. C. A. 4th Cir. 1919) 258 Fed. 441, 169 C. C. A. 457.

Claim of alienage.—Although the action of local and district boards within the scope of their authority is final, and not subject to judicial review, when the investigation has been fair and the finding supported by substantial evidence, yet where there is proof that the investigation has not been fair, or that the board has abused its discretion by a finding contrary to all the substantial evidence, relief should be given by the courts under the writ of habeas corpus. Thus, where it appeared that a local board rejected a registrant's claim of alienage, which was supported by affidavits, without making an investigation, for the reason that the members of the board believed the affidavits to be false, the sole basis of such belief being the ease with which members of the board had found that such affidavits could be obtained, the rejection was held to be arbitrary and unfair, and the registrant entitled to a writ of habeas corpus. *Arbitman v. Woodside*, (C. C. A. 4th Cir. 1919) 258 Fed. 441, 169 C. C. A. 457.

Estoppel of United States to exercise jurisdiction over registrant.—Where an alien who has registered and has been exempted under this Act is caused by the acts of a member of his local board and a commissioner of immigration to leave the United States to escape deportation, their acts do not estop the United States from inducting him into military service under the provisions of the Canadian-American Convention, if he later returns to this country from

Canada under a permit from the immigration authorities. *Morris v. Johnston* (C. C. A. 9th Cir. 1919) 280 Fed. 821, wherein the court said:

"Tested even by the principles of estoppel which apply between individuals, the facts set up by petitioner fall short of showing a case in his favor. First, Whitney had neither authority nor duty to deport him. He was powerless as chairman of the local board to order his deportation. Neither he nor the board had any power or duty in regard to enforcement of the immigration laws, and their jurisdiction was complete under the Draft Act. The petitioner had voluntarily put himself within its influence, and his rights and his duties, so far as military service due the United States are concerned, were to be weighed and determined by the terms of that act and the instrumentalities created by it."

Vol. IX, p. 1157, sec. 4. [First ed., 1918 Supp., p. 1016.]

Selective Service Rules and Regulations—Judicial notice.—The courts will take judicial notice of the Selective Service Rules and Regulations made under authority of this section. *Hettleman v. Frank*, (Md. 1920) 110 Atl. 715.

Misconduct of attorney in soliciting compensated employment in filling out questionnaires involves moral turpitude and is ground for disbarment. *In re Wiltse*, (Wash. 1920) 188 Pac. 848. See also *In re Arctander* (Wash. 1920) 188 Pac. 380. See to the same effect *In re Kerl*, (1920) 32 Idaho 737, 188 Pac. 40, 8 A. L. R. 1259 (conviction of obstructing draft ground for disbarment).

Vol. IX, p. 1159, sec. 5. [First ed., 1918 Supp., p. 1018.]

For cases construing presidential regulations promulgated pursuant to this section, see *Brown v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 703, 168 C. C. A. 653.

Vol. IX, p. 1159, sec. 6. [First ed., 1918 Supp., p. 1019.]

Conspiracy of nonofficial persons to violate section.—Nonofficial persons may be convicted of a conspiracy to violate the provisions of this section, that any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this act or of said regulations, shall be guilty of a misdemeanor. *O'Connell v. U. S.*, (1920) 253 U. S. 142, 40 S. Ct. 444, 64 U. S. (L. ed.) —.

Failure to register—Persons absent from country.—A defendant in a prosecution under this Act for failure to register cannot be regarded as residing abroad and therefore not required to register, where it appears that his father had two farms, one in Montana and one in Canada, a short distance across the border; that the defendant spent a portion of his time in Montana, where he maintained a room and received some of his mail, and the remainder of his time on his father's farm in Canada; that he admitted he was not a citizen of Canada, had taken no steps to become such and was in Montana on registration day. *Brown v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 703, 168 C. C. A. 653.

Failure to answer questionnaire.—It is a violation of the act for a registrant instead of answering the questions pertaining to exemption to write across the sheet:

"I hereby claim my exemption given me under the Constitution of the United States from any and all military service, except for the purpose of executing the laws of the Union, suppress insurrection, and repel invasions." *Uhl v. U. S.*, (C. C. A. 5th Cir. 1920) 263 Fed. 79.

Effect of acquittal by court-martial.—A registrant who has been tried and acquitted by a court-martial on the charges of failing to answer his questionnaire and of desertion, may not thereafter be tried by a federal court under this section on the same charges. *U. S. v. Block*, (D. C. Ind. 1920) 262 Fed. 205. The court said:

"The plea of the defendant is based upon the theory that he has been once placed in jeopardy and acquitted of the offense charged against him in the indictment. The Selective Service Law provides, in section 6, for the punishment of a registrant failing or neglecting to answer his questionnaire. The section, so far as it is applicable to this case, reads as follows:

"... Or who, in any manner shall fail or neglect fully to perform any duty required of him in the execution of this act, shall, if not subject to military law, be guilty of a misdemeanor and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct."

"The Supreme Court of the United States in *Grafton v. United States*, 206 U. S. 333, 27 Sup. Ct. 749, 51 L. Ed. 1084, 11 Ann. Cas. 640, held that a soldier in the army, having been acquitted of the crime of homicide, alleged to have been committed by him in the Philippine Islands, by a military court-martial of competent jurisdiction proceeding under authority of the United States, cannot be subsequently tried for the same offense in a civil court exercising authority in that territory. In the course of its opinion the court said (206 U. S. on page

345, 27 Sup. Ct. 751, 51 L. Ed. 1084, 11 Ann. Cas. 640):

"We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted or convicted must have had jurisdiction to try him for the offense charged. It is alike indisputable that if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance."

"Grafton having been acquitted of the crime of homicide by a court-martial, and having thereafter been convicted in the civil courts, the Supreme Court reversed the case and ordered that the complaint of the United States against Grafton be dismissed, and that he be discharged. This principle, that a man shall not be placed in jeopardy twice for the same offense, applies to misdemeanors as well as to graver crimes. *Ex parte Lange*, 85 U. S. (8 Wall.) 163, 21 L. Ed. 872.

"In that part of section 6 of the Selective Service Law above quoted, Congress provided that whoever violated such section, 'if not subject to military law,' should be guilty of a misdemeanor, and upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and provided further, in the alternative, that 'if subject to military law' he should be tried by court-martial and suffer such punishment as a court-martial may direct, thus recognizing the legal principle that a man may not be subjected to trial or punishment twice for the same offense.

"This is not the case of a plea setting up the former conviction or acquittal of the defendant in a court of another sovereignty. It is well settled that an acquittal or conviction in a state court is not a good defense in this court; but the rule is different where both courts derive their powers from the same sovereignty. In this case the court-martial and the District Court of the United States sitting in this district both derive their powers from the government of the United States."

Indictment—Sufficiency.—In *Kreibich v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 168, an indictment for violation of this section was held to be sufficient which alleged in substance, (1) that defendant was a male person of 28 years of age, a resident of St. Louis, Mo., a registrant and subject to the jurisdiction of the local board for division 13 of said city, (2) that he was before that board pursuant to said act and the acts amendatory thereof and supplementary thereto, and the regulations promulgated by the President, for the purpose of being classified for service under said acts and regulations, and (3) that "for the purpose of obtaining a more deferred classification

than that to which he was rightfully entitled" he willfully, feloniously, and corruptly made the statements set out in the indictment, which were to the effect that his father was dependent upon him for support.

Information—Allegations.—An information charging the defendant with failure to register as required by this Act, need not allege that he is a citizen of the United States. *Brown v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 703, 168 C. C. A. 653.

Verification.—An information alleging a violation of this Act may be verified by an assistant United States district attorney, for R. S. sec. 363 (4 Fed. Stat. Ann. (2d ed.) 620) gives the Attorney General power to employ attorneys "to assist the district attorneys in the discharge of their duties" and places no restriction upon the powers of such assistant district attorneys. Such verification may be made on information and belief, since there is no statute which requires any verification of an information. *Brown v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 703, 168 C. C. A. 653.

Evidence—Admissibility.—In a prosecution for failure to register in accordance with the provisions of this Act, vouchers given to the defendant in February, 1917, which upon their face indicate that at that time he was acting as deputy sheriff of a county in the district in which the prosecution was brought, are admissible as public records, and may be taken into consideration by the jury in connection with other evidence as to the actual residence of the defendant on June 5, 1917. *Brown v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 703, 168 C. C. A. 653, wherein it was further held that evidence that the defendant had been furnished with an opinion from the local advisory board to the effect that he was not required to register was held to have been properly excluded, where there was no offer to show that the opinion had been given on or prior to June 5, 1917.

In a prosecution under this section for failure to register, affidavits made by the defendant several years previous regarding other matters and in which he stated that he was of a certain age at that time, are inadmissible in evidence against him. *Gordnier v. U. S.*, (C. C. A. 9th Cir. 1920) 261 Fed. 910, wherein the court said:

"The affidavits which were introduced in evidence against the plaintiff in error were not confessions, and they can hardly be said to be admissions, not having been against interest at the time when they were made. Nor are they judicial admissions. They stand only as declarations of the accused made under oath at a time long prior to the enactment of the law under which he is here prosecuted. They would undoubtedly have been admissible in evidence if there had been some proof tending to show that the plaintiff in error was in fact of the age which he represented himself to be at the time when they were made. In brief, the whole case against the plaintiff in error

rests upon his affidavits. Unless he was within the prescribed age, he committed no crime by failing to register. The fact that he was subject to registration cannot be established beyond a reasonable doubt by the contents of the affidavits."

Vcl. IX, p. 1162, sec. 12. [First ed., 1918 Supp., p. 1022.]

Extent of zone.—This section and the Presidential regulations promulgated thereunder provide "for a zone five miles wide around every military camp, and if any such zone takes in any portion of an incorporated city or town within which the sale of alcoholic liquor is not prohibited by state or local law, then only so much of the territory of such city or town can be included in the prohibited zone as lies within one-half mile from the nearest boundary of the camp." *Evans v. U. S.*, (C. C. A. 2d Cir. 1919) 261 Fed. 902.

Measurement of distance from camp to place of sale.—In determining whether the place of business of a defendant in a prosecution under this section is within a prohibited zone around a camp, the distance is to be measured in a straight line rather by measuring the distance an automobile would travel in going from the camp to the defendant's place of business. *Evans v. U. S.*, (C. C. A. 2d Cir. 1919) 261 Fed. 902.

Transportation of liquor in prohibited zones as offense.—While this section does not designate the "transportation" of liquor as an offense, it does provide for regulations to be promulgated by the President, and section 1 of the regulations promulgated June 27, 1918, specifically prohibits that any liquor be "transported to any place within any such zone." *Robertson v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 948.

Transportation to private home for use of family.—The regulation promulgated pursuant to this section by the President July 3, 1918, prohibiting the carrying of liquors into any place within five miles of a military camp and containing a proviso excluding from its operation the carrying of such liquor to a private home for use of members of the family or bona fide guests, is not violated by one who carries such liquor to his home for the use of his wife in cooking and for use medicinally by an aged relative, who from time to time stopped at his home. *Leitch v. U. S.*, (App. Cas. D. C. 1919) 261 Fed. 456.

"Newbro's Herpicide" was held to be an alcoholic liquor within the meaning of this section in *U. S. v. Kinsel*, (W. D. Wash. 1918) 263 Fed. 141.

Ending of war as affecting prosecution for violation.—This section remained in force after the passing of the emergency existing at the time of its enactment, for it contains no such limitation or restriction as appears in other parts of the act which are in terms made effective "for the period of the present emergency" or "during the present war,"

and it is therefore unnecessary to determine whether, at the time the acts were done which were alleged to constitute a violation of this section, the war had or had not ended. *Laughter v. U. S.*, (C. C. A. 5th Cir. 1919) 261 Fed. 68, 171 C. C. A. 664, affirming a conviction for violation of this section and also for conspiracy to violate it.

Prosecution by information.—In *Robertson v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 948, it was contended that a person violating section 12 could be proceeded against only by indictment. Answering this contention, the court said:

"The next proposition is that the accused could be proceeded against only by indictment. The argument advanced is that, although the statute did not provide for imprisonment beyond one year, and made no provision for jail sentence to be at 'hard labor,' and although the sentence was for less than a year, and no requirement therein of hard labor, yet that the sentence might have required such hard labor, and therefore might have been an 'infamous punishment.' No hard labor requirement could have been attached to this sentence, because the maximum imprisonment permitted was one year, and hard labor was not expressly permitted by the statute. *Ex parte Karstendick*, 93 U. S. 396, 23 L. Ed. 889; *In re Mills*, 135 U. S. 263, 10 Sup. Ct. 782, 34 L. Ed. 107. The reliance placed by the counsel of accused upon the provision in section 338 of the Criminal Code (Act March 4, 1909, 35 Stat. p. 1088), that the omission of the words 'hard labor' from the provisions of the Criminal Code should not deprive the court of the power to impose such, is not well founded. That provision referred to that statute alone, and has no application to this one, subsequently enacted."

Allegations in information.—An information under this section is not defective because it fails to allege that the offense charged was not punishable under the Articles of War. *Robertson v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 948. Regarding the necessity of such an allegation, the court said:

"Such exception in the statute was no part of the definition of the offense. and was a matter of defense, rather than one necessary to be alleged in the information."

It was also contended that the President had no authority to prohibit the "transportation" of liquor within the camp zone, but if he had such authority, the information was fatally defective in failing to state that such regulations had been made. Concerning such contention, the court said:

"The statute gave the President power to make regulations 'governing the prohibition of alcoholic liquors in or near military camps,' and prescribed the punishment for violation of such regulations. Congress, having declared the purpose of the regulations and the punishment for violation of them, could and did leave the definition of those regulations to the Executive. The regula-

tion prohibiting the transportation of liquor within certain reasonable limits 'near' the camps was well within the authority granted. Such a regulation has the effect of law, and it was not necessary to plead its existence in the information. The information properly covered this phase of the accusation, by alleging facts which would bring the acts charged within the regulations."

Evidence—Admissibility.—In a prosecution under this section for selling alcoholic liquors to a seaman of the United States navy while in uniform, evidence on behalf of one of the defendants that he believed the liquors were ordered by a woman accompanying the seaman, were intended for her own use and that he charged them to her, is admissible. *Fetters v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 142, 171 C. C. A. 178. Regarding the admissibility of such evidence, the court said:

"There was testimony to the effect that George Fetters, who, it is admitted, was not in the dance hall, had some communication with his wife, and that he gave her a package which subsequently turned out to be liquor. Mrs. Fetters did not testify. Fetters testified that he got the order for the liquor, wine, and beer from Mrs. Lewis, and that Mrs. Fetters told him in the barroom that Mrs. Lewis wanted the 'stuff' packed in a box, that he charged Mrs. Lewis for it all. Thereupon the court struck out the testimony 'with reference to the whole thing,' meaning, we take it, the statements of Mrs. Fetters to Fetters; the judge stating that he thought the witness was telling about Mrs. Lewis making application for the liquor and wine. Defendants' counsel objected to striking out the testimony, whereupon the court asked Fetters if all that he knew about the person the liquors 'were ordered for was what Mrs. Fetters came and told' him. Fetters replied, 'Yes.' Thereupon the court struck out the testimony on that subject, and defendants' counsel saved an exception. Fetters said that a few days afterwards Mrs. Lewis promised to pay the bill.

"Inasmuch as it was not contended that Fetters was present with Cranfill or the party at the time the liquors were ordered, the principal circumstances relied upon by the prosecution were that Mrs. Fetters went to the barroom and got a package from her husband, and that the package contained liquor. Fetters denied having sold liquor to men in uniform, and said that he had issued orders to his employees that no liquors were to be sold to men in uniform.

"As against George Fetters we think it was prejudicial error to strike out his testimony as to what Mrs. Fetters told him when she went for the liquors. As the case developed, the effect of the ruling deprived him of his main defense, an honest belief on his part that the liquors were bought by order of Mrs. Lewis for her own use. Intrinsically the delivery of the liquors

would have only an ambiguous significance, and he had a right to explain the transaction, and in so doing could testify to what was then and there said to him by the person who, according to his story, was the only one present when he packed or delivered the liquors. Whether such testimony was true or false is not for us to say; but that it was competent is clear to us."

Vol. IX, p. 1163, sec. 13. [First ed., 1918 Supp., p. 1022.]

Constitutionality.—To same effect as second paragraph of 1919 Supplement annotation, see *Blanc v. U. S.*, (C. C. A. 9th Cir. 1919) 258 Fed. 921, 169 C. C. A. 641.

This section was enacted pursuant to the authority conferred on Congress by section 8 of article 1 of the Constitution of the United States "to raise and support armies" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

It is not the exercise of the police power of the state, but the constitutional authority of the United States. *Grancourt v. U. S.*, (C. C. A. 9th Cir. 1919) 258 Fed. 25, 169 C. C. A. 163.

Amendment of this section by Act of July 9, 1918, c. 143, subc. xiv, 1918 Supp. p. 896, did not have the effect of relieving from liability to prosecution and punishment an offender against this section, in view of the saving provisions in R. S. sec. 13 (9 Fed. Stat. Ann. (2d ed.) 393), which section is still in force. *Goublin v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 5, 171 C. C. A. 601; *De Four v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 596, 171 C. C. A. 360.

"House of ill fame, brothel or bawdyhouse."—In *Thaler v. U. S.*, (C. C. A. 6th Cir. 1919) 261 Fed. 746, the court, in discussing the terms "house of ill fame, brothel or bawdyhouse," as used in this section, said:

"To constitute a place a bawdyhouse, it is not necessary that such house supply the prostitutes, nor that it cater only to the lecherously disposed. A house is bawdy, if persons are knowingly permitted to frequent it for the purpose of unlawful sexual intercourse (see *People v. Gastro*, 75 Mich. 127, 133, 42 N. W. 937), although such character is not generally known, save to the lasciviously inclined and to panders. If prostitution, in the sense of involving pecuniary reward, is thought essential (there are authorities both ways), it is enough to say that the testimony in the instant case would support an inference of prostitution, although the record is silent as to money payment, as such, to the women.

"Although in one or more jurisdictions proof of reputation seems to be necessary to constitute a 'house of ill fame,' and

while in some jurisdictions proof of general reputation is permitted in support of a charge of keeping a house of that character (although in others it is not), yet in general popular acceptance the terms 'bawdyhouse,' 'brothel,' and 'house of ill fame' are synonymous (see Century Dictionary); and in many jurisdictions they are held to be such (4 Words and Phrases, title 'House of Ill Fame'; 1 Words and Phrases, title 'Bawdyhouse,' and cases cited; *State v. Boardman*, 64 Me. 523, 529; *State v. Keithley*, 142 Mo. App. 417, 423, 127 S. W. 406). In the statute here involved, the words are, 'house of ill fame, brothel or bawdyhouse.' An allegation that the hotel was a 'bawdyhouse' would thus have been sufficient, and the indictment as drawn was satisfied, so far as the description of the house is concerned, by proof that it was a 'bawdyhouse'; a finding to that effect being necessarily covered by the verdict.

"The statute makes it an offense 'to aid or abet prostitution,' even though there is no resort to a bawdyhouse, brothel, or house of ill fame. The gist of the offense charged is the assisting of the four persons in question to find (and be received in) a house of such character that their lustful purposes could therein be carried out. The three characterizations used in the indictment were merely descriptive of one and the same offense, and defendant could not have been prejudiced by the inclusion of the words 'house of ill fame,' even were the proof thought to be lacking as to such character, if to be distinguished from the other character assigned. *Bennett v. United States* (C. C. A. 6) 194 Fed. 630, 633, 114 C. C. A. 402; *Daniels v. United States* (C. C. A. 6) 196 Fed. 459, 464, 116 C. C. A. 233."

Necessity of district attorney signing indictment.—An indictment for a violation of this section is not defective because of the failure of the district attorney to attach his signature thereto. *Nakano v. U. S.*, (C. C. A. 9th Cir. 1920) 262 Fed. 761.

Information.—Keeping a house of ill-fame in violation of this section is not an infamous crime, but a misdemeanor both by the terms of the section and under Penal Laws, sec. 335, 7 Fed. Stat. Ann. (2d ed.) 987, and may be prosecuted by information. *Pollard v. U. S.*, (C. C. A. 5th Cir. 1919) 261 Fed. 336; *Blanc v. U. S.*, (C. C. A. 9th Cir. 1919) 258 Fed. 921, 169 C. C. A. 641; *De Four v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 596, 171 C. C. A. 360; *Brown v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 752, 171 C. C. A. 490. In the last case the court said:

"The contention on the part of the plaintiff in error that the offense charged against her could only be prosecuted by indictment is wholly without merit, since the punishment prescribed by law for a conviction thereof is a fine or imprisonment not exceeding one year, or both, in the discretion of the court.

"By act of Congress a sentence to imprisonment for a period longer than one year, or to imprisonment and confinement at hard labor, may be ordered to be executed in a state prison or penitentiary, and such imprisonment, whether with or without hard labor, is an infamous punishment. *Mackin v. United States*, 117 U. S. 348, 352, 6 Sup. Ct. 777, 29 L. Ed. 909. But that a crime the punishment for which is confined to imprisonment in a county jail is but a misdemeanor, and may be prosecuted by information, has long been settled. *United States v. Waller*, Fed. Cas. No. 16,634, 1 Sawy. 701; *United States v. J. Lindsay Wells Co. (D. C.)* 186 Fed. 248; *In re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, 39 L. Ed. 149, and cases there cited; *Ex parte Wilson*, 114 U. S. 417, 425, 5 Sup. Ct. 935, 29 L. Ed. 89."

Sufficiency.—An information for a violation of this section need not allege that the offense was committed knowingly. *De Four v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 596, 171 C. C. A. 360.

A count is sufficient which charges the defendant with unlawfully, knowingly and wilfully receiving and permitting to be received and to remain for immoral purposes—i. e., for the purpose of assignation and prostitution—a woman into a structure, etc., then and there used for the purpose of lewdness, assignation and prostitution, within the prohibited zone of a cantonment used for military purposes. It is not necessary to charge the defendant with having been the owner of or in control of the premises. If he knowingly aided and abetted the owner or proprietor by giving a woman entrance to the premises for such purposes, his guilt is that of a principal and may be so charged. *Pollard v. U. S.*, (C. C. A. 5th Cir. 1919) 261 Fed. 336.

Judicial notice of location of house.—In a prosecution for a violation of this section, the court may properly take judicial notice of the fact the defendant's house was less than five miles from a United States military encampment. *Anzine v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 827, 171 C. C. A. 553.

Evidence—Admissibility.—In a prosecution for a violation of this section, evidence of the general reputation of the house maintained by the defendant is admissible for the value which it may have in determining the question of the defendant's guilt or innocence where there is other evidence tending to establish that the house was a house of ill-fame. *Anzine v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 827, 171 C. C. A. 553.

On the same principle, evidence that a woman living on the premises was soliciting prostitution there, when arrested, is admissible. *Nakano v. U. S.*, (1920) 262 Fed. 761.

Evidence of a physician of the city board of health as to the diseased physical condition of certain women found on the prem-

ises of the defendant, is admissible in a prosecution under this section, as evidence tending to prove the character of the house. *Anzine v. U. S.*, (C. C. A. 1919) 260 Fed. 827, 171 C. C. A. 553; *Nakano v. U. S.*, (1920) 262 Fed. 761.

In a prosecution for a violation of this section, testimony of certain police officers repeating questions asked of the defendant by certain soldiers as to whether there were any women in the house conducted by the defendant, transactions of an immoral character with such women, and testimony of the policemen that the occupation of the women in the house was that of prostitution, was held to have been properly admitted as relevant, material and competent. *Gran-court v. U. S.*, (C. C. A. 9th Cir. 1919) 258 Fed. 25, 169 C. C. A. 163.

In a prosecution for a violation of this section evidence that the defendant had previously conducted houses of ill-fame, is admissible to rebut an inference of mistake, want of guilty knowledge, wrongful purpose or innocent intent. *De Four v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 596, 171 C. C. A. 360.

In a prosecution under this section for assisting certain persons to find and be received in a hotel of such character that their lustful purposes could therein be carried out, evidence that they were served with liquor while in their rooms is relevant and admissible. *Thaler v. U. S.*, (C. C. A. 6th Cir. 1919) 261 Fed. 746, wherein it was said:

"There was no error in refusing to strike out the testimony that liquor was furnished the party, notwithstanding defendant was not present at that time. While neither he nor the hotel men were on trial for selling liquor (it was an offense to sell liquor to a soldier in uniform), the testimony that liquor was furnished was a natural part of the narrative of the entire occurrence; it bore upon the credibility of the story of the transaction in the vital respects involved; that the proof was strong enough without it did not render it irrelevant, and we cannot say that the furnishing of several orders of liquor to a party so composed, in a private room, had no tendency to support a conclusion that rooms were being let for purposes of illicit sexual relation. The fact that the liquor was ordered from and paid for to the bell boy did not necessarily destroy the relevancy of the testimony."

Sufficiency.—In *De Four v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 596, 171 C. C. A. 360, it was held that the evidence was sufficient to sustain a conviction for a violation of this section.

Sentence.—Where a defendant is found guilty of a violation of this section, he may be sentenced to consecutive terms of imprisonment on the various counts and to pay a fine on each count, despite the fact that the offenses charged constitute but one continuous offense, if the aggregate of the sentences and fines are less than the maxi-

mum punishment fixed by this section. *Anzine v. U. S.*, (C. C. A. 9th Cir. 1919) 260 Fed. 827, 171 C. C. A. 553.

Vol. IX, p. 1237, sec. 6. [First ed., vol. VII, p. 1072.]

Shooting of constable attempting to arrest without warrant as murder.—A constable may arrest a deserter without a warrant and if the deserter resists and kills the constable he is guilty of the crime of murder. *Boatwright v. State*, (1919) 120 Miss. 883, 83 So. 311.

Vol. IX, p. 1242, sec. 1998. [First ed., 1914 Supp., p. 43.]

Re-enlistment in naval service.—An enlisted man who in time of peace has incurred the penalties for desertion prescribed by this section and R. S. sec. 1996 (see same page of vol. IX), and who has received an unconditional pardon for such offense, is eligible for re-entry into the naval service. (1918) 31 Op. Atty-Gen. 225.

Vol. IX, p. 1254, art. 2. [First ed., 1918 Supp., p. 977.]

The acceptance by an officer of a captain's commission, carrying the privileges and pay of the office, is amply sufficient proof that he is subject to military law. *Es p. Givins*, (N. D. Ga. 1920) 262 Fed. 702.

"In the field."—In *Es p. Jochen*, (S. D. Tex. 1919) 257 Fed. 200, it was held that a superintendent of the quartermaster corps, serving with the army on the Mexican border during the war between the United States and Germany, and at a time when there were frequent disturbances on the border, was serving with the army "in the field" within the meaning of paragraph (d) of this section. In defining the term "in the field," *Hutcheson, J.*, said:

"I hold that the terms 'in the field' were used by Congress in the meaning and sense given to them in the general orders of the War Department, as follows:

"'Field service is defined to be service in mobilization, concentration, instruction or maneuver camps as well as service in campaign, simulated campaign or on the march.'

"And, second, that if in this I am mistaken, and the words are not broad enough to embrace armies in concentration, maneuver, and mobilization camps, but must have application only where the armies are in or expecting actual conflict, that the conditions on the border during the period of *Jochen's* service were such as that, in the more limited sense as well, the armies with which he was serving were 'in the field.'"

A cantonment in the United States where during a war troops are trained for overseas service in the theater of operations is a place where troops may be said to be "in the field" within the meaning of this section. Consequently, a civilian employee at such

a cantonment charged with rendering false claims against the United States is subject to military law and may be tried by a court-martial. *Hines v. Mikell*, (C. C. A. 4th Cir. 1919) 259 Fed. 28, 170 C. C. A. 28, *reversing* (E. D. S. C. 1918) 253 Fed. 817, in 1919 Supplement annotation. In passing upon this question, the court said: "In time of war, with some exceptions, practically the entire army is 'in the field,' but not necessarily 'in the theater of operations.' This would be undoubtedly true in case of war within our borders, and we can conceive of no reason why the army in America engaged in training and preparing for service on the firing line overseas should not be considered and treated as a component part of the entire army, the majority of whom were actually engaged on the firing line. To maintain those who were 'over there,' it was necessary to have a reserve force located so near thereto as to be available in the case of an emergency, and during the war just ended it was very essential that they should continue to increase such reserve force under the selective draft, and in order to do this the individual had to be mustered into the service and undergo strict discipline and training so that he might render efficient service under the modern mode of warfare. It seems perfectly clear that from the moment he entered the service he was in every sense of the word a part of the army, and when he was taken to the cantonment he thereby was serving with the army 'in the field,' doing practically everything required of a soldier save that of engaging in actual combat. All the training he received was for the purpose, as we have stated, of qualifying him for the contest that was going on, as we all know, at a fearful rate.

"If an individual during peace had enlisted at an army post he could not, so long as he remained there, in any sense of the word be deemed to be engaged in the service 'in the field.' However, those who entered the cantonment took the first step which was to lead them to the firing line, and they were then as much 'in the field' in pursuance of such training as those who were encamped on the fields of Flanders awaiting orders to enter the engagement."

Civilian employees.—It is not necessary that a person be in uniform in order to be a part of the land forces of the United States and subject to military jurisdiction. Thus, a civilian serving as superintendent of the quartermaster corps with troops on the Mexican border during the war between the United States and Germany, is a part of the land forces of the United States and may be tried by a military tribunal for offenses committed by him while with the army. *Ex p. Jochen*, (S. D. Tex. 1919) 257 Fed. 200.

Vol. IX, p. 1259, art. 8. [First ed., 1918 Supp., p. 978.]

The term "district" used in this section has no technical military meaning, but in-

cludes the territory occupied by a permanent military camp. *Ex p. Givins*, (N. D. Ga. 1920) 262 Fed. 702.

The commander of a camp may appoint a general court-martial when authorized to do so by the President. *Ex p. Givins*, (N. D. Ga.) 1920) 262 Fed. 702.

Vol. IX, p. 1273, art. 50. [First ed., 1918 Supp., p. 986.]

Promotion of officer while awaiting trial by general court-martial as constructive pardon.—The promotion of an officer of the Navy while under charges awaiting trial by general court-martial does not operate as a constructive pardon of the offenses charged against him. Thus where an ensign in the Navy, while under charges general in their nature and not peculiar to his office of ensign, was commissioned a lieutenant, and was thereafter found guilty of such charges by a general court-martial and sentenced to be dismissed from the service, the Secretary of the Navy was authorized by the law in mitigating his sentence with reference to the grade in which he was permanently serving. (1919) 31 Op. Atty-Gen. 419.

Vol. IX, p. 1281, art. 74. [First ed., 1918 Supp., p. 991.]

Jurisdiction of civil courts.—Congress, by re-enacting in the Act of August 29, 1916, the Articles of War did not vest in the military courts in war time exclusive jurisdiction to try and punish a soldier for the murder of a civilian at a place within the jurisdiction of a state, and not within the confines of any camp or place subject to the control of the federal civil or military authorities, despite the words in Art. 74, "except in time of war," qualifying the duty of a military commander, imposed by that article, to respond to the demand by state authority for the surrender of military offenders against the state criminal laws, and the grant in Art. 92, expressed in the form of a negative pregnant, of authority to courts-martial to try capital crimes when committed by an officer or soldier within the geographical limits of the United States and the District of Columbia in time of war, both of which provisions take their origin in the Act of March 3, 1863, and were drawn from the terms of that act as re-expressed in the Revision of 1874. *Caldwell v. Parker*, (1920) 252 U. S. 376, 40 S. Ct. 388, 64 U. S. (L. ed.) —.

Vol. IX, p. 1283, art. 82. [First ed., 1918 Supp., p. 993.]

Persons not triable as spies by military tribunals.—A person apprehended on United States territory not under martial law, who had not entered any camp, fortification, or other military premises of the United States and who had not come through the fighting lines or field of military operations,

cannot be tried as a spy by a military tribunal, and to such a case R. S. sec. 1343 and this article of the Articles of War cannot constitutionally be applied. 31 Op. Atty.-Gen. 356.

Vol. IX, p. 1286, art. 92. [First ed., 1918 Supp., p. 994.]

Jurisdiction of civil courts.—See *supra*, this title, p. 813.

Time of war.—For military persons a time of war, within the meaning of this section, continues from the date of the declaration of war by Congress until some formal proclamation of peace by an authority competent to proclaim it. *Ex p. Givins*, (N. D. Ga. 1920) 262 Fed. 702.

Necessity of allegation in record of court-martial.—The failure of the record of a court-martial, held under the provisions of this section, to aver the crime to have been committed in a time of war is not fatal. *Ex p. Givins*, (N. D. Ga. 1920) 262 Fed. 702.

Vol. IX, p. 1286, art. 93. [First ed., 1918 Supp., p. 994.]

Sentence—Place of execution.—Since this article authorizes punishment "as the court-martial may direct," the court may properly prescribe the kind and duration of the punishment for a person found guilty of manslaughter. The place of the execution of the sentence, however, is under legislative control and must be designated in accordance with the provisions of article 42 and section 2 of the Act of March 4, 1915. Accordingly, a sentence of a court-martial, imposed on a person found guilty of manslaughter, is not defective because it does not include the place of confinement but leaves its designation to the reviewing authority. *Ex p. Givins*, (N. D. Ga. 1920) 262 Fed. 702.

Vol. IX, p. 1302, sec. 5. [First ed., 1918 Supp., p. 893.]

Right to sue government.—In *Covey v. U. S.*, (N. D. Ia. 1920) 263 Fed. 768, the court, quoting this section, said: "It thus appears that the Director of the Bureau of War Risk Insurance, subject to the general direction of the Secretary of the Treasury is empowered and directed to administer and enforce the provisions of the War Risk Insurance Act, and for that purpose is given full power and authority to establish the right to benefits, compensation, or insurance provided for in this act, the form of applications therefor, the method of making investigations and medical examinations, and all other things necessary or proper to a full and final determination of the rights of all claimants to compensation, the manner and form of the adjudications and award, and it is only 'in the event of disagreement as to the claim for losses, or

amount thereof, between the said bureau and the parties to such contract or policy,' that an action on the claim may be brought against the United States in the District Court, either in admiralty or otherwise, under the War Risk Insurance Act."

Vol. IX, p. 1319, sec. 302. [First ed., 1918 Supp., p. 910.]

"Injury" as including insanity.—In (1919) 31 Op. Atty.-Gen. 431, it was the opinion of the Attorney General that Curtis M. Berry, an enlisted man who had served some time in the United States army and who was discharged therefrom because of his insanity, was properly admitted to St. Elizabeth's Hospital upon the order of the Secretary of the Treasury as an insane patient of the Bureau of War Risk Insurance. It was said that the hospital service to which Berry was entitled was included in the purposes for which appropriations were made for the use of war risk insurance, and the cost of the same should be paid out of these appropriations. It was further said that the only provision for a judicial inquiry into the mental status of any persons previous to their admission to St. Elizabeth's Hospital was in the case of indigent persons residing in the District of Columbia, and as Berry did not come within this class, no such judicial inquiry was necessary in his case.

Vol. IX, p. 1322, sec. 312. [First ed., 1918 Supp., p. 913.]

Effect of R. S. 4756.—See annotation under that section, *ante*, p. 718.

Vol. IX, p. 1325, sec. 400. [First ed., 1918 Supp., p. 916.]

Application by whom made.—The privilege of applying for insurance under this section is confined to persons in the military or naval service of the United States, including of course their duly authorized representatives. (1917) 31 Op. Atty.-Gen. 188.

Vol. IX, p. 1325, sec. 401. [First ed., 1918 Supp., p. 916.]

Total disability occurring before application thereof.—An enlisted man, who was in the active service at the time of the publication of the terms and conditions of the contract of insurance covering total permanent disability, and who sustained such disability before the expiration of 120 days from such publication, without having applied for such insurance, is entitled to be treated as having been automatically insured and to receive \$25 per month. The Bureau of War Risk Insurance is unauthorized to grant insurance against total permanent disability upon an application made therefor after such disability has been

sustained, and hence any premiums paid upon insurance thus applied for should be returned to the applicant. (1919) 31 Op. Atty-Gen. 534.

Vol. IX, p. 1326, sec. 402. [First ed., 1918 Supp., p. 917.]

Validity of provision in converted policy making commuted value payable to estate of insured.—Inclusion in the converted insurance policies proposed to be issued under the War Risk Insurance Act of a provision that the commuted value of the policy shall be payable to the estate of the insured, in the event of the failure of any person within the permitted classes to survive the insured, or in the event of the exhaustion by death of all persons within those classes before the payment of the full number of installments provided for, is authorized by the law and will be valid. (1919) 31 Op. Atty-Gen. 387, wherein it was said: "The form of policy submitted is one of the forms of insurance into which it is proposed to convert the term insurance heretofore issued. The precise question is whether the fact that section 402 does not expressly provide that, in any event, anything more than the reserve value of the policy shall be paid to the estate of the insured precludes authority to insert in the converted policy a provision making the commuted value of the insurance payable to the estate of the insured. This, as has been seen, it is proposed to do in two contingencies. In the case of a beneficiary or beneficiaries within the permitted classes surviving the insured, as stated above, the obligation of the United States to pay the full amount of the insurance accrues even in the case of the temporary insurance, and section 402 does not undertake to direct to whom any unpaid part of it shall go in the event of the death of the beneficiary. The result is that the Secretary of the Treasury was left free, in determining upon 'the full and exact terms and conditions of such contract,' to provide for the disposition of the unpaid part of the insurance in this contingency. I am of opinion, therefore, that he could lawfully have put into the policy of temporary insurance the last sentence of the paragraph quoted above from the proposed policy, and here can be no doubt about his right to insert this in the converted policy.

"The only remaining question is whether he is now authorized to insert in the converted policy a provision making payable to the estate of the insured the commuted value of the insurance in the event no beneficiary within the permitted classes survives the insured when, under section 402, the policy of temporary insurance was required to provide that, in that event, only the reserve value of the policy should be paid, . . . I am therefore of opinion that, in the event of the failure of any person within the permitted classes to survive the insured, or in the event of the exhaustion by death

of all persons within those classes before the payment of the full number of installments provided for, there is ample authority to make the amount then and thereafter payable under the policy payable to the estate of the insured. This being true, there can be no legal objection to commuting future payments and discharging the obligation of the United States by paying the commuted value."

Vol. IX, p. 1328, sec. 404. [First ed., 1918 Supp., p. 919.]

Conversion of war time term insurance into other forms of insurance.—The Bureau of War Risk Insurance may, without awaiting the formal termination of the war as declared by proclamation of the President of the United States, convert war-time term insurance heretofore granted under the provisions of the War Risk Insurance Act into other forms of insurance authorized by said Act. 31 Op. Atty-Gen. 382.

1918 Supp., p. 887. [*Medals of honor, etc.*] [First ed., 1918 Supp., p. 1045.]

Acceptance by naval officers of medals and decorations conferred by allied nations in great war.—By virtue of this provision of the Army Appropriation Act, the Department of State is justified in delivering to naval officers of the United States medals and decorations heretofore tendered to such officers through said Department by the governments of nations concurrently engaged with the United States in the great war. The words "medal or decoration," appearing in the provision, are used in their usual meaning and do not include such articles as bowls, cups, and photographs. (1919) 31 Op. Atty-Gen. 445, wherein it was said: "The paragraph under consideration is one of twelve contained in the Army appropriation act of July 9, 1918, which deal with the subject of medals and decorations. The first nine paragraphs authorize the award of such medals and decorations by the United States to persons serving in any capacity with the Army. The tenth paragraph provides that American citizens who since August 1, 1914, have received 'decorations or medals for distinguished service in the armies or in connection with the field service of those nations engaged in war against the Imperial German Government, shall, on entering the military service of the United States, be permitted to wear such medals or decorations.' The eleventh paragraph is the one under consideration. The twelfth provides that the President 'is authorized, under regulations to be prescribed by him, to confer such medals and decorations as may be authorized in the military service of the United States upon officers and enlisted men of the military forces of the countries concurrently engaged

with the United States in the present war' (40 Stat. 872).

"The repeated use in the last three paragraphs of such terms as 'military service' and 'military forces,' terms which may be construed as referring to the Navy as well as to the Army, in the place of expressions in the first nine paragraphs which unmistakably restrict the application of the latter to the Army could not have been inadvertent and is significant. It should be noted, also, as tending to show the intention of Congress that the provisions of the first nine paragraphs are substantially embraced in the act of February 4, 1919, authorizing the award of medals and decorations by the United States to persons in the naval service, and that a bill 'to permit American citizens to wear medals or decorations received from certain foreign countries on entering the military or naval service of the United States, and for other purposes,' was on July 15, 1918, tabled by the House without objection for the reason, as given by the member of the Military Affairs Committee in charge of the bill, that its provisions had been enacted in the Army appropriation act of July 9, 1918.

"For reasons growing out of the organization and jurisdiction of the respective congressional committees, there was a reason why the legislation relating to the award by the United States of decorations to the personnel of the two branches of the service, involving the necessity of appropriations, should take the form of separate bills. But in enacting the provisions authorizing the acceptance of medals from the allied governments, these considerations did not apply and so it was reasonable that broader language should be used, applicable alike to the Army and Navy."

1918 Supp., p. 896, ch. XIV. [First ed., 1918 Supp., p. 1023, note.]

Sec. 13 of Act of May 18, 1917, here amended remained in force as to prosecution and punishment of offenses already committed against it, in view of the saving provisions in R. S. sec. 13 (9 Fed. Stat. Ann. (2nd ed.) 393), which section is still in force. *Goublin v. U. S.*, (C. C. A. 9th Cir. 1919) 261 Fed. 5, 171 C. C. A. 601, *Rosa, J.*, dissenting.

WATERS

Vol. IX, p. 1349, sec. 2339. [First ed., vol. VII, p. 1090.]

- I. Construction in general.
- II. Appropriation of waters.

I. CONSTRUCTION IN GENERAL (p. 1349)

Nature of statute.—*Not a grant.*—To the same effect as the original annotation, see *Sarret v. Hunter*, (1919) 32 Idaho 536, 185 Pac. 1072.

II. APPROPRIATION OF WATERS (p. 1351)

Riparian ownership unnecessary.—This section "was not intended to grant from the federal government to the people of the state the waters on the public domain, but to confirm the rights of those who have acquired, under certain conditions, the use of the water, and calls that right a vested one, even though the waters are taken from streams upon the public domain and without the assent of the government. The right to appropriate water exists without private ownership in the soil or without perfect title thereto, as against all persons except the government or its grantees." *Laurance v. Brown*, (1919) 94 Ore. 387, 185 Pac. 761.

Vol. IX, p. 1366, sec. 3. [First ed., vol. VII, p. 1099.]

Withdrawal under the first clause.—"A withdrawal under the first form—that is, a withdrawal of lands required for 'irrigation works'—is intended as a permanent reser-

vation for governmental use. It amounts to a legislative withdrawal, and is absolute. *United States v. Hanson*, 167 Fed. 881, 93 C. C. A. 371. Until its restoration to entry, land withdrawn under the first form of withdrawal is not subject to entry, and no right thereto can be initiated by any settler thereon. By its withdrawal the land is segregated from the public domain, and is excepted from the operation of the public land laws. No right of a private settler attaches to, or hangs over, the land so withdrawn, to interfere with such action as the government may thereafter see fit to take in respect to it." *Donley v. West*, (Cal. App. 1920) 189 Pac. 1052.

Effect of revocation of withdrawal.—"We can see no reason why this order revoking the previously made order of withdrawal should not, when noted on the records in the General Land Office and in the local land office, as directed by the Secretary's order, have the effect of an order of restoration, restoring the land again to settlement as public land subject to entry under the homestead laws of the United States." *Donley v. West*, (Cal. App. 1920) 189 Pac. 1052.

Vol. IX, p. 1367, sec. 4. [First ed., vol. VII, p. 1099.]

Increase of estimate by Secretary—Waiver of estimate.—"The primary purpose of the law, of course, is to secure the settlement and reclamation of arid public lands. In its administration the first step

is an investigation for the purpose of determining the feasibility of a proposed project. Such investigation necessarily involves some consideration of the probable cost, but apparently Congress was not content to have the Secretary base his estimate upon the opinion of engineers alone; he is first to let contracts for construction, and then he is to estimate the probable cost, and equitably apportion it to the lands to be reclaimed. Of this estimate and apportionment he is to give public notice, and thereupon prospective settlers may determine for themselves whether they will or will not

settle upon the lands, and thus bind themselves to pay the published price for water. In case of settlement under such conditions, it is incompetent for the Secretary to increase the price at a later date, even if it turns out that the published estimate is insufficient to cover the actual cost." *Payette-Boise Water Users' Assoc. v. Cole*, (D. C. Idaho 1919) 263 Fed. 734, holding, however, that the requirements of the section as to estimate may be waived by the settlers, in which event the actual cost only can be charged and this is a subject of judicial inquiry.

WHITE SLAVE TRAFFIC

Vol. IX, p. 1409, sec. 2. [First ed., 1912 Supp., p. 419.]

III. Elements of offense.

1. Debauchery.

IV. Indictment.

1. In general.

2. Purpose of transportation.

V. Evidence.

1. Admissibility.

2. Sufficiency.

III. ELEMENTS OF OFFENSE

1. Debauchery (p. 1410)

Immoral act committed on interstate journey.—The mere fact that an immoral act is committed on an interstate journey does not of itself constitute a violation of this section. *Biggerstaff v. U. S.*, (C. C. A. 8th Cir. 1919) 260 Fed. 926. Regarding the effect of the proof of such an act, the court said: "Its relevance in that respect is evidential, not substantive, and when relied on as evidence of a preconceived purpose care must be taken to regard it in a true perspective. The act may have been a casual incident in the journey, without forethought or anticipation at the time it was begun. Many things, good and bad, occur in that way."

IV. INDICTMENT

1. In General (p. 1411)

A count in an indictment which follows the language of the statute is sufficient. *Huffman v. U. S.*, (C. C. A. 8th Cir. 1919) 259 Fed. 35, 170 C. C. A. 35. The court said:

"This offense is statutory, and we must look to the language of the statute for the ingredients of the offense. The said first count of the indictment in the case at bar charges the offense in the language of the statute, and is therefore sufficient. *U. S. v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693; *Potter v. U. S.*, 155 U. S. 438, 15 Sup. Ct. 144,

39 L. Ed. 214; *Burton v. U. S.*, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392.

"We think the count in question contained every element of the offense intended to be charged; that it was sufficient to notify the defendant of what he was charged with, and therefore what he must be prepared to meet; and upon its face accurately revealed to what extent an acquittal or conviction upon that count of the indictment might be pleaded, in the event of other proceedings for the same or a similar offense."

2. Purpose of Transportation (p. 1411)

An indictment under this section which charges that the transportation was unlawfully and feloniously made "for the purpose of debauchery," sufficiently alleges the necessary criminal intent. *Ammerman v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 124.

V. EVIDENCE

1. Admissibility (p. 1412)

Similar offenses.—In a prosecution under this section evidence of prior illicit relations between the accused and the woman charged to have been transported are admissible, as bearing upon the element of the intent with which she was transported at the time specified in the indictment. *Ammerman v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 124.

For evidence held admissible to show a violation of this Act, see *Nokis v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 413, 168 C. C. A. 453.

2. Sufficiency (p. 1412)

For evidence held to be sufficient to show violation of this Act, see *Nokis v. U. S.*, (C. C. A. 8th Cir. 1919) 257 Fed. 413, 168 C. C. A. 453; *Huffman v. U. S.*, (C. C. A. 8th Cir. 1919) 259 Fed. 35, 170 C. C. A. 35; *Blackstock v. U. S.*, (C. C. A. 8th Cir. 1919) 261 Fed. 150.

Vol. IX, p. 1415, sec. 3. [First ed., 1912 Supp., p. 420.]

"Any other immoral purpose."—"Without deciding the proposition, it may be said to be at least doubtful whether the statute was intended to cover transportation for immoralities other than those of a sexual nature"—for instance, a purpose of rob-

bery or blackmail. Per Alschuler, J., in *Griffith v. U. S.*, (C. C. A. 7th Cir. 1919) 261 Fed. 159, affirming a conviction, however, on a record abundantly showing that the purpose of the transportation was that of illicit sexual intercourse, even if this did not, under the record, amount to debauchery or prostitution within contemplation of the statute.

WITNESSES

Vol. IX, p. 1421, sec. 858. [First ed., 1909 Supp., p. 708.]

I. GENERAL CONSIDERATIONS (p. 1422)

Effect of amendment.—The amendment of this section by the Act of June 29, 1906, ch. 3608, applies to civil cases only. *Adams v. U. S.*, (C. C. A. 8th Cir. 1919) 259 Fed. 214, 170 C. C. A. 282.

Vol. IX, p. 1434. [*Defendants in criminal cases may be witnesses.*] [First ed., vol. VII, p. 1120.]

An instruction in the language of this section that defendant's failure to testify creates no presumption against him, is not error. *Robilio v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 101, 170 C. C. A. 169.

Comment on failure to testify.—In *Robilio v. U. S.*, (C. C. A. 6th Cir. 1919) 259 Fed. 101, 170 C. C. A. 169, regarding comments on the defendant's failure to testify, the court said:

"The additional remarks of the court to the jury, to the effect that the situation created by the government's proofs remained 'unexplained,' as such remarks would naturally be applied to the facts of this case, and as they were interpreted by the response of the court when his attention was called thereto, did not constitute that 'comment' condemned in *Wilson v. United States*, 149 U. S. 60, 13 Sup. Ct. 765, 37 L. Ed. 650. See *Stout v. United States*, *supra*, 227 Fed. at page 804, 142 C. C. A. 323, and *Shea v. United States* (C. C. A. 6) 251 Fed. 440, 445, 163 C. C. A. 458."

CONSTITUTION OF THE UNITED STATES

NINETEENTH AMENDMENT

(WOMAN SUFFRAGE)

[819]



NINETEENTH AMENDMENT TO THE CONSTITUTION

(WOMAN SUFFRAGE)

BAINBRIDGE COLBY,

Secretary of State of the United States of America.

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That the Congress of the United States at the first session, Sixty-sixth Congress begun at Washington on the nineteenth day of May in the year one thousand nine hundred and nineteen, passed a Resolution as follows: to wit —

JOINT RESOLUTION

Proposing an amendment to the Constitution extending the right of suffrage to women.

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED (TWO-THIRDS OF EACH HOUSE CONCURRING THEREIN), That the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States.

“Article —.

“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

“Congress shall have power to enforce this article by appropriate legislation.”

And, further, that it appears from official documents on file in the Department of State that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming.

And, further, that the States whose Legislatures have so ratified the said proposed Amendment, constitute three-fourths of the whole number of States in the United States.

Now, therefore, be it known that I, Bainbridge Colby, Secretary of State of the United States, by virtue and in pursuance of Section 205 of the Revised Statutes of the United States, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

Done at the City of Washington, this 26th day of August, in the year of our Lord one thousand nine hundred and twenty.

[Seal.]

BAINBRIDGE COLBY.

SUPPLEMENTAL NOTES

ON THE

CONSTITUTION OF THE UNITED STATES

Vol. X, p. 335, art. 1, sec. 2.

IV. DIRECT TAXES

4. *Whether Particular Taxes are Direct or Indirect*

a. On Income (p. 339)

Stock dividends as income.—"Income" as used in the sixteenth amendment (see vol. XI, p. 1110) qualifying this clause of sec. 2 by providing that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states" does not include stock dividends which are still subject to the rule of apportionment. *Eisner v. Macomber*, (1920) 252 U. S. 189, 40 S. Ct. 189, 64 U. S. (L. ed.) —.

Vol. X, p. 410, art. 1, sec. 8.

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- (10) Privilege taxes on foreign corporations, 828.

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- (39) Tax on income from interstate business, 830.

II. WHAT CONSTITUTES INTERSTATE AND FOREIGN COMMERCE

3. *Particular Transactions*

a. Transportation of Persons and Property

- (1) In General (p. 435)

Transmission of electric current.—The transportation or transmission of electric current from state to state through appropriate instrumentalities is "commerce" between the states. Moreover, the transportation or transmission of electric current direct from the seller in one state to the consumer in another, for immediate or practically immediate use, subject only to a temporary stop en route for the purpose of reducing the current to a commercial voltage, remains "interstate commerce" until the commodity has reached its goal, unless theretofore sold to independent distributing companies in the latter state for resale to local consumers. *Mill Creek Coal, etc., Co. v. Public Service*.

Commission, (W. Va. 1919) 100 S. E. 557, 7 A. L. R. 1081.

(5) Local Part of Interstate Shipment
(p. 436)

In determining when commerce ceases to be interstate and becomes intrastate, the essential character of unity of the movement is decisive. *Mill Creek Coal, etc., Co. v. Public Service Commission*, (W. Va.) 1919) 100 S. E. 557, 7 A. L. R. 1081.

(10) Accommodations for Passengers of Different Races (p. 438)

A Kentucky street railway may be required by a statute of that state to furnish either separate cars or separate compartments in the same car for white and negro passengers, although its principal business is the carriage of passengers in interstate commerce between Cincinnati, Ohio, and Kentucky cities across the Ohio river. Such a requirement affects interstate commerce only incidentally, and does not subject it to unreasonable demands. *South Covington, etc., St. R. Co. v. Kentucky*, (1920) 252 U. S. 399, 40 S. Ct. 378, 64 U. S. (L. ed.) — (*affirming* (1918) 181 Ky. 449, 205 S. W. 603), wherein the court said: "There was a distinct operation in Kentucky, an operation authorized and required by the charters of the companies, and it is that operation the act in question regulates, and does no more, and therefore is not a regulation of interstate commerce. This is the effect of the ruling in *South Covington & C. Street R. Co. v. Covington*, 235 U. S. 537, 59 L. ed. 350, L. R. A. 1915F, 792, P. U. R. 1915A, 231, 35 Sup. Ct. Rep. 158. The regulation of the act affects interstate business incidentally, and does not subject it to unreasonable demands.

"The cited case points out the equal necessity, under our system of government, to preserve the power of the states within their sovereignties as to prevent the power from intrusive exercise within the national sovereignty, and an interurban railroad company deriving its powers from the state, and subject to obligations under the law of the state, should not be permitted to exercise the powers given by the state, and escape its obligations to the state, under the circumstances presented by this record, by running its coaches beyond the state lines. But we need not extend the discussion. The cited case expresses the principle of decision, and marks the limitation upon the power of a state, and when its legislation is or is not an interference with interstate commerce. And regarding its principle, we think, as we have said, the act in controversy does not transcend that limitation."

Interstate traffic over a Kentucky interurban electric railway may be subjected to the operation of a statute of that state requiring separate coaches, or separate compartments in the same coach, for white and negro passengers, without unlawfully interfering with interstate commerce. *Cincinnati, etc., R. Co. v. Kentucky*, (1920) 252 U. S.

408, 40 S. Ct. 381, 64 U. S. (L. ed.) —, *affirming* (1918) 181 Ky. 449, 205 S. W. 603.

G. Manufacture and Sale of Goods

(1) In General (p. 442)

Where a company maintains its principal office within a state, and most of officers reside there, and the greater proportion of its business is transacted therein, it must be regarded as engaged in intrastate commerce, at least as to the business transacted within the state, and subject to a state tax thereon. *Hayes Wheel Co. v. American Distributing Co.*, (C. C. A. 6th Cir. 1919) 257 Fed. 881, 169 C. C. A. 31. In determining this question the court said:

"We are thus brought to the ultimately controlling question whether, as plaintiff urgently insists is the case, its business was solely interstate commerce, the local business being merely incidental thereto, or whether, on the other hand, plaintiff was engaged locally in both state and interstate commerce. In the former case it would not be subject to the tax; in the latter, it would be.

"Plaintiff's business embraced sales largely by way of orders taken by traveling solicitors from automobile manufacturers in several states lying generally, if not universally, north of the Ohio and east of the Mississippi rivers. Plaintiff seems to have had no office, at least for commercial business, anywhere except at Jackson, Mich. There its books and records of commercial transactions were kept; there a majority at least of its officers resided, and at or from that point all of its business seems to have been directed and conducted, excepting so far as concerns actual solicitation of orders by traveling salesmen. The business of at least one of these salesmen was confined to Michigan. Plaintiff was acting under similar contracts as sales agent for several manufacturers of automobile parts, other than defendant. So far as the record shows, all its tangible property was in Michigan. That state was and is the most prominent of the automobile manufacturing states.

"During the five-year contract period plaintiff's sales in Michigan amounted to 61.2 per cent. of its total sales, and for the last 1½ years of that period the Michigan sales were about 75 or 80 per cent. of the aggregate business. While the proportion of Michigan business increased during the contract period, and the proportion when the contract was made does not definitely appear, the natural inference from the record and the arguments would be, we think, that the Michigan sales were from the first approximately at least one-half of the total sales. Plaintiff's declaration, made September 29, 1913, for authority to do business in Michigan, gave the location of its principal office and of its principal place of business as Jackson, Mich., and two of its three officers as residing there, and the third as living at Detroit, Mich. Its authorized capital stock was reported at \$4,000 [under the statute in

question the tax would have been \$25]; the total value of its property owned and used in its business as \$23,538.98, all of which, with the exception of furniture and fixtures, represented cash and accounts and bills receivable. The value of the property owned and used in Michigan was given as 'furniture and fixtures \$294.96,' the total amount of business transacted during the preceding year was stated (in the sixth item) to be \$42,893.96, and the amount transacted in Michigan as 'all, as specified in sixth item.'

"It is difficult, if not impossible, to distinguish plaintiff's business in principle from that of the ordinary domestic mercantile corporation selling at wholesale, both in the state of its creation and business location as well as in other states. Assuming, as we do, for the purposes at least of this opinion, that plaintiff's business, so far as it related to business outside of Michigan, was in interstate commerce, it yet seems plain to us, not only that, independently of the question whether plaintiff's business was local or interstate, it was doing business in Michigan, and so within the statute of that state if it was doing a substantial Michigan business (International Text-Book Co. v. Pigg, *supra*, 217 U. S. at pages 104, 105, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. [N. S.] 493, 18 Ann. Cas. 1103), but also that it was in fact doing a substantial local business in Michigan within the meaning of the law of interstate commerce. We think it a misnomer to characterize its business as essentially interstate. In our opinion it had a substantial local and domestic business, entirely separate from, and not merely incidental to, its interstate business. *Baltic Mining Co. v. Massachusetts*, *supra*, at page 86, 34 Sup. Ct. 15, 58 L. Ed. 127; *Nernst Lamp Co. v. Conrad*, *supra*; *Lange v. Brace*, *supra*, at page 462, 152 N. W. 1026; *American, etc., Co. v. Griswold*, 143 App. Div. 807, 128 N. Y. Supp. 206, *affirmed* 206 N. Y. 723, 100 N. E. 1124; *Flint v. LeHeup*, *supra*, at page 47, 165 N. W. 626; *Loomis v. Construction Co.* (C. C. A. 6) 211 Fed. 453, 456, 128 C. C. A. 125, and cases cited."

(3) Sale of Goods After Arrival in State

(a) In General (p. 445)

Auto trucks consigned to selling agents in another state to be sold direct by such consignees from their storage warehouses are after reaching such storehouses not a part of interstate commerce though incidentally used for demonstration purposes. *Bethlehem Motors Corp. v. Flynt*, (1919) 178 N. C. 399, 100 S. E. 693, wherein the court said: "Under such circumstances, the goods, after reaching the storage warehouse in this state, were not in interstate commerce. *Sewing Machine Co. v. Brickell*, 233 U. S. 304. Again, where coal was mined in Pennsylvania and sent by water to New Orleans, and sold on the open market on account of the mine owners in Pennsylvania; or even if the coal was not landed in New Orleans, but

was sold and transferred there to another vessel bound to a foreign port, the coal was intermingled with property in Louisiana and the sale was not an interstate transaction. *Brown v. Houston*, 114 U. S. 622. There was no error in the exception that the judge did not find that this was interstate commerce."

III. EXCLUSIVENESS OF POWER

2. When State May Exercise Power

b. Police Power of the States

(1) In General (p. 451)

Prevention of fraud by use of trade name or good will of another.—A state may, in the exercise of its police power, prevent fraud upon its citizens by the use of the trade-name or good will of another, even though that trade-name and good will is attached to an article which prior to its being brought into this state for distribution has been a subject of interstate commerce. *Ingersoll v. Hahne*, (N. J. 1918) 108 Atl. 128.

d. Effect of Non-Action by Congress

(1) National Subjects to be Unobstructed by State Action (p. 459)

To the same effect as the original annotation, see *Mill Creek Coal, etc., Co. v. Public Service Commission*, (W. Va. 1919) 100 S. E. 557, 7 A. L. R. 1081.

(2) Local Subjects May Be Regulated by State Action (p. 460)

The regulation of the rates at which electric current transported or transmitted from one state to another shall be sold in the latter state is, so long as the rate fixed is not confiscatory or discriminatory against citizens of another state, a matter essentially local in its nature, and not of such national importance as to require a general system and uniformity of regulation. *Mill Creek Coal, etc., Co. v. Public Service Commission*, (W. Va. 1919) 100 S. E. 557, 7 A. L. R. 1081.

IV. POWER OF CONGRESS

16. Subjects of Regulation

g. Bridges

(2) Power to Construct or Authorize Construction (p. 490)

The concurrence and consent of the states.—To the same effect as the original annotation, see *People v. Hudson River Connecting R. Corp.*, (1920) 228 N. Y. 203, 128 N. E. 801, wherein the court said:

"It is a comprehensive clause, including within its intent the instruments and means by which interstate commerce is or may be carried on, even if those means or instruments are such as are inherently within a single state, such as the wharf of a transatlantic line, or the tracks over which pass trains en route from state to state, or the engine used to draw those trains, be it used for ever so short a haul within the state, and if this authority extends to the tracks and the engine, though used wholly within

the state, surely it also includes bridges over which both of these pass, and this is particularly true if that bridge crosses a navigable stream, the first great recognized instrument of interstate commerce. *Erie R. Co. v. New York*, 233 U. S. 671, 34 Sup. Ct. 756, 58 L. Ed. 1149, 52 L. R. A. (N. S.) 266, Ann. Cas. 1915D, 138; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 15 L. Ed. 435. The bridge in question, it is conceded, will be used for interstate commerce.

"The Constitution containing the authority, and the power of Congress being plenary, it only remains to consider whether in the instant case Congress has acted in authorizing this bridge, and by its action has excluded any further or other action by the state. An answer in the affirmative is conclusive."

IX. POWER OF STATES

2. State and Municipal Legislation Affecting Commerce

c. Discrimination Against Foreign Products

(1) In General (p. 522)

License tax.—A state statute imposing license taxes on the manufacturer or other person engaged in the business of selling automobiles in the state and reducing the rate if three-fourths of the entire assets of the manufacturer were invested and returned for taxes within the state, is not in violation of the interstate commerce clause. *Bethlehem Motors Corp. v. Flynt*, (1919) 178 N. C. 399, 100 S. E. 693.

d. Inspection Laws

(3) Inspection Fees (p. 530)

Gasoline.—*See infra*, p. 827, for a discussion of the question whether the taxing by a state of the business of selling gasoline is valid.

e. Quarantine and Health Laws

(6) Against Diseased Animals (p. 536)

Prohibiting importation of sheep from certain localities.—A state statute forbidding the importation of sheep from a state which has been designated by proclamation as a place where epidemic disease of sheep exists, is not invalid as an attempt to regulate interstate commerce. *Ex p. Goddard*, (Nev. 1920) 190 Pac. 916.

g. Telegraph and Telephone Companies

(7) "Mental Anguish" Statute (p. 584)

A telegraph company accepting a telegram to be transmitted between points in this state, where a recovery for mental anguish is allowed, may not avoid such liability under the federal decisions by unnecessarily sending the message through another state, when it could have reasonably been otherwise transmitted. *Speight v. Western Union Tel. Co.*, (1919) 178 N. C. 146, 100 S. E. 351.

j. Ferries

(3) Exclusive Grant of Ferry (p. 604)

A town ordinance granting to a certain party an exclusive franchise to operate an interstate ferry, and penalizing all others who engage in the operation of a similar ferry, is void as being in violation of this article. *Long v. Miller*, (C. C. A. 5th Cir. 1919) 262 Fed. 362.

g1. Natural Gas

(2) Regulation of Rates (p. 646)

Until Congress acts under its superior authority by regulating the subject-matter for itself, the regulation by a state public service commission of rates for natural gas transmitted directly from the source of supply outside the state to local consumers in municipalities within the state does not offend against the commerce clause of the Constitution. *Pennsylvania Gas Co. v. Public Service Commission*, (1920) 252 U. S. 23, 40 S. Ct. 279, 64 U. S. (L. ed.) — (affirming (1919) 225 N. Y. 397, 122 N. E. 260), wherein the court said:

"The Federal question presented for our consideration involves the correctness of the contention of the plaintiff in error that the authority undertaken to be exercised by the Commission, and sustained by the court, was an attempt, under state authority, to regulate interstate commerce, and violative of the constitutional power granted to Congress over commerce among the states. The facts are undisputed. The plaintiff in error, the Pennsylvania Gas Company, is a corporation organized under the laws of the state of Pennsylvania, and engaged in transmitting and selling natural gas in the state of New York and Pennsylvania. It transports the gas by pipe lines about 50 miles in length from the source of supply in the state of Pennsylvania into the state of New York. It sells and delivers gas to consumers in the city of Jamestown, in the town of Endicott, and in the village of Falconer, all in Chautauqua county, New York. It also sells and delivers natural gas to consumers in the cities of Warren, Corry, and Erie, in Pennsylvania.

"We think that the transmission and sale of natural gas produced in one state, transported by means of pipe lines, and directly furnished to consumers in another state, is interstate commerce within the principles of the cases already determined by this court. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. ed. 716, 35 L. R. A. (N. S.) 1193, 31 Sup. Ct. Rep. 564; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 56 L. ed. 738, 32 Sup. Ct. Rep. 442; *Western U. Teleg. Co. v. Foster*, 247 U. S. 105, 62 L. ed. 1006, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438.

"This case differs from *Public Utilities Commission v. Landon*, 249 U. S. 236, 63 L. ed. 577, P. U. R. 1919C, 834, 39 Sup. Ct. Rep. 268, wherein we dealt with the piping of natural gas from one state to another,

and its sale to independent local gas companies in the receiving state, and held that the retailing of gas by the local companies to their consumers was intrastate commerce, and not a continuation of interstate commerce, although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce, and, therefore, the matter was subject to local regulation.

"In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single, and is, in our opinion, a transmission in interstate commerce, and therefore subject to applicable constitutional limitations which govern the states in dealing with matters of the character of the one now before us.

"The general principle is well established and often asserted in the decisions of this court that the state may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Constitution to the control of the Federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself."

xi. State Taxation

(1) In General (p. 657)

Special assessment upon railway right of way.—A special assessment for a local drain upon a railway right of way if benefited is not violative of the commerce clause. *Northern Pac. R. Co. v. Sargent County*, (N. D. 1919) 174 N. W. 811, *following* *Northern Pac. R. Co. v. Richland County*, (1914) 28 N. D. 172, 148 N. W. 545, *Ann. Cas.* 1916E 574, *L. R. A.* 1915A 129.

(2) Separation of Interstate from Intrastate Commerce (p. 657)

To same effect as original annotation, see *Hayes Wheel Co. v. American Distributing Co.*, (C. C. A. 6th Cir. 1919) 257 Fed. 881, 169 C. C. A. 31. In passing upon this question, the court said:

"Does the Michigan statute impose or attempt to impose a tax upon all the capital of a foreign corporation whether employed in state or interstate commerce, or to tax property permanently without the state, or to impose a fee upon its business done in the state, without distinction between state

and interstate? It seems to us clear that it neither does nor attempts to do either of these things. The language of the statute indicates, in our opinion, an intention to assess the franchise fee only upon domestic business, which is assumed to be capable of separation from interstate business. The tax is in terms limited to a percentage of 'the proportion of its authorized capital stock represented by the property owned and used and business transacted in Michigan, determined as above provided.' The secretary of state is to determine this proportion, not arbitrarily, as plaintiff charges, but 'from the papers so filed and the facts so reported [by the corporation] and any other facts coming to his knowledge bearing upon the question.' Nor is the corporation without remedy against unrestrained or mistaken determination of what such proportion amounts to, neither is it subject to the employment of secret or private information in reaching such determination. It is not only expressly given 'the right, on application, to be heard by the secretary of state touching the matter of the determination of the proportion of its capital stock represented by property used and business done in Michigan,' but, if dissatisfied with the result, it is in terms given the right of appeal to a 'board of appeal consisting of the auditor general, state treasurer and attorney general.' Due provision is thus, in our opinion, made for separating state from interstate business."

Gasoline.—A state tax which is in effect a privilege tax upon the business of selling gasoline in the tank cars or other original packages in which the gasoline was brought into the state, and which provides for the levy of fees in excess of the cost of inspection, is invalid, as amounting to a direct burden on interstate commerce. But the business of selling gasoline at retail in quantities to suit customers, but not in the original packages, is properly taxable by the laws of the state, although the state itself producing no gasoline, it must of necessity have been brought into the state in interstate commerce. *Askren v. Continental Oil Co.*, (1920) 252 U. S. 444, 40 S. Ct. 355, 64 U. S. (L. ed.) —, wherein the court said:

"Plaintiffs are engaged in the business of buying and selling gasoline and other petroleum products. The bill states that they purchase gasoline in the state of Colorado, California, Oklahoma, Texas and Kansas, and ship it into the state of New Mexico, there to be sold and delivered. The bill describes two classes of business:

"First, that it purchases in the states mentioned, or in some one of said states, gasoline, and ships it in tank cars from the state in which purchased into the state of New Mexico, and there, according to its custom and the ordinary method in the conduct of its business, it sells in tank cars the whole of the contents thereof to a single customer, before the package or packages in which the gasoline was shipped have been broken. In the usual and regular course of

its business it purchases gasoline in one of the states, other than the state of New Mexico, and ships it, so purchased from that state, in barrels and packages containing not less than two 5-gallon cans into the state of New Mexico, and there, in the usual and ordinary course of its business, without breaking the barrels and packages, containing the cans, it is its custom to sell the gasoline in the original packages and barrels. The gasoline is sold and delivered to the customers in precisely the same form and condition as when received in the state of New Mexico; that this manner of sale makes the plaintiffs distributors of gasoline as the term is defined in the statute, and they are required to pay the sum of \$50 per annum for each of their stations as an annual license tax for purchasing, shipping and selling gasoline as aforesaid.

"A second method of dealing in gasoline is described in the bill: That the gasoline shipped to the plaintiffs from the other states, as aforesaid, is in tank cars, and plaintiff, or plaintiffs, sell such gasoline from such tank cars, barrels and packages in such quantities as the purchaser requires.

"As to the gasoline brought into the state in the tank cars, or in the original packages and so sold, we are unable to discover any difference in plan of importation and sale between the instant case and that before us in *Standard Oil Co. v. Graves*, 249 U. S. 389, 39 Sup. Ct. 320, 63 L. Ed. 662, in which we held that a tax, which was in effect a privilege tax, as is the one under consideration, providing for a levy of fees in excess of the cost of inspection, amounted to a direct burden on interstate commerce. In that case we reaffirmed, what had often been adjudicated heretofore in this court, that the direct and necessary effect of such legislation was to impose a burden upon interstate commerce; that under the Federal Constitution the importer of such products from another state into his own state for sale in the original packages, had a right to sell the same in such packages without being taxed for the privilege by taxation of the sort here involved. Upon this branch of the case we deem it only necessary to refer to that case, and the cases therein cited, as establishing the proposition that the license tax upon the sale of gasoline brought into the state in tank cars, or original packages, and thus sold, is beyond the taxing power of the state.

"The plaintiffs state in the bills that their business in part consists in selling gasoline in retail in quantities to suit purchasers. A business of this sort, although the gasoline was brought into the state in interstate commerce, is properly taxable by the laws of the state.

"Much is made of the fact that New Mexico does not produce gasoline, and all of it that is dealt in within that state must be brought in from other states. But, so long as there is no discrimination against the products of another state, and none is shown from the mere fact that the gasoline is pro-

duced in another state, the gasoline thus stored and dealt in is not beyond the taxing power of the state. *W. F. Wagner & Sons v. City of Covington*, 251 U. S. 95, 40 Sup. Ct. 93, 64 L. Ed. —, decided by this court December 8, 1919, and the cases from this court cited therein.

"Sales of the class last mentioned would be a subject of taxation within the legitimate power of the state. But from the averments of the bills it is impossible to determine the relative importance of this part of the business as compared with that which is non-taxable, and at this preliminary stage of the cases we will not go into the question whether the act is separable, and capable of being sustained so far as it imposes a tax upon business legitimately taxable. That question may be reserved for the final hearing. The District Court did not err in granting the temporary injunctions."

(4) Transportation, Telegraph, and Telephone Companies

(b) Tax on Instrumentalities of Commerce as Property

aa. In General (p. 667)

Bridge.—A bridge belonging to an interstate electric railway company and the appurtenances thereof are taxable by the state in which it is situated. *State v. St. Louis, etc., Electric R. Co.*, (Mo. 1919) 216 S. W. 763.

(10) Privilege Taxes on Foreign Corporations (p. 698)

A tax in the form of a two per cent tax on the net income of corporations whether domestic or foreign carrying on business in the state, the net income taxed being that on which the corporation is required to pay a tax to the United States, is a privilege tax and not, as applied to a foreign corporation, in violation of the commerce clause of the Constitution. *Underwood Typewriter Co. v. Chamberlain*, (Conn. 1919) 108 Atl. 154, wherein the court said: "The fact that the tax is measured by a percentage of net income, or in the case of a corporation engaged in interstate commerce by a percentage of a part of its net income proportioned to the amount of its tangible property in this state, does not, of course, prevent it from being an excise or privilege tax. The next question is whether the tax, regarded as an excise or privilege tax, is, in its application to the plaintiff corporation, an unlawful restraint on interstate commerce. This question appears to us to have been answered in the negative by the recent case of *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E 748, wherein the Supreme Court took occasion to point out some of the things which a state might lawfully do in levying taxes on the net incomes of corporation engaged in interstate commerce. We quote from page 326 of 247 U. S. (38 Sup. Ct. 500, 62 L. Ed. 1135, Ann. Cas. 1918E 748):

'But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on business, but its enforcement left to the ordinary means devised for the collection of taxes.' And again (247 U. S. on pages 328, 329, 38 Sup. Ct. 501, 62 L. Ed. 1135, Ann. Cas. 1918E 748): 'A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states.'

"The plaintiff contends that the Glue Company Case is authority for the taxation of net incomes of domestic corporations only. But this ignores the plain statement, above quoted, that a tax which is in form a tax for the privilege of exercising its franchises within the state may be levied upon a corporation, whether foreign or domestic, engaged in interstate commerce, if the ascertainment of its amount is made dependent in fact on the value of its property within the state, and if it does not exceed the sum which might be leviable directly thereon.

"Of course, no tax at all can be levied by any state which is in form or effect a direct tax on interstate commerce, and for the purposes of this case the significance of the quotation from pages 328 and 329 of the opinion is that the tax on net income—as distinguished from a tax on gross receipts, condemned in *Oklahoma v. Wells Fargo Co.*, 223 U. S. 298, 32 Sup. Ct. 218, 56 L. Ed. 445, and in *Levick Co. v. Pennsylvania*, 245 U. S. 292, 38 Sup. Ct. 126, 62 L. Ed. 295—is not in form or effect a direct tax on interstate

commerce. It is therefore a tax which a state may assess against persons or corporations engaged in interstate commerce, provided it keeps within its jurisdiction in other respects and within the limitations noted in the opinion.

"As we read the opinion in the Glue Company Case, it decides that within the limitation stated a state may tax the entire net income of a domestic corporation engaged in interstate commerce; and it points out as a logical consequence of this decision that a state may, under the form of a privilege tax, tax some fractional part of the net income of a foreign corporation engaged in interstate commerce, provided that the apportionment is made dependent in fact on the value of its property situated within the state, that the amount of the tax is not excessive regarded as a tax on property within the state, and that there is no discrimination against interstate commerce in the admeasurement or enforcement of the tax. The tax in question complies with every requisite pointed out."

(15) Tax on Merchants and Peddlers (p. 703)

Tax on wholesalers of soft drinks.—A nonresident manufacturer of "soft drinks" doing a business in a municipality in the state which largely consists in carrying a supply of such drinks from one retailer's place of business to another's upon the vehicle in which the goods were brought across the state line, exposing them for sale, soliciting and negotiating sales, and immediately delivering the goods sold in the original unbroken cases, may be required to take out the license required of all wholesalers in soft drinks without infringing the commerce clause of the Federal Constitution. *Wagner v. Covington*, (1919) 251 U. S. 95, 40 S. Ct. 93, 64 U. S. (L. ed.) — (affirming (1917) 177 Ky. 385, 197 S. W. 806) wherein the court said:

"The trial court, and, on appeal, the court of appeals of Kentucky gave judgment for defendant, overruling the contention of plaintiffs that the ordinances as carried into effect against them were repugnant to the 'commerce clause' (art. 1, § 8) of the Constitution of the United States (177 Ky. 385, 197 S. W. 806), and upon this Federal question the case is brought here by writ of error.

"It is important to observe the precise point that we have to determine. It is indisputable that, with respect to the goods occasionally carried upon plaintiff's wagon from one state to the other, in response to orders previously received at their place of business in Cincinnati, plaintiffs are engaged in interstate commerce, not subject to the licensing power of the Kentucky municipality. The court of appeals in the present case, in line with its previous decisions in *Newport v. Wagner*, 168 Ky. 641, 646, 182 S. W. 834, Ann. Cas. 1917A, 962,

and *Newport v. French Bros. Bauer Co.* 169 Ky. 174, 183 S. W. 532, recognizing the authority of the decisions of this court bearing upon the subject, conceded that this part of plaintiff's business was not subject to state regulation (177 Ky. 388). At the same time the court held that, with respect to the remaining and principal part of the business conducted in Covington, that which consists in carrying a supply of goods from place to place upon wagons, exposing them for sale, soliciting and negotiating sales, and immediately delivering the goods sold, plaintiffs were subject to the licensing ordinances; and it is with this alone that we have to deal. If, with respect to this portion of their business, plaintiffs may be subject to the regulatory power of the state, acting through the municipality, we are not concerned with the question whether the general language of the ordinances, if applied with respect to some other method of dealing with goods brought from state to state, might be repugnant to the Federal Constitution.

"From the facts recited it is evident that, in essence, that part of plaintiffs' business which is subjected to regulation is the business of itinerant vender or peddler,—a traveling from place to place within the state, selling goods that are carried about with the seller for the purpose. Plaintiffs in error insist that this view of the matter is untenable because the courts of Kentucky have held that sales made to a retail merchant for resale do not constitute peddling within the meaning of the statutes of that state. *Standard Oil Co. v. Com.*, 107 Ky. 606, 609, 55 S. W. 8; *Newport v. French Bros. Bauer Co.*, 169 Ky. 174, 185, 183 S. W. 532. These decisions, however, deal merely with a question of statutory definitions; and it hardly is necessary to repeat that when this court is called upon to test a state tax by the provisions of the Constitution of the United States, our decision must depend not upon the form of the taxing scheme, or any characterization of it adopted by the courts of the state, but rather by the practical operation and effect of the tax as applied and enforced. The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax that, in its actual effect, violates no constitutional provision, by inaccurately defining it. *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99.

"We have, then, a state tax upon the business of an itinerant vender of goods as carried on within the state,—a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other states. It is settled by repeated decisions of this court that a license regulation or tax of this nature, im-

posed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the state, and does not conflict with the 'commerce clause.' *Woodruff v. Parham*, 8 Wall. 123, 140, 19 L. ed. 382, 387; *Howe Mach. Co. v. Gage*, 100 U. S. 876, 25 L. ed. 754; *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Bacaus v. Louisiana*, 232 U. S. 334, 58 L. ed. 627, 34 Sup. Ct. Rep. 439."

(39) Tax on Income from Interstate Business (p. 726)

A state income tax upon the net income of a nonresident from the business carried on by him in the state is not a burden on interstate commerce merely because the products of the business are shipped out of the state, since the tax, not being upon gross receipts, but only upon the net proceeds, is plainly sustainable even if it includes net gains from interstate commerce. *Shaffer v. Carter*, (1920) 252 U. S. 37, 40 S. Ct. 221, 64 U. S. (L. ed.) —, wherein the court said: "It is urged that, regarding the tax as imposed upon the business conducted within the state, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the state. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 62 L. ed. 295, 38 Sup. Ct. Rep. 126, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 62 L. ed. 1136, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748. Compare *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 62 L. ed. 1049, 38 Sup. Ct. Rep. 432."

Vol. X, p. 765, art. 1, sec. 8.

VI. EXCLUSIVENESS OF POWER OF CONGRESS

2. As to Weights and Measures (p. 767)

Power of state.—The establishment of a uniform system of weights and measures is within the police power of a state. *Dwight, etc., Sintering Co. v. American Ore Reclamation Co.*, (C. C. A. 2d Cir. 1920) 263 Fed. 315.

Vol. X, p. 783, art. 1, sec. 8.

III. RIGHT OF GOVERNMENT TO USE A PATENT (p. 785)

To same effect as original annotation, see *U. S. v. Basic Products Co.*, (W. D. Pa. 1919) 260 Fed. 472.

Vol. X, p. 807, art. 1, sec. 8.**III. EFFECT OF DECLARATION OF WAR****1. In General (p. 808)**

Volstead Act extending wartime prohibition.—The implied war power of Congress over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors, but will effectually prevent their sale. Thus Congress, in the exercise of the war power, could, in order to make effective the existing war-time prohibition against the manufacture and sale of intoxicating liquors, enact the provisions of the Volstead Act of October 28, 1919 (see 1919 Supp. p. —), extending such prohibition to malt liquors, whether in fact intoxicating or not, with alcoholic content of as much as $\frac{1}{2}$ of 1 per cent of alcohol by volume. *Ruppert v. Caffey*, (1920) 251 U. S. 264, 40 S. Ct. 141, 64 U. S. (L. ed.) —.

Soldiers' and Sailors' Civil Relief Act (Fed. Stat. Ann. 1918 Supp. p. 810) is within the war power of Congress. *Kuehn v. Neugebauer*, (Tex. Civ. App. 1919) 216 S. W. 259.

Vol. X, p. 816, art. 1, sec. 8.**IX. STATE BOUNTIES TO DRAFTED OR RECRUITED MEN (p. 819)**

A state bounty law does not violate this paragraph of the Federal Constitution. *State v. Johnson*, (1919) 170 Wis. 218, 175 N. W. 589, 7 A. L. R. 1617. See also *Gustafson v. Rhinow*, (1920) 144 Minn. 415, 176 N. W. 903.

Vol. X, p. 838, art. 1, sec. 8.**X. STATE JURISDICTION****3. Taxation by States (p. 850)**

Personal property on ceded land is not subject to state taxation. *Concessions Co. v. Morris*, (Wash. 1919) 186 Pac. 655.

Vol. X, p. 887, art. 1, sec. 9.

The sixteenth amendment (see vol. XI, p. 1110) qualifies this section on the subject of direct taxes by providing that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without . . . regard to any census or enumeration." But "incomes," as used in the sixteenth amendment does not include stock dividends and any taxation of them must be in accordance with this clause of sec. 9, and clause 3 of sec. 2 of art. 1. *Eisner v. Macomber*, (1920) 252 U. S. 189, 40 S. Ct. 189, 64 U. S. (L. ed.) —.

Vol. X, p. 944, art. 1, sec. 10.**V. Contracts protected, 831.****11. Contracts of states, 831.****b. Contracts for purchase of public lands, 831.****12. Contracts of municipal corporations, 832.****a. In general, 832.****13. Charters of municipal and public corporations as contracts, 832.****b. Municipal corporations, 832.****14. Charters of private corporations as contracts, 832.****h. Power to amend charters, 832.****(1) In general, 832.****17. Of railroad companies, 832.****c. Municipal control, 832.****d. Regulation of railroad rates, 832.****(2) When subject to legislative or municipal control, 832.****(3) When not subject to legislative or municipal control, 832.****h. Invalidating relief department contracts, 833.****18. Of waterworks companies, 833.****e. Regulation of water rates, 833.****19. Of lighting companies, 833.****a. In general, 833.****20. Of telegraph and telephone companies, 834.****a. In general, 834.****22. Of banking companies, 834.****a. In general, 834.****40. Marriage, 834.****VII. Laws affecting contracts, 835.****4. Sources of laws affecting contracts, 835.****a. Constitutions and statutes, 835.****VIII. What constitutes impairment, 836.****1. In general, 836.****2. Imposing conditions on foreign corporations, 837.****4. Statute of limitations, 837.****V. CONTRACTS PROTECTED.****11. Contracts of States****b. Contracts for Purchase of Public Lands (p. 970)**

A state land warrant is a contract giving a right to locate on land within the tract described in the warrant, despite the fact that the grant of the lands in question from the United States to the state was not formally complete when the warrant was issued. *Rosenberg v. Bump*, (Cal. App. 1919) 185 Pac. 218.

Statute creating state agency and investing it with authority to dispose of public lands as "contract."—A statute creating a state agency and investing it with authority to dispose of public lands is not a "contract" within the meaning of the clause forbidding the enactment of laws impairing the obligations of contracts. The only legislative grants that are protected by the clause forbidding the enactment of laws impairing the obligations of contracts are grants made to

or for the benefit of individuals or private corporations, or grants on the faith of which and according to the terms of which an individual or private corporation has acquired title. *Atchafalaya-Land Co. v. F. B. Williams Cypress Co.*, (1920) 146 La. 1047, 84 So. 351.

12. *Contracts of Municipal Corporations*

a. In General (p. 979)

A reservation of trees in a deed to a county of land for highway purposes is a contract which cannot be impaired by a city which took the highway over from the county, though the trees interfered with the drainage of the highway and prevented desired improvement thereof. *Hill v. Oxnard*, (Cal. App. 1920) 189 Pac. 825.

13. *Charters of Municipal and Public Corporations as Contracts*

b. Municipal Corporations (p. 990)

Regulation of municipal waterworks.—Chapter 47, Laws 1919, which limits and restricts the application of the revenue derived by municipalities from public utilities, and authorizes the appointment of a receiver for a public utility upon the failure of the municipal authorities to comply with the statute, does not impair the obligation of a contract, contrary to the provisions of section 10, art. 1, of the Constitution of the United States, and section 19, art. 2, of the state." *Dreyfus v. Socorro*, (N. M. 1920) 189 Pac. 878.

14. *Charters of Private Corporations as Contracts*

h. Power to Amend Charters

(1) In General (p. 1004)

A statute which permits life insurance corporations to amend their charters and reorganize, but expressly preserves existing contracts in full force and effect, does not violate this section. *Richards v. Security Mut. L. Ins. Co.*, (N. D. N. Y. 1919) 259 Fed. 727.

17. *Of Railroad Companies*

c. Municipal Control (p. 1042)

Paving portion of streets occupied by tracks.—The terms and conditions in a street railway franchise which require the street railway company under certain conditions to pave or pay for paving certain portions of occupied streets do not amount to a contract which prevents, on constitutional grounds, the imposition by the municipality upon a central strip in the highway owned in fee by the street railway company of its fair share, according to benefits, of the expense of paving such street. *Oklahoma R. Co. v. Severns Pav. Co.*, (1919) 251 U. S. 104, 40 S. Ct. 73, 64 U. S. (L. ed.) —, *modifying and affirming* (Okla. 1918) 170 Pac. 216.

Sprinkling portion of streets occupied by streets and beyond.—The obligation of the contract right which a street railway company has under its franchises to operate its railway in the streets of a municipality is not impaired by an ordinance enacted in the exercise of the police power, requiring the street railway company to sprinkle the surface of the streets occupied by its railway between the rails and tracks, and for a sufficient distance beyond the outer rails, so as effectually to lay the dust and prevent the same from arising when the cars are in operation. *Pacific Gas, etc., Co. v. Police Ct.*, (1919) 251 U. S. 22, 40 S. Ct. 79, 64 U. S. (L. ed.) —, *affirming* (1915) 28 Cal. App. 412, 152 Pac. 928.

Regulations affecting railroad track laid in public street.—"A railroad track laid in a public street, though by express public grant, is subject to such regulations as are reasonably necessary to secure the public safety; for this power "is inalienable even by express grant," and its legitimate exertion contravenes neither the contract clause of the Constitution nor the due process clause of the Fourteenth Amendment. . . . Of course, all regulations of this class are subject to judicial scrutiny, and when they are found to be plainly unreasonable and arbitrary must be pronounced invalid, as transcending that power and falling within the condemnation of one or both, as the case may be, of those constitutional restrictions." *Denver & R. G. R. Co. v. Denver*, 250 U. S. 241, 243, 39 Sup. Ct. 450, 451 (63 (L. Ed. 953))." *Connecticut Co. v. Stamford*, (Conn. 1920) 110 Atl. 554.

d. Regulation of Railroad Rates

(2) When Subject to Legislative or Municipal Control (p. 1047)

To the same effect as the original annotation, see *Black v. New Orleans Ry., etc., Co.*, (1919) 145 La. 180, 82 So. 81.

Municipal ordinance regulating fares to certain persons.—A provision in a franchise ordinance enacted by a municipality requiring a street railway to transport certain classes of persons for half fare during certain hours, is not a contract within the meaning of this article, and may be annulled by an act of the state legislature. *Dubuque Electric Co. v. Dubuque* (C. C. A. 8th Cir. 1919) 260 Fed. 353, 171 C. C. A. 219, *following* *Pawhuska v. Pawhuska Oil, etc., Co.*, (1919) 250 U. S. 394, 39 S. Ct. 526, 63 U. S. (L. ed.) 1054.

(3) When Not Subject to Legislative or Municipal Control (p. 1049)

When a rate of fare that may be charged by a street railway company is fixed by positive agreement.—To same effect as original annotation, see *Michigan R. Co. v. Lansing*, (E. D. Mich. 1919) 260 Fed. 322, holding that a franchise granted by a municipality to a street railway was a contract, and that neither the state nor any of its agencies might impair the obligations of it.

b. Invalidating Relief Department Contracts (p. 1052)

The freedom of contract guaranteed by the Constitution is not infringed by the provisions of sections 9012, 9013, and 9014, Ohio General Code, which prohibit a corporation from compelling employees to join any association, from withholding any part of the wages or salary of employees for the payment of dues therein, from requiring either as a condition of securing employment or being employed, or from making an agreement with a person about to enter employment whereby he agrees to waive any right to damages against a railroad company thereafter arising for personal injury or death, or whereby he agrees to surrender or waive, in case he asserts such right, any other right. *Baltimore, etc., R. Co. v. Bailey*, (1919) 99 Ohio St. 312, 124 N. E. 195, wherein the court said:

"It is also contended that these statutes violate the Fourteenth Amendment to the Constitution of the United States. It is sufficient as to this to say that a similar contract was under investigation by the Supreme Court of the United States in *C. & B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328. McGuire was an employee of the company and a member of its relief association. After his injuries he accepted benefits to the extent of \$822. In reference to the Iowa statute concerning relief associations, which is similar to the Ohio statute, the federal Supreme Court held in the McGuire Case that a state has power to prohibit contracts limiting liability for injuries, made in advance of the injuries received, and to provide that the subsequent acceptance of benefits under such contracts shall not constitute satisfaction of the claim for injuries received after the contract, and that such a statute does not impair the liberty of contract guaranteed by the Fourteenth Amendment."

18. Of Waterworks Companies

e. Regulation of Water Rates (p. 1059)

The state, as an attribute of sovereignty, is endowed with authority, in the appropriate exercise of the police power, to regulate the charges of public utilities. Regulation in such cases is not an unwarranted interference with the right of contract which the constitutional guaranty of the enjoyment of liberty includes. Private contracts, concerning property rights, are inviolable, but no obligation of a contract can extend to the defeat of legitimate governmental power. Contract rights which affect the public safety and welfare must yield to that which is essential to the general good. The legislature, in the exercise of the police power, is unrestricted by the provisions of contracts between individuals or corporations, or between individuals and municipal corporations. The state may decrease or increase the contract specified rates for public utility services as justness and reasonableness may

require. Underlying such right of regulation is the fundamental doctrine that the utility for the adequate doing of that which it was chartered to do, should receive tolls sufficient to enable it to meet the exacted requirement. Rates should be neither so low as to deprive the utility of means of appropriately discharging duty nor so high as to unduly burden the public. Safe and efficient service, with substantial equality of treatment in like situations, is the essential. *In re Guilford Water Co.*, (1919) 118 Me. 367, 108 Atl. 446.

Municipality when bound by rate fixed in contract with utility company.—While all contracts by municipalities or by individuals with a utility company for any service are presumed to be entered into with the understanding that the state may at any time regulate the service and the rates to be charged therefor, the state may by appropriate legislation suspend its authority to exercise its power of regulation, and authorize a municipality to enter into an inviolable contract with a utility company for a reasonable period fixing the rates to be charged by such utility for the public service, which contract will be protected against impairment under the Federal and State Constitutions. The surrender by the state of this important governmental function, however, must be in terms so clear and unequivocal as to admit of no doubt of the intent to surrender. General authority to contract is not sufficient. Express terms are required. All doubts must be resolved in favor of the state. Unless such surrender is made, the rates for any public service such as the supplying of water or other utility for public or domestic uses are just as fully subject to regulation by the state under its police powers, when fixed by mutual consent in a contract, as when summarily determined by the utility company itself. All contracts relating to the public service must be understood as made in contemplation of the possible exercise at any time by the state of this legitimate governmental power. The duty, once undertaken, to serve the public in a reasonable manner cannot be avoided by a contract. *In re Searsport Water Co.*, (1919) 118 Me. 382, 108 Atl. 452.

Increase of franchise rates by the public service commission does not impair the obligation of a contract. *Hillsboro v. Public Service Commission*, (Ore. 1920) 187 Pac. 617.

19. Of Lighting Companies

a. In General (p. 1060)

Regulation of poles and wires by municipality.—The obligation of a municipal electric light and power franchise covering public and private uses, granted when the applicable statute then in force gave the municipality a qualified control over the erection of electric light and power appliances in the streets, was not impaired by subsequent legislation giving the municipality exclusive control, under which the light and

power company, having removed and dismantled its street lighting system upon the expiration of a street lighting contract, may be restrained from erecting any poles or wires in the street until the consent of the municipality shall have been obtained, without prejudice to the company's right to maintain, repair, or replace such poles and wires as it is then using for commercial lighting. *Hardin-Wyandot Lighting Co. v. Upper Sandusky*, (1919) 251 U. S. 173, 40 S. Ct. 104, 64 U. S. (L. ed.) —, *affirming* (1916) 93 Ohio St. 428, 113 N. E. 402.

20. Of Telegraph and Telephone Companies

a. In General (p. 1063)

Relinquishment by state of right to exercise regulatory power.—"When a state, either directly or through the action of a municipality having express delegated authority so to do, has agreed to relinquish its right to exercise its regulatory power as to rates, or as to other matters prescribed by the contract, such agreement is reciprocal and binding only as between the parties to the agreement. Neither party to the contract can change it without the consent of the other; but the parties to such a contract may agree by mutual consent to change the contract, or to release each other entirely from the obligations of the contract. *Winfield v. Public Service Commission*, (1918) 187 Ind. 53, 118 N. E. 531. In making the contract the state, or the city, as the case may be, represents the public as against the person or corporation with which the contract is made; and, in agreeing to a change of the contract or to its complete rescission, the city, or the state, as the case may be, acts for the public and binds it as effectively in the one case as in the other. An agreement with a public utility by which the state relinquishes its regulatory power in certain particulars affecting the contractual right of such utility does not create any such obligation on the part of the state in favor of the public. So far as the rights of the public are concerned, the state retains all of its regulatory powers. By making the contract the state relinquishes its regulatory power only to the extent expressed in the contract, and only so far as such exercise would affect the rights of the other contracting party. In conformity to the principle thus stated, the Supreme Court of the United States, in the case of *Worcester v. Street Railway*, 196 U. S. 539, 25 Sup. Ct. 327, 49 L. Ed. 591, held that the Legislature had power to relieve the street car company from the obligation to pave the streets between its tracks and 18 inches on each side thereof, as provided in some of its grants, and, as provided by other grants, to pave the streets on which its lines were located from curb to curb. All of these grants were accepted by the street car company, and for the purpose of the opinion the court assumed that the city in making the grants had power to impose such conditions, and that when accepted the grant

with the conditions contained therein became a binding contract between the city and company. It was held that the city acted in behalf of the public in making grants, and that the Legislature had a right, with the consent of the street car company, to modify or abrogate the conditions under which the locations in the streets had been granted after such conditions had been imposed by the city. In the opinion of the court it is said:

"These restrictions and conditions were of a public nature, imposed as a means of collecting from the railroad company part, or possibly the whole, of the expenses of paving or repaving the streets in which the tracks were laid, and that method of collection did not become an absolute property right in favor of the city, as against the right of the Legislature to alter or abolish it, or substitute some other method with the consent of the company, even though as to the company itself there might be a contract not alterable except with its consent."

"In accordance with the same principle, the courts also hold that all contracts made for services to be furnished by public utilities must be regarded as made in contemplation of the regulatory power of the state, and that, when the state exercises such power by changing rates or conditions of services, such change does not impair the obligations of existing contracts, although such contracts must yield to the changes so made." *Central Union Telephone Co. v. Indianapolis Telephone Co.*, (Ind. 1920) 126 N. E. 628.

22. Of Banking Companies

a. In General (p. 1067)

Providing for reasonable examinations and reports.—The obligation of the state's undertaking in a special act incorporating a bank, that "the business of said bank shall be confided to and controlled by its stockholders under such rules of law and regulations as said company may see fit to adopt, provided the same be not in conflict with the Constitution of the United States or of this state," was not unconstitutionally impaired by the subsequent enactment of legislation providing for reasonable examinations and reports by duly authorized officers of the state banking department created by such legislation, and for the enforced annual contribution to the expenses of such department of 1/40 of 1 per cent of the bank's total assets. *Oxford Bank v. Love*, (1919) 250 U. S. 603, 40 S. Ct. 22, 64 U. S. (L. ed.) —, *affirming* (1916) 111 Miss. 699, 72 So. 133, 8 A. L. R. 894.

40. Marriage (p. 1095)

Divorce.—Each state has the right to prescribe the conditions upon which the marital relations of its own citizens shall be created and the causes for and manner in which, by its laws, those relations may be dissolved; and that right extends to women who, hav-

ing married in other states and having left their husbands for lawful causes, have, in good faith, established here such separate domiciles as entitle them to citizenship; hence statutes authorizing constructive service upon nonresident defendants, making it a cause for divorce that a married person bringing the suit has resided in this state continuously for seven years or more and lived continuously separate and apart from his or her spouse during that period, are competent statutes, as not being repugnant to the constitutional provisions relating to the impairment of the obligations of contracts, the divestiture of vested rights, or due process of law. *Lepenser v. Griffin*, (1920) 146 La. 584, 83 So. 839.

VII. LAWS AFFECTING CONTRACTS

4. Sources of Laws Affecting Contracts

a. Constitutions and Statutes (p. 1107)

Resolution of board of trade.—A resolution of an incorporated board of trade impairing a contract has been held not to be invalid under this section on the ground that it was not a "law" as that term was used in the constitution. *Thomson v. Thomson*, (1920) 293 Ill. 584, 127 N. E. 882, wherein the court said:

"Is the resolution a law within the meaning of the constitutional declaration that no law impairing the obligation of contracts shall ever be made? This prohibition is directed against the law-making power—the legislative department of the government. It is not applicable to the decisions of the courts in the construction of contracts, or the application of general principles of law to contract relations or obligations.

"The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607.

"Though the prohibition is against the making of a law, it is not essential that the enactment, to be within the prohibition of the Constitution, shall be a statute enacted by the Legislature or a constitutional provision adopted by the people. Any enactment of a governmental agency to which the force of law is given by the state may be regarded as a law within the territory in which it is so enforced. *Williams v. Bruffy*, 96 U. S. 176, 24 L. Ed. 716. So an act of the Confederate congress sequestrating the property and credits within states in rebellion of loyal citizens of the United States, which was enforced by the state of Virginia as a valid law, was held to be an infringement of the prohibition of the Federal Constitution against any state passing any law impairing the obligation of contracts. The prohibition reaches every form in which the legislative power of the state is exerted, whether constitution, constitutional amendment, enact-

ment of the Legislature, ordinance of a municipal corporation, or a regulation of some other instrumentality of the state exercising delegated legislative authority. *Ross v. Oregon*, 227 U. S. 150, 33 Sup. Ct. 220, 57 L. Ed. 458, Ann. Cas. 1914C, 224. In *Grand Trunk Western Railway Co. v. Railroad Com.*, 221 U. S. 400, 31 Sup. Ct. 537, 55 L. Ed. 786, an order of the Railroad Commission of Indiana for the installation of an interlocking plant was held to be a legislative act by an instrumentality of the state exercising delegated legislative authority, and so a law of the state within the meaning of the constitutional provision; and the same view was taken of a resolution of a board of county commissioners terminating a grant of the right to locate, construct, maintain, and operate an electric railroad along a state highway, without specifying any limit of time. *Northern Ohio Traction Co. v. State of Ohio*, 245 U. S. 574, 38 Sup. Ct. 196, 62 L. Ed. 481, L. R. A. 1918E, 865. These were all cases of action taken by some governmental instrumentality to which some part of the legislative power had been delegated by an act of the Legislature.

"No political or governmental power has been delegated to the Chicago Board of Trade. The voluntary association of individuals composing that body at the time its charter was granted by the Legislature was incorporated with the ordinary powers and privileges of private corporations, with authority to make such rules, regulations, and by-laws from time to time as they might think proper or necessary for the government of the corporation not contrary to the laws of the land, and to establish such rules, regulations, and by-laws for the management of their business and the mode in which it should be transacted as they might think proper. There was no grant of any legislative power. The Board of Trade is merely a voluntary organization, although incorporated under an act of the General Assembly. *People v. Board of Trade*, 80 Ill. 134. The grant of the power to adopt by-laws, rules, and regulations for the government of the corporation and the management of its business is no more than a recognition of the inherent and implied power, which is a necessary and inseparable incident of its existence. 1 *Blackstone's Com.* 476; 2 *Kent's Com.* 278; *People v. Live Stock Exchange*, 170 Ill. 556, 48 N. E. 1062, 39 L. R. A. 373, 62 Am. St. Rep. 404. The persons becoming members of the corporation have voluntarily submitted themselves to the operation of all laws enacted for its government and agreed to be bound by them so far as within the corporate authority. *Board of Trade v. Nelson*, 162 Ill. 431, 44 N. E. 743, 53 Am. St. Rep. 312. Whether the contracts in question, made by members of the corporation in their own names but really for the appellant, were affected by the resolution of the board of directors is not a question of construction of the Constitution. If the resolution was inoperative against the appellant its invalidity arose, not from any

constitutional prohibition against its adoption, but because of the lack of power by the board of directors, under the general principles of law in relation to contracts, to adopt it."

VIII. WHAT CONSTITUTES IMPAIRMENT

1. In General (p. 1113)

Incompleted contract.—A statute that has the effect of violating or repudiating an incompleted contract previously made with the state does not impair the obligation of a contract. The obligation remains as before and forms the measure of the contractor's right to recover from the state the damages sustained. *Hays v. Seattle*, (1920) 251 U. S. 233, 40 S. Ct. 125, 64 U. S. (L. ed.) —, *affirming* (W. D. Wash. 1915) 226 Fed. 287.

Paving contract with street railway.—A municipal ordinance requiring a street railway company to bear the cost of paving with asphalt upon a concrete foundation, like the rest of a newly paved street, that part of such street which lies between the tracks and for a distance of one foot outside, does not, although theretofore the street had been paved from curb to curb with macadam, impair the obligation of the street railway company's franchise contract under which its duty extends to keeping "in good repair the roadway between the rails and for one foot on the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs," unless the railway company and the city shall agree upon some other material. *Milwaukee Electric R., etc., Co. v. Wisconsin*, (1920) 252 U. S. 100, 40 S. Ct. 306, 64 U. S. (L. ed.) —, *affirming* (1917) 166 Wis. 163, 164 N. W. 844.

Passage of law as of what time.—The contract clause of the Federal Constitution applies only to legislation subsequent in time to the contract alleged to have been impaired. *Munday v. Wisconsin Trust Co.*, (1920) 252 U. S. 499, 40 S. Ct. 365, 64 U. S. (L. ed.) —, *affirming* (1918) 168 Wis. 31, 168 N. W. 393, 169 N. W. 612.

Judicial action.—The contract clause is aimed at legislative, not judicial action, and the overruling by an appellate court of a previous decision under which an oil lease has been secured does not impair the obligation of a contract. *McCray v. Miller*, (1920) 78 Okla. 16, 184 Pac. 781, 186 Pac. 1089.

Escheat Act.—A state statute is constitutional which provides for the escheating of abandoned or unclaimed property in the hands of the bailee or depositary. *German-town Trust Co. v. Powell*, (1919) 265 Pa. St. 71, 108 Atl. 441, wherein the court said:

"There seems to be no room for doubt that the commonwealth, by virtue of its sovereign power, may take charge of property abandoned or unclaimed for a period of time, or which has no known owner. *Com. v.*

Dollar Savings Bank, 259 Pa. 138, 145, 102 Atl. 569, 1 A. L. R. 1048, and cases cited. This right is not seriously disputed; it is contended, however, in the first place, that the act in question violates article 1, § 17, of the Constitution of Pennsylvania, and article 1, § 10, of the Constitution of the United States, by impairing the obligation of the contract between the owner of the property and the depositary; the theory being that upon money being deposited in a bank, a contract attaches between the depositor and the bank under which the latter is bound to return to the former, on demand, the amount of the deposit, and that the provisions in the act for the taking of money or other property after the expiration of a specified time, if the owner has not been heard from, amounts to a violation of this contract. The agreement of the bank or depositary, however, is merely to keep the money of the depositor until it is demanded by the owner, or his duly authorized representatives. It agrees to pay on demand. When demand is made the contractual relation ceases, there being no vested right to continue the contract in force thereafter, or for any definite time. If the depositor should die or make an assignment, his personal representative or assignee succeeds to his right to make demand for the money and the bank is in duty bound to make payment. A statute of escheat, in effect, simply provides for a termination of the contract of deposit, at the instance of the commonwealth and by virtue of its sovereign power, where there are no heirs to claim the property after the death of a person, or after the expiration of such reasonable time as may be fixed by law to raise a presumption of death. While the act requires the filing of certain reports for the information of the commonwealth a considerable time before an escheat is declared, this provision is reasonable and enables the commonwealth to follow up property as to which there is no apparent claim of ownership. The right of escheat has been recognized under the English law from the earliest times, and has also been the subject of continuous statutory regulation in Pennsylvania from colonial days; the latest general enactment on the subject being the act of May 2, 1889 (P. L. 66). The validity of these acts has been sustained without suggestion that their enforcement violates any contract between the owner of the property and the person or institution in whose hands the property was deposited or placed for keeping."

A state "moratorium" law was held unconstitutional as impairing the obligation of a leasing contract in the case of *Granger v. Luther*, (S. D. 1920) 176 N. W. 1019, wherein the court said: "Following the action of the states during the Civil War, certain states enacted 'moratorium' laws during the late war. Some of these laws were before the courts in *Thress v. Zemple*, (N. D.) 174 N. W. 85, *Klonkel v. State*, 168 Wis. 335, 170 N. W. 715, and *Pierrard v.*

Hoch, (Or.) 184 Pac. 494. An examination of these laws, as well as the federal law, discloses that they merely suspend the ordinary legal remedies. Not so with the law of this state. Section 1 exempts the beneficiaries under such law, until one year after the termination of the war or of service therein from any obligation to pay moneys due on any contract except life insurance policies. Section 2 provides that 'the . . . enforcement of any . . . right of entry . . . which may hereafter . . . arise during the continuance of the present war shall be suspended or stayed' during the period above mentioned. The other provisions of this law are not material to the present discussion. The two provisions above referred to are the only ones that can give any support to the decision of the trial court.

"We are of the opinion, in view of the remainder of section 2, that the above provision as to enforcement of 'right of entry' relates only to enforcement by action and therefore pertains only to legal proceedings brought against the beneficiary under such law. We therefore think it has no application to the facts of this case. But if we were to hold that it denied to a party the contracted right of entry—the only ground upon which respondent can deny appellant's right of possession of said land—then we are presented with the question as to whether the provisions of sections 1 and 2 above referred to impair the obligation of the contract entered into between respondent and appellant's grantor.

"That they do impair the obligation of this contract is perfectly apparent. As said by the court in *Edmonson v. Ferguson*, [11 Mo. 344]:

"If the General Assembly were to pass an act declaring . . . that a contract for the payment of any stipulated sum of money within one year . . . should not be due and payable for five years, it would be readily seen that the obligation of the contract was impaired—the contract would be lessened in value."

"Here by section 1, our lawmakers have attempted to extend the time for payment of money due under contract. If A. enters into a contract whereby he leases land to B., B.'s right of entry to come into existence and the term of the lease to commence upon a certain date, any law that would take from B. the right to enter on said land or defer the exercise of such right impairs A.'s obligation under such contract and thereby diminishes the value of such contract to B. Here, upon the happening of either one of two events, the lessor or his grantee had, under the contract entered into by respondent, the right to enter upon and take possession of said premises. Both events happened; respondent defaulted in payment of rent and the lessor sold the premises."

A statute reducing the revenue of a highway district does not impair the obligation of bonds previously issued unless it appears that the bondholders will thereby be defeated

or postponed in their right to the payment of the bonds when due. *Highway Dist. No. 1 v. Fremont County*, (1919) 32 Idaho 473, 185 Pac. 66.

2. Imposing Conditions on Foreign Corporations (p. 1115)

Requiring withholding of tax on salaries of employees.—A foreign corporation doing business within the state and elsewhere has no just ground of complaint against a state income tax, in the absence of any contract limiting the state's power of regulation, by reason of being required to adjust its system of accounting and paying salaries and wages to the extent required to fulfill the duty of deducting and withholding the tax from that part of the salaries and wages of its non-resident employees which was earned by them within the state, although the corporation asserts that the statute impairs the obligation of contracts between it and its employees, there being no averment, however, that any such contract, made before the passage of the statute, required the wages or salaries to be paid in the state of incorporation, where it has its principal place of business, or contained other provisions in anywise conflicting with the withholding requirement. *Travis v. Yale, etc., Mfg. Co.*, (1920) 252 U. S. 60, 40 S. Ct. 228, 64 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1919) 262 Fed. 576.

Where interstate commerce is not directly affected a state may forbid a foreign corporation from doing business or acquiring property within her borders unless a copy of the charter is filed with the secretary of state. *Munday v. Wisconsin Trust Co.*, (1920) 252 U. S. 499, 40 S. Ct. 365, 64 U. S. (L. ed.) —, *affirming* (1918) 168 Wis. 31, 168 N. W. 303, 169 N. W. 612.

4. Statute of Limitations (p. 1116)

Rule stated.—A statute cannot, under the guise of merely changing the remedy for asserting a right or for enforcing an obligation, immediately take away the right or materially impair the means of enforcing the obligation. The test of validity of a statute of limitation, under that doctrine, is whether it allows a reasonable time for the assertion of the right or the enforcement of the obligation; and the legislature is primarily the judge of the reasonableness of the time allowed. *Atchafalaya Land Co. v. F. B. Williams Cypress Co.*, (1920) 146 La. 1047, 84 So. 351.

Vol. XI, p. 5, art. 2, sec. 1.

Discretion of state as to manner of appointing electors.—Under this section the power of determining in what manner presidential electors shall be chosen and of prescribing the qualifications of the voters thereof is in the states. *In re Opinion of Justices*, (1919) 118 Me. 552, 107 Atl. 705, 5 A. L. R. 1407, wherein the court said: "The language of sec. 2 [sec. 1, cl. 2] is clear

and unambiguous. It admits of no doubt as to where the constitutional power of appointment is vested, namely, in the several states. 'Each state shall appoint in such manner as the Legislature thereof may direct' are the significant words of the section, and their plain meaning is that each state is thereby clothed with the absolute power to appoint electors in such manner as it may see fit, without any interference or control on the part of the federal government, except, of course, in case of attempted discrimination as to race, color, or previous condition of servitude under the fifteenth amendment. The clause, 'in such manner as the Legislature thereof may direct,' means simply that the state shall give expression to its will, as it must, of necessity, through its law-making body, the Legislature. The will of the state in this respect must be voiced in legislative acts or resolves, which shall prescribe in detail the manner of choosing electors, the qualifications of voters therefor, and the proceedings on the part of the electors when chosen.

"But these acts and resolves must be passed and become effective in accordance with and in subjection to the Constitution of the state, like all other acts and resolves having the force of law. The Legislature was not given in this respect any superiority over or independence from the organic law of the state in force at the time when a given law is passed. Nor was it designated by the Federal Constitution as a mere agency or representative of the people to perform a certain act, as it was under article 5 in ratifying a federal amendment, a point more fully discussed in the answer to the question concerning the federal prohibitory amendment. It is simply the ordinary instrumentality of the state, the legislative branch of the government, the lawmaking power, to put into words the will of the state in connection with the choice of presidential electors. The distinction between the function and power of the Legislature in the case under consideration and its function and power as a particular body designated by the Federal Constitution to ratify or reject a federal amendment is sharp and clear and must be borne in mind.

"It follows, therefore, that under the provisions of the Federal Constitution the state by its legislative direction may establish such a method of choosing its presidential electors as it may see fit, and may change that method from time to time as it may deem advisable; but the legislative acts both of establishment and of change must always be subject to the provisions of the Constitution of the state in force at the time such acts are passed and can be valid and effective only when enacted in compliance therewith.

"In the exercise of the power thus conferred by the Federal Constitution, various methods of electing presidential electors were adopted in the early days by the several states, as set forth in detail in Mc-

Pherson v. Blacker, 146 U. S. at pages 29 to 35, 13 Sup. Ct. 3, 36 L. Ed. 869."

Vol. XI, p. 72, art. 3, sec. 1.

VI. Exercise of judicial functions by other departments.

2. Imposed on executive and administrative officers.

a. In general.

VIII. Diminution of compensation.

VI. EXERCISE OF JUDICIAL FUNCTIONS BY OTHER DEPARTMENTS

2. Imposed on Executive and Administrative Officers

a. In General (p. 89)

Right of Congress to confer judicial powers.—"The judicial power granted by section 1, art. 3, of the Constitution of the United States, is the power to try the ten classes of cases specified in section 2 of that article; but said sections neither expressly nor impliedly prohibit the Congress from conferring judicial power upon other courts, or upon executive or other officers, in other cases, where, in its opinion, the devolution of such power is either necessary or convenient in the execution of the authority granted to the legislative or to the executive department of the government through the Constitution. The congressional power to make such grant and to vest such power in state courts and officers, in such cases, exists by virtue of the established rule that the grant of a power to accomplish an object is a grant of the authority to select and use the appropriate means to attain it. *Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476." *State v. Huser*, (1919) 76 Okla. 130, 184 Pac. 113.

Congress is not prohibited from conferring judicial power upon other courts or other agencies as to cases not covered by the classes specified in section 2 of this article where the exercise of such power is deemed necessary and convenient in the execution of the authority granted to it by the Constitution. *In re Jessie*, (E. D. Okla. 1919) 259 Fed. 694.

VIII. DIMINUTION OF COMPENSATION (p. 93)

Income tax.—A federal district judge cannot, consistently with the provision that all federal judges shall, at stated times, receive for their services a compensation "which shall not be diminished during their continuance in office," be subjected to an income tax imposed in respect of his salary as such judge. *Evans v. Gore*, (1920) 253 U. S. 245, 40 S. Ct. 550, 64 U. S. (L. ed.) —, (reversing *W. D. Ky.* 1919) 262 Fed. 550) wherein the court said: "Apart from his salary, a Federal judge is as much within the taxing power as other men are. If he has a home or other property, it may be taxed just as if it belonged to another. If he has an income other than his salary, it

also may be taxed in the same way. And, speaking generally, his duties and obligations as a citizen are not different from those of his neighbors. But for the common good—to render him, in the words of John Marshall, 'perfectly and completely independent, with nothing to influence or control him but God and his conscience'—his compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support.

"The court below concluded that the compensation was not diminished, and regarded this as inferable from our decisions in *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 174, 175, 62 L. ed. 1049, 1051, 1052, 38 Sup. Ct. Rep. 432, and *United States Glue Co. v. Oak Creek*, 247 U. S. 321, 329, 62 L. ed. 1135, 1141, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 748. We think neither case tends to support that view. Each related to a business—one to exportation, the other to interstate commerce—which the taxing power—of Congress in one case, of a state in the other—was restrained from directly burdening; and the holding in both was that an income tax was laid, not on the gross receipts, but on the net proceeds remaining after all expenses were paid and losses adjusted, did not directly burden the business, but only indirectly and remotely affected it. Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation as well as otherwise. The taxing act directs that the compensation—the full sum, with no deduction for expenses—be included in computing the net income, on which the tax is laid. If the compensation be the only income, the tax falls on it alone; and, if there be other income, the inclusion of the compensation augments the tax accordingly. In either event the compensation suffers a diminution to the extent that it is taxed."

Vol. XI, p. 95, art. 3, sec. 2.

VII. "Of admiralty and maritime jurisdiction."

6. Power of Congress to legislate over maritime law.

a. In general.

7. Power of state to legislate over maritime law.

c. State Workmen's Compensation Act.

VII. "OF ADMIRALTY AND MARITIME JURISDICTION."

6. Power of Congress to Legislate Over Maritime Law

a. In General (p. 120)

The Federal Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law, and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime

jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law, or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters, and bring them within control of the federal government, was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere. *Knickerbocker Ice Co. v. Stewart*, (1920) 253 U. S. 149, 40 S. Ct. 438, 64 U. S. (L. ed.) —, reversing (1919) 226 N. Y. 302, 123 N. E. 382.

The mere reservation of partially concurrent cognizance to state courts by an act of Congress conferring an otherwise exclusive admiralty jurisdiction upon the federal courts could not create substantive rights or obligations, nor indicate assent to their creation by the states. *Knickerbocker Ice Co. v. Stewart*, (1920) 253 U. S. 149, 40 S. Ct. 438, 64 U. S. (L. ed.) —, reversing (1919) 226 N. Y. 302, 123 N. E. 382.

7. Power of State to Legislate Over Maritime Law

c. State Workmen's Compensation Act (p. 124)

Congress exceeded its constitutional power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, by attempting, as it did in the Act of October 6, 1917 (see 1918 Supp. p. 414), to permit the application of Workmen's Compensation Laws of the several states to injuries within the admiralty and maritime jurisdiction, thus virtually destroying the harmony and uniformity which the Constitution not only contemplated, but actually established. *Knickerbocker Ice Co. v. Stewart*, (1920) 253 U. S. 149, 40 S. Ct. 438, 64 U. S. (L. ed.) —, reversing (1919) 226 N. Y. 302, 123 N. E. 382. See to the same effect *Sudden v. Industrial Acc. Commission*, (Cal. 1920). 188 Pac. 803.

Vol. XI, p. 153, art. 3, sec. 2.

I. ORIGINAL JURISDICTION OF SUPREME COURT

2. "In Which a State Shall Be Party"

a. Limited to Cases Enumerated in Preceding Clause (p. 154)

A suit brought by a citizen against his own state without its consent is not drawn within the original jurisdiction of the Supreme Court by the provision conferring original jurisdiction upon that court in all cases in which a state shall be a party, since this clause merely distributes into original and appellate jurisdiction the jurisdiction previously conferred, and does not

itself grant any new jurisdiction. *Duhne v. New Jersey*, (1920) 251 U. S. 311, 40 S. Ct. 154, 64 U. S. (L. ed.) —, wherein the court said: "But it has been long since settled that the whole sum of the judicial power granted by the Constitution to the United States does not embrace the authority to entertain a suit brought by a citizen against his own state without its consent. *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842; *North Carolina v. Temple*, 134 U. S. 22, 10 Sup. Ct. 509, 33 L. Ed. 849; *California v. Southern Pacific Co.*, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683; *Fitts v. McGhee*, 172 U. S. 516, 524, 19 Sup. Ct. 269, 43 L. Ed. 535.

"It is urged, however, that although this may be the general rule, it is not true as to the original jurisdiction of this court, since the second clause of section 2, article 3, of the Constitution, confers original jurisdiction upon this court 'in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party. . . .' In other words, the argument is that the effect of the clause referred to is to divest every state of an essential attribute of its sovereignty by subjecting it without its consent to be used in every case if only the suit is originally brought in this court. Here again the error arises from treating the language of the clause as creative of jurisdiction instead of confining it to its merely distributive significance according to the rule long since announced as follows:

"This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only." *Louisiana v. Texas*, 176 U. S. 1, 16, 20 Sup. Ct. 251, 256 (44 L. Ed. 347).

"That is to say, the fallacy of the contention consists in overlooking the fact that the distribution which the clause makes relates solely to the grounds of federal jurisdiction previously conferred and hence solely deals with cases in which the original jurisdiction of this court may be resorted to in the exercise of the judicial power as previously given. In fact, in view of the rule now so well settled as to be elementary, that the federal jurisdiction does not embrace the power to entertain a suit brought against a state without its consent, the contention now insisted upon comes to the proposition that the clause relied upon provides for the exercise by this court of original jurisdiction in a case where no federal judicial power is conferred."

Vol. XI, p. 185, art. 4, sec. 1.

III. To judicial proceedings, 840.

9. Effect of foreign judgment, 840.

d. Same effect as in state in which rendered, 840.

[10]7. Defenses, that may be set up in suit on foreign judgment, 841.

a. Want of jurisdiction, 841.

(3) Facts necessary to give jurisdiction, 841.

(6) Service of process, 841.

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III. To JUDICIAL PROCEEDINGS

9. Effect of Foreign Judgment

d. Same Effect as in State in Which Rendered (p. 194)

To the same effect as the original annotation; see *Bruce v. Ackroyd*, (Conn. 1920) 110 Atl. 835, and see further, annotations to R. S. sec. 905 set out in this volume under the title *EVIDENCE, ante*, p. 505.

Original cause of action not maintainable in courts of state as ground for refusal to enforce foreign judgment entered in such cause.—The fact that the original cause of action could not have been maintained in the courts of a state is not an answer to a suit upon a judgment rendered by a court of another state. There a state statute providing that no action shall be brought or prosecuted in that state for damages occasioned by death occurring in another state in consequence of wrongful conduct contravenes the full faith and credit clause of the Federal Constitution when construed by the state courts as forbidding the maintenance of an action upon a judgment recovered in a court of another state, in conformity with the laws of that state, for negligently causing the death of plaintiff's intestate in that state. *Kenney v. Supreme Lodge, etc.*, (1920) 252 U. S. 411, 40 S. Ct. 371, 64 U. S. (L. ed.) — (*reversing* (1918) 285 Ill. 188, 120 N. E. 631, 4 A. L. R. 964), wherein the court said: "In the court below and in the argument before us reliance was placed upon *Anglo-American Provision Co. v. Davis Provision Co.*, No. 1, 191 U. S. 373, 24 Sup. Ct. 92, 48 L. Ed. 225, and language in *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239, the former as showing that the clause requiring full faith and credit to be given to judgments of other states does not require a state to furnish a court, and the latter as sanctioning an inquiry into the nature of the original cause of action in order to determine the jurisdiction of a court to enforce a foreign judgment founded upon it. But we are of opinion that the conclusion sought to be built upon these premises in the present case cannot be sustained. *Davis Provision Co. v. Anglo-American Provision Co.* was a suit by a foreign corporation on a

foreign judgment against a foreign corporation. The decision is sufficiently explained without more by the views about foreign corporations that had prevailed unquestioned since *Bank of Augusta v. Earle*, 13 Pet. 579, 589-591, 10 L. Ed. 274; cited 191 U. S. 375, 24 Sup. Ct. 92, 48 L. Ed. 225. Moreover no doubt there is truth in the proposition that the Constitution does not require the state to furnish a court. But it also is true that there are limits to the power of exclusion and to the power to consider the nature of the cause of action before the foreign judgment based upon it is given effect.

"In *Fauntleroy v. Lum*, 210 U. S. 230, 28 Sup. Ct. 641, 52 L. Ed. 1039, it was held that the courts of Mississippi were bound to enforce a judgment rendered in Missouri upon a cause of action arising in Mississippi and illegal and void there. The policy of Mississippi was more actively contravened in that case than the policy of Illinois is in this. Therefore the fact that here the original cause of action could not have been maintained in Illinois is not an answer to a suit upon the judgment. See *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475; *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292. But this being true, it is plain that a state cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent. The assumption that it could not do so was the basis of the decision in *International Text Book Co. v. Pigg*, 217 U. S. 91, 111, 112, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103, and the same principle was foreshadowed in *General Oil Co. v. Crain*, 209 U. S. 211, 216, 220, 228, 28 Sup. Ct. 475, 52 L. Ed. 754, and in *Fauntleroy v. Lum*, 210 U. S. 230, 235, 236, 28 Sup. Ct. 641, 52 L. Ed. 1039. See *Keyser v. Lowell*, 117 Fed. 400, 54 C. C. A. 574; *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 148, 28 Sup. Ct. 34, 52 L. Ed. 143, and cases cited. Whether the Illinois statute should be construed as the Mississippi Act was construed in *Fauntleroy v. Lum* was for the Supreme Court of the state to decide, but read as that court read it, it attempted to achieve a result that the Constitution of the United States forbade.

"Some argument was based upon the fact that the statute of Alabama allowed an action to be maintained in a court of competent jurisdiction within the state "and not elsewhere." But when the cause of action is created the invalidity of attempts to limit the jurisdiction of other states to enforce it has been established by the decisions of this court. *Tennessee Coal, Iron & R. R. Co. v. George*, 233 U. S. 354, 34 Sup. Ct. 587, 58 L. Ed. 997, L. R. A. 1916D, 685; *Atchison, Topeka & Santa Fé Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695. And had these decisions been otherwise they would not have imported that a

judgment rendered exactly as required by the Alabama statute was not to have the respect due to other judgments of a sister state."

[10]7. *Defenses that May Be Set up in Suit on Foreign Judgment*

a. Want of Jurisdiction

(3) *Facts Necessary to Give Jurisdiction* (p. 202)

"The record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist; that want of jurisdiction may be shown either as to the subject-matter or the person." *Pembleton v. Illinois Commercial Men's Assoc.*, (1919) 289 Ill. 99, 124 N. E. 355.

(6) *Service of Process*

(f) *Service on Foreign Corporations* (p. 205)

"It has also been settled by the federal decisions that three conditions are necessary to give a court jurisdiction in personam over a foreign corporation: first, it must appear that the corporation was carrying on its business in the state where process was served on its agent; second, that the business was transacted or managed by some agent or officer appointed by or representing the corporation in such state; third, the existence of some local law making such corporation amenable to suit there as a condition, express or implied, of doing business in the state. 21 R. C. L. 1340; *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *Armstrong Co. v. New York Central & Hudson River Railroad Co.*, 129 Minn. 104, 151 N. W. 917, L. R. A. 1916E 232, Ann. Cas. 1916E 335. It is also established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; *Commercial Mutual Accident Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. Ed. 782, and cases there cited.

"The courts have laid down no all-embracing rule by which it may be determined what constitutes the doing of business by a foreign corporation in such manner as to make it subject to jurisdiction. In general it may be said that the business must be of such a character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process. 21 R. C. L. 1341; *Green v. Chicago, Burlington & Quincy*

Railway Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; *St. Louis Southwestern Railway Co. v. Alexander*, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 496, Ann. Cas. 1915B, 77. The transaction of business must be such that the corporation is for the time being within the state in which it is sued. *Armstrong Co. v. New York Central & Hudson River Railroad Co.*, *supra*. The general rule is that the mere solicitation of business by agents of a foreign corporation is not such 'doing business' within the state as to subject the foreign corporation to the jurisdiction of the courts of the state in which the business is solicited. The tendency of the courts, however, in recent years, seems to be toward considering agents engaged in soliciting business as the representatives of the corporation for the purpose of the service of process. 21 R. C. L. 1342. The rule has been laid down by the United States Supreme Court that where there is a continuous course of business in the state by the solicitation of orders which are sent to another state, in response to which the subject-matter thereof is delivered in the state where the order was taken and payment is received therein by money, notes, or checks, this constitutes doing business in such state, rendering the corporation subject to the process of its courts. *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479. But so far as we are advised the federal courts have never laid down the rule that the mere solicitation of business by agents of a foreign corporation within the state was the doing of business in that state. Many decisions hold that the taking of orders for goods in a state by an ordinary agent or salesman is not doing business therein, where orders so taken are forwarded to the corporation at its domicile for its acceptance and the goods are sent directly to the purchasers. 12 R. C. L. 76." *Pemberton v. Illinois Commercial Men's Assoc.*, (1919) 289 Ill. 99, 124 N. E. 355.

b. Fraud (p. 205)

By virtue of the full faith and credit provision of the Federal Constitution, the courts of this state are bound to give to the judgment of a sister state the same faith and credit, and only the same, which it has in the state where it was rendered; if re-examinable, or subject to defense on certain grounds there, it is open to the same inquiries and subject to the same defenses here. It follows that the requirement that full faith and credit shall be given in one state to the judgments obtained in another will not prevent the courts of this state, in which legal and equitable rights and remedies are administered in one court and in one form of action, from permitting an equitable defense to be interposed against a judgment obtained by fraud in another state, where the courts of the state where the judgment was rendered are authorized to vacate

or enjoin the enforcement of a judgment obtained by fraud. *Shary v. Fazlinger*, (N. D. 1920), 176 N. W. 938.

[12]9. Judgments in Particular Cases Conclusive Vel Non

e. Relating to Marriage and Divorce

(4) Decree of Alimony (p. 214)

Alimony payable in instalments.—Where alimony is payable in instalments accrued payments are within the protection of the full faith and credit clause, but the decree may be modified as to instalments which have not fallen due. *Critser v. Gaffey*, (Tex. 1920) 222 S. W. 193.

Decree not final.—The full faith and credit clause does not apply to a foreign decree for alimony which is subject to modification by the court rendering it. *Levine v. Levine*, (1920) 95 Ore. 94, 187 Pac. 609, holding, however, that such a judgment is "at least prima facie final."

(5) Custody of Children (p. 214)

Power of juvenile court.—The award of the custody of a child in one state does not preclude the juvenile court of another state from awarding the custody to another on a finding that the child is neglected. *Hartman v. Henry*, (Mo. 1920) 217 S. W. 987.

Vol. XI, p. 220, art. 4, sec. 2.

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2. Privileges belonging to citizenship, 842.

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II. NATURE OF PRIVILEGES AND IMMUNITIES

2. Privileges Belonging to Citizenship

(p. 223)

To the same effect as the original annotation see *Maxwell v. Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 64 U. S. (L. ed.) —, *affirming* (1917) 90 N. J. L. 707, 101 Atl. 248; *Hill v. Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 64 U. S. (L. ed.) —, *affirming* (1918) 92 N. J. L. 514, 105 Atl. 893.

III. WHO ARE CITIZENS

1. Corporations as Citizens (p. 226)

To the same effect as the original annotation see *Adams v. American Agricultural Chemical Co.*, (Fla. 1919) 82 So. 850.

IV. LEGISLATION AFFECTING PRIVILEGES AND IMMUNITIES

2. State Taxation

a. Discriminating Tax on Sales by Nonresident (p. 232)

A state statute imposing license taxes on the manufacturer or other person engaged in the business of selling automobiles in this state, reducing the rate if three-fourths of the entire assets of the manufacturer are invested and returned for taxes herein, applies indiscriminately to the manufacturers of every state, and being for the object of reducing the license tax for selling automobiles in this state when the seller is already paying a tax here on three-fourths of his assets, is not in violation of this section. *Bethlehem Motors Corp. v. Flynt*, (1919) 178 N. C. 399, 100 S. E. 693.

c. Taxation of Property of Nonresident (p. 237)

State law imposing income tax on non-residents.—Nonresidents are not denied their constitutional privileges or immunities, nor the equal protection of the laws, by a state tax imposed upon the net income derived by them from property owned within the state, and from any business, trade, or profession carried on within its borders, either on the theory that, since the tax is, as to citizens of the state, a purely personal tax, measured by their incomes, while, as applied to a nonresident, it is essentially a tax upon his property and business within the state, to which the property and business of citizens and residents of the state are not subjected, there was a discrimination against the nonresident, or because the taxing statute permits residents to deduct from their gross income not only losses incurred within the state, but also those sustained elsewhere, while nonresidents may deduct only those incurred within the state. *Shaffer v. Carter*, (1920) 252 U. S. 37, 40 S. Ct. 221, 64 U. S. (L. ed.) —.

So, there is no unconstitutional discrimination against citizens of other states in a state income tax law merely because it confines the deduction of expenses, losses, etc., in the case of nonresident taxpayers, to such as are connected with income arising from sources within the taxing state. *Travis v. Yale, etc., Mfg. Co.*, (1920) 252 U. S. 60, 40 S. Ct. 228, 64 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1919) 262 Fed. 576.

Again a state income tax law does not unconstitutionally discriminate against non-citizens merely because it confines the withholding at source to the income of nonresidents, since such provision does not in any way increase the burden of the tax upon nonresidents, but merely recognizes the fact that, as to them, the state imposes no personal liability, and hence adopts a convenient substitute for it. *Travis v. Yale, etc., Mfg. Co.*, (1920) 252 U. S. 60, 40 S. Ct.

228, 64 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1919) 262 Fed. 576.

But privileges and immunities of citizens of New York are unconstitutionally denied to citizens of Connecticut and New Jersey by the provision of the New York Income Tax Law which denies to all nonresidents, without special reference to citizenship, the exemptions accorded to residents, viz., \$1,000 of the income of a single person, \$2,000 in the case of a married person, and \$200 additional for each dependent, although the nonresident, if liable to an income tax in his own state, including income derived from sources within New York, and subject to taxation under the New York act, is allowed a credit upon the income tax otherwise payable to New York by the same proportion of the tax payable to the state of his residence as his income subject to taxation by the New York act bears to his entire income taxed in his own state, provided that such credit shall be given only if the laws of said state grant a substantially similar credit to residents of New York subject to income tax under such laws, and although the New York act also excludes from the income of non-resident taxpayers annuities, interest on bank deposits, interest on bonds, notes, or other interest-bearing obligations, or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession, or occupation carried on in the state, subject to taxation under that act. *Travis v. Yale, etc., Mfg. Co.*, (1920) 252 U. S. 60, 40 S. Ct. 228, 64 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1919) 262 Fed. 576, wherein it was further held that the discrimination against citizens of Connecticut and New Jersey could not be upheld on the theory that nonresidents have untaxed income derived from sources in their home states or elsewhere outside of the state of New York, corresponding to the amount upon which residents of the latter state are exempt from taxation under the act. Moreover it was held that a discrimination by the state of New York in its income tax legislation against citizens of adjoining states would not be cured were those states to establish like discriminations against citizens of the state of New York.

d. Discrimination as to Collateral Inheritance Taxes (p. 238)

Privileges and immunities of New Jersey citizens are not denied to citizens of other states, nor are the privileges or immunities of citizens of the United States abridged by the New Jersey Inheritance Tax Law under which the tax on the transfer by will or intestacy of the estate of a nonresident decedent, consisting of property both within and without the state, is first ascertained on the entire estate as though it were the estate of a resident with all the decedent's property, both real and personal, situated within the state, and is then apportioned

and assessed in the proportion that the taxable estate within the state bears to the entire estate, wherever situated, although by reason of the graduation of the tax the application of the apportionment formula fixed by the statute may result in a greater tax on the transfer of the property of the estate subject to the state's jurisdiction than would be assessed for the transfer of an equal amount, in similar manner, of the property of a resident decedent. *Maxwell v. Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 64 U. S. (L. ed.) —, *affirming* (1917) 90 N. J. L. 707, 101 Atl. 248; *Hill v. Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 64 U. S. (L. ed.) —, *affirming* (1918) 92 N. J. L. 514, 105 Atl. 893.

11. Statute of Limitations (p. 247)

Constitutional privileges and immunities of a nonresident citizen are not denied by the exemption accorded to resident citizens by the provisions of a state statute, that "when a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued," where the foreign limitation, though shorter than that of Minnesota, is not unduly short. *Canadian Northern R. Co. v. Eggen*, (1920) 252 U. S. 553, 40 S. Ct. 402, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1918) 255 Fed. 937, 167 C. C. A. 229, wherein the court said: "This court has never attempted to formulate a comprehensive list of the rights included within the 'privileges and immunities' clause of the Constitution (article 4, § 2), but it has repeatedly approved as authoritative the statement by Mr. Justice Washington, in 1825, in *Corfield v. Coryell*, 4 Wash. C. C. 371, 380, Fed. Cas. No. 3,230 (the first federal case in which this clause was considered), saying: 'We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental.' *Slaughter-House Cases*, 16 Wall. 36, 75, 21 L. Ed. 394; *Blake v. McClung*, 172 U. S. 239, 248, 19 Sup. Ct. 165, 43 L. Ed. 432; *Chambers v. Baltimore & Ohio R. R. Co.*, 207 U. S. 142, 155, 28 Sup. Ct. 34, 52 L. Ed. 143. In the *Corfield Case* the court included in a partial list of such fundamental privileges 'the right of a citizen of one state . . . to institute and maintain actions of any kind in the courts of' another. The state of Minnesota, in the statute we are considering, recognized this right of citizens of other states to institute and maintain suits in its courts as a fundamental right, protected by the Constitution, and for one year from the time his cause of action accrued the respondent was given all of the rights which citizens of Minnesota had under it. The discrimination of which he complains could arise only from his own neglect. This is not disputed, nor can it be fairly claimed that the limita-

tion of one year is unduly short, having regard to the likelihood of the dispersing of witnesses to accidents such as that in which the respondent was injured, their exposure to injury and death, and the failure of memory as to the minute details of conduct on which questions of negligence so often turn. Thus, the holding of the Circuit Court of Appeals comes to this, that the privilege and immunity clause of the Constitution guarantees to a nonresident precisely the same rights in the courts of a state as resident citizens have, and that any statute which gives him a less, even though it be an adequate, remedy is unconstitutional and void.

"Such a literal interpretation of the clause cannot be accepted.

"From very early in our history, requirements have been imposed upon nonresidents in many, perhaps in all, of the states as a condition of resorting to other courts, which have not been imposed upon resident citizens. For instance, security for costs has very generally been required of a nonresident, but not of a resident citizen, and a nonresident's property in many states may be attached under conditions which would not justify the attaching of a resident citizen's property. This court has said of such requirements:

"Such a regulation of the internal affairs of a state cannot reasonably be characterized as hostile to the fundamental rights of citizens of other states. . . . It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each state of the privileges and immunities secured by the Constitution to citizens of the several states.' *Blake v. McClung*, 172 U. S. 239, 256, 19 Sup. Ct. 165, 172 (43 L. Ed. 432).

"The principle on which this holding rests is that the constitutional requirement is satisfied if the nonresident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.

"This is the principle on which this court has repeatedly ruled that contracts were not impaired in a constitutional sense by change in limitation statutes which reduced the time for commencing actions upon them, provided a reasonable time was given for commencing suit before the new bar took effect. *Sohn v. Waterson*, 17 Wall. 596, 21 L. Ed. 737; *Terry v. Anderson*, 95 U. S. 628, 632, 24 L. Ed. 365; *Tennessee v. Sneed*, 96 U. S. 69, 74, 24 L. Ed. 610; *Antoni v. Green-*

how, 107 U. S. 769, 774, 2 Sup. Ct. 91, 27 L. Ed. 468.

"A like result to that which we are announcing was reached with respect to similar statutes, in *Chemung Canal Bank v. Lowery*, 93 U. S. 72, 23 L. Ed. 806; by the Circuit Court of Appeals, Second Circuit, in *Aultman & Taylor Co. v. Syme*, 79 Fed. 238, 24 C. C. A. 539; in *Klotz v. Angle*, 220 N. Y. 347, 116 N. E. 24; and in *Robinson v. Oceanic Steam Navigation Co.*, 112 N. Y. 315, 325, 19 N. E. 625, 627 (2 L. R. A. 636).

"In this last case the Court of Appeals of New York pertinently says:

"A construction of the constitutional limitation [the one we are considering] which would apply it to such a case as this would strike down a large body of laws which have existed in all the states from the foundation of the government, making some discrimination between residents and nonresidents in legal proceedings and other matters."

"The laws of Minnesota gave to the non-resident respondent free access to its courts, for the purpose of enforcing any right which he may have had, for a year — as long a time as was given him for that purpose by the laws under which he chose to live and work — and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit elsewhere is not revived for his benefit by the laws of the state to which he went for the sole purpose of prosecuting his suit. The privilege extended to him for enforcing his claim was reasonably sufficient and adequate and the statute is a valid law."

31. Legislation against Diseased Animals (p. 254)

A state statute forbidding the importation of sheep from a state which has been designated by proclamation as a place where epidemic disease of sheep exists, but making no discrimination in favor of sheep owned by residents, is valid. *Ex p. Goddard*, (Nev. 1920) 190 Pac. 916.

Vol. XI, p. 284, art. 4, sec. 3.

VI. GOVERNMENT OF TERRITORIES

4. Territorial Courts

a. In General (p. 301)

Under this section Congress may create territorial courts and confer upon them judicial power. The establishing of such courts and the conferring of such authority constitutes appropriate means to the exercise of the power to make needful rules respecting such territory. *In re Jessie*, (E. D. Okla. 1919) 259 Fed. 694.

Vol. XI, p. 309, art. 5.

Methods of proposing amendments.—In *In re Opinion of Justices*, (1919) 118 Me. 544, 107 Atl. 673, 5 A. L. R. 1412, the court, commenting on the different methods authorized by this article for proposing amendments, said:

"It will be observed that there are two distinct stages in the process, the proposal and the ratification. The proposal may originate in either of two ways:

"First, from Congress, by joint resolution, whenever two-thirds of both Houses deem it necessary.

"Second, from the states, whenever two-thirds of the Legislatures of the several states may request that a national constitutional convention be called for that purpose, in which case Congress must call such a convention.

"All the federal amendments which have thus far been adopted have been proposed in compliance with the first method; that is, by a joint resolution of the two Houses of Congress. No national constitutional convention has ever been called or held. Such proposed amendment is a matter within the sole control of the two houses, and is independent of all executive action. The signature of the President is not necessary, and it need not be presented to him for approval or veto. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. Ed. 644; *State v. Dahl*, 6 N. D. 81, 69 N. W. 418, 34 L. R. A. 97. Nor is Congress, in proposing constitutional amendments, strictly speaking, acting in the exercise of ordinary legislative power. It is acting in behalf of and as the representative of the people of the United States under the power expressly conferred by article 5, before quoted. The people, through their Constitution, might have designated some other body than the two houses or a national constitutional convention as the source of proposals. They might have given such power to the President, or to the Cabinet, or reserved it in themselves; but they expressly delegated it to Congress or to a constitutional convention."

Methods of adopting proposed amendments.—In *In re Opinion of Justices*, (1919) 118 Me. 544, 107 Atl. 673, 5 A. L. R. 1412, the court commenting on the different methods authorized by this article for adopting proposed amendments said:

"As there are two methods of proposal, so there are two methods of ratification. Whether an amendment is proposed by joint resolution or by a national constitutional convention, it must be ratified in one of two ways:

"First, by the Legislatures of three-fourths of the several states; or,

"Second, by constitutional conventions held in three-fourths thereof, and Congress is given the power to prescribe which mode of ratification shall be followed.

"Hitherto Congress has prescribed only the former method, and all amendments heretofore adopted have been ratified solely by the approving action of the Legislature in three-fourths of the states. That is the mode of ratification prescribed by Congress in case of the amendment now under consideration, and it was in pursuance of that prescribed mode that this ratifying resolve was passed by the Legislature of Maine.

"Here, again, the state Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by article 5. The people, through their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature; that is, the Legislative Assembly."

"Two-thirds of both houses."—The two-thirds vote in each House of Congress, which is required in proposing an amendment to the Constitution, is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a two-thirds vote of the entire membership, present and absent. *National Prohibition Cases*, (1920) 253 U. S. 360, 40 S. Ct. 486, 64 U. S. (L. ed.) —, *affirming Feigenspan v. Bodine*, (D. C. N. J. 1920) 264 Fed. 186.

In *Ohio v. Cox*, (S. D. Ohio 1919) 257 Fed. 334, an application was made for an injunction to restrain the governor of Ohio from submitting the Eighteenth Amendment (1919 Supp. Fed. Stat. Ann. 339) to the state legislature for ratification. It was contended that the proposed amendment had not been passed by two-thirds of both houses of Congress in accordance with this article. Answering this contention, the court said:

"The writ of injunction is an extraordinary remedy, to be issued only when the threatened injury, unless restrained, would be irreparable. If the proceedings in the Senate and in the House were not in accordance with the applicable provision of the Constitution, plaintiff, or any citizen of Ohio, by petition, if no member of the General Assembly acts, may show to the General Assembly, if it can be shown, in what respect they are violative of the Constitution. It cannot be assumed in advance that the General Assembly of Ohio will take any action violative of the Constitution of the United States. Moreover, if the two houses of the General Assembly should take a vote on the subject, one cannot say in advance what the result would be. The proposed amendment may be rejected, because the members of the General Assembly may think the proceedings at Washington were not in consonance with the Constitution, or because of insufficient votes in the affirmative. Indeed, the General Assembly may take no action at all. So far as one state in the Union is concerned, out of the three-fourths necessary for the adoption of the amendment, it may be that the affirmative action of the

Ohio General Assembly would be an injury to the plaintiff, if he were otherwise in a position to claim injury; but the writ of injunction does not issue to restrain acts which may or may not be injurious.

"Moreover, if the plaintiff is injured, that injury does not arise until the proposed amendment is adopted by the respective Legislatures of three-fourths of the states. Who can say that that result will come to pass within the seven years the state Legislatures are given to act? The act of the Governor and the affirmative act of the General Assembly would not be an irreparable injury, or any injury, to the plaintiff, if the requisite number of states, by their Legislatures, did not adopt the amendment. However that may be, and whatever the extent of the injury to the plaintiff affirmative action by the General Assembly of Ohio might be, it cannot be said that the act of the Governor in transmitting this certified copy constitutes an irreparable injury to the plaintiff.

"Since restraint on the Governor is the only relief sought, injunction must be denied, because no irreparable injury will result from what he threatens to do. . . .

"What is meant in article 5 by the expression, 'Whenever two-thirds of both Houses shall deem it necessary'? It is argued that 'two-thirds of both houses' means two-thirds of the members elected to those houses, and not two-thirds of a quorum. If this is right, then the joint resolution did not receive the necessary two-thirds in either house. It is argued with much force that, when the framers of the Constitution required action by a fractional part of the members to be effective with respect to certain subjects-matter, the fraction always had coupled with it the 'members present.' Article 1, § 3, par. 6, provides, in the trial of impeachments by the Senate:

"'. . . And no person shall be convicted without the concurrence of two-thirds of the members present.'

"Article 1, § 5, par. 3, as to the demand for the yeas and nays:

"'. . . And the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.'

"As to making treaties, article 2, § 2, par. 2:

"'. . . He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. . . .'

"But, when the subject-matter is an amendment of the Constitution, or the passing of an act over the President's veto, it is required that 'two-thirds of both houses' shall concur, as to one, and 'two-thirds of that house' in which the bill originated shall agree to pass the bill over the veto, as to the other. This, it is said, shows conclusively the purpose to require, in these especially important matters, the concurrence of two-thirds of the entire membership, as dis-

tinguished from two-thirds of a quorum or two-thirds of those present.

"What does 'house' mean? Webster says:

"One of the estates of a kingdom assembled in Parliament or Legislature; a body of men united in their legislative capacity; as the House of Lords, or Peers, of Great Britain, the House of Commons, the House of Representatives."

"So, when we speak of 'both houses,' we mean the members meeting in their legislative capacity. While passing such a resolution is not a legislative act, in the sense that it is the enactment of a law, yet it is action by the legislative bodies assembled in their legislative capacity. Indeed, a resolution is the first step in that which may result, as has often resulted, in establishing, and in that sense enacting, the fundamental law which is the supreme law of the land. In passing the resolution each house acts in the same capacity in which it enacts ordinary legislation; and when we say that a bill or resolution has passed the Senate or House, as the case may be, we mean that it has received the number of votes required for the transaction of business.

"Section 5 of article 1 provides:

"Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business. . . ."

"A part of the business of the Senate and of the House is to pass laws; a part of its business is to pass joint resolutions proposing amendments to the Constitution. If a quorum is present, they may transact that business. If a majority of a quorum in either house votes for a bill, it passes that house. If two-thirds of a quorum in each house votes for the resolution, it passes the house, in the ordinary course of the legislative business intrusted to it by the Constitution.

"In *United States v. Ballin*, 144 U. S. 1, 5, 12 Sup. Ct. 507, 509 (36 L. Ed. 321) the Supreme Court, speaking through Mr. Justice Brewer, said:

"The Constitution provides that 'a majority of each [house] shall constitute a quorum to do business.' . . . Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent of any single member or fraction of the majority present. All that the Constitution requires is the presence of a majority, and when that majority are present the power of the House arises."

"And at page 6 of 144 U. S., at page 509 of 12 Sup. Ct. (36 L. Ed. 321):

"The general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations; as, for instance,

in those states where the Constitution provides that a majority of all the members elected to either house shall be necessary for the passage of any bill. No such limitation is found in the federal Constitution, and therefore the general law of such bodies obtains."

"Among the many cases cited is *State v. Delieesseline*, 1 McCord (S. C.) 43, 49, in which it is said:

"For, according to the principle of all the cases referred to, a quorum possesses all the powers of the whole body; a majority of which quorum must of course govern. . . . The Constitutions of this state and of the United States declare that a majority shall be a quorum to do business; but a majority of that quorum are sufficient to decide the most important question."

"Since the 'body' is the 'house,' and a majority of a quorum transact the business of the house in passing a bill, so two-thirds of a quorum passes a resolution proposing an amendment. So it seems to this court."

"Shall deem it necessary."—The adoption by both Houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution, sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. *National Prohibition Cases*, (1920) 253 U. S. 350, 40 S. Ct. 486, 64 U. S. (L. ed.) —, *affirming Feigenspan v. Bodine*, (D. C. N. J. 1920) 264 Fed. 186.

Ratification of amendments by legislature as permitting referendum to people.—Referendum provisions of state constitution and statutes cannot be applied in the ratification or rejection of amendments to the Federal Constitution without violating the requirement of this article, that such ratification shall be by the legislatures of the several states, or by conventions therein, as Congress shall decide. *Hawke v. Smith*, (1920) 253 U. S. 221, 231, 40 S. Ct. 495, 498, 64 U. S. (L. ed.) — (*reversing* (1919) 100 Ohio St. 385, 540, 128 N. E. 400), wherein the court said: "The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by 'legislatures'? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. Article 1, § 2, prescribes the qualifications of electors of Congressmen as 'those requisite for electors of the most numerous branch of the state legislature.' Article 1, § 3, provided that Senators shall be chosen in each state by the legislature thereof, and this was the method of choosing Senators until the adoption of the 17th Amendment, which made provision for the election of Senators by vote of the people, the electors

to have the qualifications requisite for electors of the most numerous branch of the state legislature. That Congress and the states understood that this election by the people was entirely distinct from legislative action is shown by the provision of the Amendment giving the legislature of any state the power to authorize the executive to make temporary appointments until the people shall fill the vacancies by election. It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote. The necessity of the Amendment to accomplish the purpose of popular election is shown in the adoption of the Amendment. In article 4 the United States is required to protect every state against domestic violence upon application of the legislature, or of the executive when the legislature cannot be convened. Article 6 requires the members of the several legislatures to be bound by oath or affirmation, to support the Constitution of the United States. By article 1, § 8, Congress is given exclusive jurisdiction over all places purchased by the consent of the legislature of the state in which the same shall be. Article 4, § 3, provides that no new states shall be carved out of old states without the consent of the legislatures of the states concerned.

"There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several states. Article 1, § 2.

"The Constitution of Ohio in its present form, although making provision for a referendum, vests the legislative power primarily in a general assembly consisting of a senate and house of representatives. Article 2, § 1, provides:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives, but the people reserve to themselves the power to propose to the general assembly, laws and amendments to the Constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided."

"The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the

word. It is but the expression of the assent of the state to a proposed amendment.

"At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the 11th Amendment. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. ed. 644. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution, as an inspection of the original roll showed that it had never been submitted to the President for his approval, in accordance with article 1, § 7, of the Constitution. The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing the President with a qualified negative on the acts and resolutions of Congress. In a footnote to this argument of the Attorney General, Justice Chase said: 'There can surely be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution.' The court by a unanimous judgment held that the amendment was constitutionally adopted.

"It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the state derives its authority from the Federal Constitution to which the state and its people have alike assented.

"This view of the amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 *et seq.* Any other view might lead to endless confusion in the manner of ratification of Federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several states."

See to the same effect National Prohibition Cases, (1920) 253 U. S. 350, 40 S. Ct. 486, 64 U. S. (L. ed.) —; *Ex p. Dillon*, (N. D. Cal. 1920) 262 Fed. 563; *Prior v. Noland*, (Colo. 1920) 198 Pac. 729; *Barlotti v. Lyons*, (Cal. 1920) 189 Pac. 232.

The constitutional provision that the states shall ratify proposed amendments by their legislatures does not require or contemplate a submission of the proposed amendment to the voters under state referendum laws. *In re Opinion of Justices*, (1919) 118 Me. 544, 107 Atl. 673, 5 A. L. R. 1412, wherein the court said:

"It admits of no doubt that in the matter of amendment which is governed by article 5, the people divested themselves of all authority and conferred the power of proposal upon Congress or upon a national constitutional convention, and the power of ratification upon the state Legislature or upon state constitutional conventions. . . . It fol-

lows, from what has been said, that even if the people of Maine, by adopting in 1908 the initiative and referendum amendment of our state Constitution, had attempted to assume or regain the power of ratification of proposed amendments to the federal Constitution, by exercising a supervisory authority over the state Legislature in that respect, such attempt would have been futile. Their power over amendments had been completely and unreservedly lodged with the bodies designated by article 5, and so long as that article remains unmodified they have no power left in themselves either to propose or to ratify federal amendments. The authority is elsewhere.

"But the people, by the adoption of the initiative and referendum amendment, did not intend to assume or regain such power.

"The purpose and scope of that amendment were fully considered and discussed in the case of *Moulton v. Scully*, 111 Me. 428, 446, 80 Atl. 944, and it was there held that the design of the initiative and referendum was to make the law-making power of the Legislature, not final, but subject to the will of the people, and to confer that power in the last analysis upon the people themselves."

"Legislature" in this article means the legislative assembly and does not include a referendum to the people. *Decher v. Vaughan*, (Mich. 1920) 177 N. W. 388, wherein the court said:

"The purpose of the Constitution was to establish a representative form of government, not a pure democracy in which all power is exercised by the people acting as a whole. While it provides for a popular branch of the legislative department, to be elected at short intervals by the vote of those entitled to the elective franchise in the several states, it is suggestive that neither the President, Vice President, nor United States Senators are to be so elected. It is also significant that when there was a popular demand that Senators should be elected, it was not deemed sufficient to provide in the state Constitutions for a referendum in making the selection, although the Constitution provided that they 'should be chosen by the Legislature,' but an amendment to the federal Constitution, the seventeenth, was adopted therefor.

"The term 'legislature' is thus defined: 'That body of men which makes the laws for a state or nation' (Bouvier's Law Dict. (Rawle's Ed.) 17)—and 'legislative power' as: 'Authority exercised by that department of government which is charged with the enactment of law as distinguished from the executive and judicial functions. The law-making power of a sovereign state.'

"Counsel for the relators insist that under our state Constitution 'the power to legislate is vested in both the constituent assembly and the electors themselves'; that in writing article 5 of the federal Constitution its framers intended to submit an amendment to such legislative power for

ratification, and not merely to the legislative body known as the Legislature. We cannot but think that such an interpretation does violence to the plain meaning of the word 'legislature' as understood at the time the federal Constitution was adopted. There were then lawmaking bodies, always referred to as 'legislatures,' in all of the colonies which under the Constitution afterwards became states. This term is frequently used in the Constitution, and an examination will reveal the fact that in most cases it could not be applied other than to such assemblies.

"It is suggested that the intent of the Constitution is simply 'to call the roll of states and get an expression from each state as to its will and desire.' In what way shall such expression be voiced? The Constitution says by the 'legislatures.' In making response, the members act collectively, and when a majority of those constituting such bodies respond in the affirmative, and such action is certified to the federal authorities by a sufficient number of states, the amendment is adopted, and is thereafter a part of the Constitution.

"The action of the Legislature in ratifying an amendment is not, strictly speaking, a legislative act. It is but one of several steps required to be taken to change the federal Constitution. The Congress, or the states by petition, must first propose an amendment. In order that it may become operative, it must receive the assent of the states by ratification in the manner provided in article 5. How shall such assent be expressed? By the adoption by the state Legislature of a joint resolution ratifying the amendment. The state thus participates in the making of a new law simply by expressing its assent thereto in the manner provided. It has not thereby enacted a law any more than the President or Governor does so by approving bills passed by the Congress or Legislature.

"The language of article 5 of our state Constitution negatives the claim of relators. It provides:

"The legislative power of the state of Michigan is vested in a Senate and House of Representatives."

"This is followed by the provisions relating to the referendum wherein the right 'to approve or reject at the polls any act passed by the Legislature' is reserved to the people. The framers of this instrument thus clearly distinguish between the legislative power vested in the Legislature and the Legislature itself. The former embraces the right to enact legislation, the latter the body in whom such right is primarily vested. Under the provisions which follow as to initiative and referendum, the people have no power to enact legislation until the proposal therefor has been submitted by petition to the Legislature for action thereon. The right of the people to thus legislate in no way makes them a part of the Legislature, or changes the well-recognized meaning of that term."

Power to amend Constitution as authorizing prohibition amendment.—The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the 18th Amendment to the Federal Constitution, is within the power to amend reserved by the 5th article of such Constitution. *National Prohibition Cases*, (1920) 253 U. S. 350, 40 S. Ct. 486, 64 U. S. (L. ed.) —, *affirming* *Feigenspan v. Bodine*, (D. C. N. J. 1920) 264 Fed. 186.

Vol. XI, p. 310, art. 6.

II. Supremacy of acts of Congress and Treaties.

4. Treaties binding on the states.
 - a. In general.

IV. State taxation.

2. Of federal agencies.
 - a. In general.

II. SUPREMACY OF ACTS OF CONGRESS AND TREATIES

4. Treaties Binding on the States

- a. In General (p. 321)

State testamentary laws.—In *Chryssikos v. Demarco*, (1919) 134 Md. 533, 107 Atl. 358, it was held that there was no conflict between the Maryland testamentary laws and the "most-favored nation" clause of the treaty between Greece and the United States which made it necessary for the Maryland courts to appoint the Greek consul to administer the estate of a Greek citizen resident of Maryland at the time of his death rather than a person qualified under the Maryland laws for appointment. The court said: "There can, of course, be no question about the obligation of state courts to obey and respect treaties made under the authority of the United States, as the Constitution and the laws of the United States made in pursuance thereof and all treaties made under the authority of the United States are the supreme law of the land, 'and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.' Article 6, Const. of U. S. Article 2 of the Declaration of Rights of this state is to the same effect, and for the most part in the same language. When, then, the rights of a party under a treaty are alleged to be involved, it behooves a court to give such a case its most thorough investigation and consideration, so that such rights as he has will be fully protected, and possible international controversies be avoided. We are not required, however, to give a strained construction to the language of a treaty, or place an unreasonable interpretation upon it, for the purpose of securing to foreigners privileges which are denied citizens of this country."

IV. STATE TAXATION

2. Of Federal Agencies

- a. In General (p. 328)

Property of "Fleet Corporation."—Land standing in the name of the United States Shipping Board Emergency Fleet Corporation and improved by it by the erection thereon of a number of workmen's dwellings, for the use of persons employed in shipbuilding in the vicinity, and also certain ships and shipyard shops and appurtenances standing on land belonging to a private shipbuilding company, are not taxable by state authorities; since the Fleet Corporation is a governmental agency, exclusively employed in governmental work, and "the fact that the ships and shops are on land belonging to the shipbuilding company does not, so long as the things taxed are the property of an agency of the United States, and are used exclusively for governmental purposes, make them taxable." *U. S. v. Coghlan*, (D. C. Md. 1919) 261 Fed. 425.

Vol. XI, p. 345, amend. 1.

The Espionage Act of June 15, 1917 (see 1918 Supp. p. 118) does not fall within the language of this amendment. *Abrams v. U. S.*, (1919) 250 U. S. 616, 40 S. Ct. 17, 64 U. S. (L. ed.) —; *Seebach v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 885.

Injunction against picketing.—The amendment is a restraint on congressional action, and has no application to an injunction to prevent the picketing of a business establishment by the members of a trade union. *Hughes v. Kansas City Motion Picture Mach. Operators*, (Mo. 1920) 221 S. W. 95.

Vol. XI, p. 351, amend. 4.

VI. "Unreasonable searches and seizures."

2. Necessity for warrant.
4. Opening letters and papers in mail.
6. Compelling an officer of corporation to produce corporate books and papers.
11. Use of papers or property illegally obtained as evidence.

VI. "UNREASONABLE SEARCHES AND SEIZURES"

2. Necessity for Warrant (p. 354)

To same effect as original annotation, see *Fitter v. U. S.*, (C. C. A. 2d Cir. 1919) 258 Fed. 567, 169 C. C. A. 507, wherein it appeared that books and papers of a person accused of a conspiracy to defraud the United States in the sale of supplies to the navy were taken from his store in his absence and that the persons taking them had no search warrant.

4. Opening Letters and Papers in Mail (p. 355)

Letters written by prisoner and opened by prison officials.—The use in evidence in a

criminal case of letters voluntarily written by the accused after the crime, while he was in prison, and which came into the possession of the prison officials under established practice reasonably demanded to promote discipline, did not infringe the constitutional safeguards against self-incrimination or unreasonable searches and seizures. *Stroud v. U. S.*, (1919) 251 U. S. 15, 40 S. Ct. 50, 64 U. S. (L. ed.) —.

6. *Compelling an Officer of Corporation to Produce Corporate Books and Papers* (p. 357)

To same effect as original annotation, see *United Mine Workers v. Coronado Coal Co.*, (C. C. A. 8th Cir. 1919) 258 Fed. 829, 160 C. C. A. 549.

11. *Use of Papers or Property Illegally Obtained as Evidence* (p. 359)

The knowledge gained by the federal government's own wrong in seizing papers in violation of the owners' constitutional protection against unlawful searches and seizures cannot be used by the government in a criminal prosecution by serving subpoenas upon such owners to produce the original papers, which it had returned after copies had been made, and by obtaining a court order commanding compliance with such subpoenas. *Silverthorne Lumber Co. v. U. S.*, (1920) 251 U. S. 385, 40 S. Ct. 182, 64 U. S. (L. ed.) —, wherein the court said:

"The proposition could not be presented more nakedly. It is that, although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834. 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the 4th Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like many others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed. The numerous decisions, like *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, holding that a col-

lateral inquiry into the mode in which evidence has been got will not be allowed when the question is raised for the first time at the trial, are no authority in the present proceeding, as is explained in *Weeks v. United States*, 232 U. S. 383, 394, 395, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. Whether some of those decisions have gone too far or have given wrong reasons it is unnecessary to inquire; the principle applicable to the present case seems to us plain. It is stated satisfactorily in *Flagg v. United States*, 233 Fed. 481, 483, 147 C. C. A. 367. In *Linn v. United States*, 251 Fed. 476, 480, 163 C. C. A. 470, it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers. But the rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way."

Stolen property recovered by unauthorized search may be introduced in evidence on a trial for burglary. *Ripsey v. State*, (Tex. Crim. 1920) 219 S. W. 463.

Vol. XI, p. 374, amend. 5.

VI. MATTERS OF PLEADING AND PROCEDURE AS INVOLVING JEOPARDY

14. *Reversal on Appeal by Defendant* (p. 389)

A person found guilty of murder in the first degree by a verdict which, conformably to Pen. Laws, sec. 330 (see vol. 7, p. 983), mitigates the punishment to life imprisonment, is not placed twice in jeopardy by an unqualified conviction for first-degree murder carrying the death penalty in a new trial had after the earlier conviction was reversed upon a writ of error sued out by the accused. *Stroud v. U. S.*, (1919) 251 U. S. 15, 40 S. Ct. 50, 64 U. S. (L. ed.) —.

Vol. XI, p. 390, amend. 5.

XIII. When may not be compelled to testify.

3. Requiring production of private books and papers.

- a. In general.
- c. In bankruptcy proceedings.

XIII. WHEN MAY NOT BE COMPELLED TO TESTIFY

3. *Requiring Production of Private Books and Papers*

- a. In General (p. 402)

The seizure without a search warrant of books and papers of a defendant in a criminal prosecution is a violation of his constitutional rights under this amendment. *Fitter v. U. S.*, (C. C. A. 2d Cir. 1919) 258 Fed. 567, 169 C. C. A. 507.

- c. In Bankruptcy Proceedings (p. 404)

In possession of trustee in bankruptcy.—The use in evidence of books of a partner-

ship lawfully in the hands of a trustee in bankruptcy by virtue of an order of the bankruptcy court was held not in violation of this amendment in the case of *People v. Bransfield*, (1919) 289 Ill. 72, 124 N. E. 365.

Vol. XI, p. 408, amend. 5.

- I. Not a limitation on the states.
- VI. Operation in acquired territory.
- X. Deprivation of life and liberty.
 - 15. Limiting compensation of pension agents and attorneys.
- XI. Deprivation of property.
 - 5. Extending Interstate Commerce Act to private oil pipe line owners.
 - 8. Webb-Kenyon Law.
 - 14. Deprivation of use of postal service.

I. NOT A LIMITATION ON THE STATES (p. 411)

To the same effect as the original annotation, see *New York, etc., Co. v. New York Cent. R. Co.*, (Pa. 1920) 110 Atl. 286.

VI. OPERATION IN ACQUIRED TERRITORY (p. 412)

As applicable to *Philippine Islands*.—The constitutional limitations of power which operate upon the authority of Congress when legislating for the United States are inapplicable and do not control Congress when it comes to exert, in virtue of the sovereignty of the United States, legislative power over territory not forming a part of the United States, because not incorporated therein. *Public Utility Com'rs v. Ynchausti*, (1920) 251 U. S. 401, 40 S. Ct. 277, 64 U. S. (L. ed.) —.

X. DEPRIVATION OF LIFE AND LIBERTY

15. Limiting Compensation of Pension Agents and Attorneys (p. 431)

The limitation of the compensation of attorneys in the prosecution of claims against the United States to 20 per cent of the amount collected, any contract to the contrary notwithstanding, which was made by the Omnibus Claims Act of March 4, 1915, § 4, does not contravene this amendment, when applied to invalidate a contingent fee contract entered into and substantially performed before the passage of the statute—especially where, at the time the contract was made, there was no legislation, general or special, which conferred upon the claimant any right of recovery, even if he should establish to the satisfaction of Congress that his claim was equitable, and where the attorney accepted and received from the United States Treasury a warrant for 20 per cent of the amount appropriated, although this was not accepted by him as a full settlement of his rights against the client. *Calhoun v. Massie*, (1920) 253 U. S. 170, 40 S. Ct. 474, 64 U. S. (L. ed.) —, affirming (1918) 123 Va. 673, 97 S. E. 576.

An existing contract for the payment to an attorney for professional services to be rendered in the prosecution of a Civil War claim against the United States of a sum equal to 50 per cent of whatever might be collected was invalidated by the provision of the Omnibus Claims Act of March 4, 1915, which, after making an appropriation for payment of such claim, made it unlawful for any attorney to exact, collect, withhold, or receive any sum which, in the aggregate, exceeds 20 per cent of the amount of any item appropriated in that act, on account of services rendered or advances made in connection with said claim, any contract to the contrary notwithstanding. *Newman v. Moyers*, (1920) 253 U. S. 182, 40 S. Ct. 478, 64 U. S. (L. ed.) —, reversing (1917) 47 App. Cas. (D. C.) 102, Ann. Cas. 1918E 528.

XI. DEPRIVATION OF PROPERTY

5. Extending Interstate Commerce Act to Private Oil Pipe Line Owners (p. 440)

Regulating oil pipe line as within power of state utility commission.—An oil pipe line constructed solely to carry oil for particular producers under strictly private contracts, and never devoted by its owner to public use, could not, by mere legislative fiat or by any regulating order of a state commission, be converted by a state into a public utility, nor its owner made a common carrier, since that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment. But a corporation which has voluntarily devoted its oil pipe line to the use of the public may, consistently with due process of law, be subjected by a state to the regulatory powers of a state commission over the rates and practices of public utilities. And a common carrier cannot, by making contracts for future transportation or business, mortgaging its property or pledging its income, prevent or postpone the exertion by a state of the power to regulate the carrier's rates and practices, nor does the contract clause of the Federal Constitution interpose any obstacle to the exertion of such power. *Producers Transp. Co. v. California Commission*, (1920) 251 U. S. 228, 40 S. Ct. 131, 64 U. S. (L. ed.) —, affirming (1917) 176 Cal. 499, 169 Pac. 59.

8. Webb-Kenyon Law (p. 441)

Volstead Act extending wartime prohibition.—Congress could, consistently with the due process of law clause of this amendment, make effective forthwith the provisions of the Volstead Act of October 28, 1919, extending the existing war-time prohibition against the manufacture and sale of intoxicating liquors to nonintoxicating malt liquors with alcoholic content of as much as one-half of one per cent by volume, without making any compensation to the owner of such intoxicating liquors acquired before the pas-

sage of the act, and which before that time he could lawfully have sold. *Ruppert v. Caffey*, (1920) 251 U. S. 264, 40 S. Ct. 141, 64 U. S. (L. ed.) —.

14. Deprivation of Use of the Postal Service (p. 443)

The exclusion of a newspaper from transportation in the mails as second-class matter on the ground that it contains articles violating the Espionage Act (1918 Supp. Fed. Stat. Ann. 132) is not a denial of due process of law, where its publishers are accorded a hearing before an Assistant Postmaster General, and his decision is reviewed by the Postmaster General. *U. S. v. Burleson*, (App. Cas. D. C. 1919) 258 Fed. 282.

Vol. XI, p. 447, amend. 5.

III. Private property.

1. No distinction between real and personal property.

VI. Without just compensation.

1. What constitutes just compensation.
6. Interest on award.

III. PRIVATE PROPERTY

1. No Distinction Between Real and Personal Property (p. 451)

Placer mining claim as property.—*North American Transp., etc., Co. v. U. S.*, (1918) 53 Ct. Cl. 424, cited in the 1919 Supp. under this catchline, was affirmed in (1920) 253 U. S. 330, 40 S. Ct. 518, 64 U. S. (L. ed.) —.

VI. WITHOUT JUST COMPENSATION

1. What Constitutes Just Compensation (p. 466)

"Just compensation rests on equitable principles, and it means substantially that the owner should be put in as good position pecuniarily as he would have had if his property had not been taken. *United States v. Nahant*, 82 C. C. A. 470, 153 Fed. 520. When in the exercise of its sovereign power the government actually appropriates and takes possession of private property in advance of proceedings in condemnation, interest from the time of taking is in a sense a convenient commutation of the value of the use of the property or the direct loss the owner sustains until the value of the property itself is paid by deposit in court or otherwise. Something of substance is lacking in an award that omits all consideration of the time of the prior actual taking. That would be obvious in the case of a completed office building, and the difference here is but in degree, not in principle. An instance in which interest was regarded as an integral part of the principal sum in issue, and not within the statutes and decisions exempting the government, may be found in *United States v. New York*, 160 U. S. 598.

619, 16 Sup. Ct. 402, 40 L. Ed. 551. That was not a case of appropriation of private property, but there is a relevant analogy. In *United States v. Cress*, 243 U. S. 316, 319, 37 Sup. Ct. 380, 61 L. Ed. 746, the judgment of the District Court, which was affirmed, embraced interest, but the period for which it was allowed does not definitely appear. *United States v. First Nat. Bank* (D. C.) 250 Fed. 299, Ann. Cas. 1918E 36, is in point. There the government took possession of property some months before commencing condemnation proceedings in the District Court. In instructing the commissioners respecting their duties the court said:

"The sole question for you to determine, in each one of the cases, is the value of the lands and the property at the time of the actual taking and occupation by the United States, together with interest at the rate of 8 per cent. per annum, the legal rate in Alabama, on said sums so ascertained by you, from the date of such actual taking and occupation."

"The proceedings in that case were under Act July 2, 1917, c. 35, 40 Stat. 241, which provided that they should 'be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted.' But, as regards the essential elements of the just compensation to be paid, the requirement is not different from the conformity provisions of section 2 of the act of August 1, 1888, *supra*, applicable to the case at bar." *U. S. v. Rogers*, (C. C. A. 8th Cir. 1919) 257 Fed. 397, 168 C. C. A. 437.

6. Interest on Award (p. 470)

To same effect as original annotation, see *U. S. v. Rogers*, (C. C. A. 8th Cir. 1919) 259 Fed. 397, 168 C. C. A. 437; *U. S. v. Highsmith*, (C. C. A. 8th Cir. 1919) 257 Fed. 401, 168 C. C. A. 441.

Vol. XI, p. 474, amend. 6.

III. "In all criminal prosecutions."

7. Deportation of aliens.

V. By an impartial jury.

1. In general.

VII. Right to be informed of nature of accusation.

3. Indictment must set out particulars.

a. In general.

III. "IN ALL CRIMINAL PROSECUTIONS"

7. Deportation of Aliens (p. 478)

Dismissal of other proceedings against alien.—The fact that proceedings in a District Court of a territory against an alien for keeping and maintaining a house of ill fame are dismissed at the time deportation proceedings are begun against her under section 3 of the Act of Feb. 20, 1907 (3 Fed. Stat. Ann. (2d ed.) 649), does not deprive her of her constitutional right to trial by

jury, since the dismissal of the proceedings was not necessary to give the immigration officials the right to proceed, and an acquittal of the alien by a jury, if she had been thus tried and acquitted, would have been no obstacle to the deportation proceeding. *Tama Miyake v. U. S.*, (C. C. A. 9th Cir. 1919) 257 Fed. 732, 169 C. C. A. 20.

V. BY AN IMPARTIAL JURY

1. In General (p. 480)

Peremptory challenges—General defendants.—The constitutional right of defendants in criminal prosecutions to a trial by an impartial jury is not infringed by the requirement of Jud. Code sec. 287 (see vol. V, 2d ed., p. 1078) that in cases where there are several defendants they shall be treated as a single party for the purpose of peremptory challenges, since there is nothing in the Federal Constitution which requires Congress to grant peremptory challenges to defendants in criminal cases, and the privilege granted must be taken with the limitations placed upon its exercise. *Stilson v. U. S.*, (1919) 250 U. S. 583, 40 S. Ct. 28, 64 U. S. (L. ed.) —, *affirming* (E. D. Pa. 1918) 254 Fed. 120.

VII. RIGHT TO BE INFORMED OF NATURE OF ACCUSATION

3. Indictment Must Set Out Particulars

a. In General (p. 486)

An indictment which fails to distinctly and specifically describe the offense with which the accused is charged so as to advise him clearly what he has to meet and give him a fair and reasonable opportunity to prepare his defense, is defective as violating this amendment. *Fontana v. U. S.*, (C. C. A. 8th Cir. 1919) 262 Fed. 283.

Vol. XI, p. 494, amend. 7.

IV. In suits at common law.

9. Proceeding in rem for forfeiture.

22. Suit by broker to recover commission. [New.]

VI. Right of trial by jury.

5. Adoption of state remedies.

c. Compulsory references.

8. Unanimity in finding a verdict.

VII. Facts re-examined only according to rules of common law.

1. In general.

IV. IN SUITS AT COMMON LAW

9. Proceeding in Rem for Forfeiture (p. 502)

Forfeiture of automobile for unlawful transporting of liquor without a jury trial of the question whether the machine was in fact unlawfully used is not a violation of the amendment. One Hudson Super-Six Automobile Model v. State, (1920) 77 Okla. 130, 187 Pac. 806.

22. Suit by Broker to Recover Commission [New]

In an action by brokers to recover commissions for the purchase and sale of cotton on the cotton exchange, the question of whether the transactions out of which the claim of the plaintiffs arose were gambling transactions, is one of fact which they are entitled to have tried by a jury. *Thorn v. Browne*, (C. C. A. 8th Cir. 1919) 257 Fed. 519, 168 C. C. A. 469.

VI. RIGHT OF TRIAL BY JURY

5. Adoption of State Remedies

c. Compulsory References (p. 507)

Appointment of auditor.—The constitutional right to trial by jury is not infringed by the compulsory appointment of an auditor, in an action at law involving long accounts with many disputed items, to make a preliminary investigation as to the facts, hear the evidence, and report his findings, with a view to simplifying the issues for the jury, where the order of appointment, though directing the auditor to form and express an opinion upon facts and items in dispute, declares that he shall not finally determine any of the issues, and that the final determination of all issues of fact is to be made by the jury at the trial. *Ex p. Peterson*, (1920) 253 U. S. 300, 40 S. C. 543, 64 U. S. (L. ed.) —, wherein the court said:

"The command of the 7th Amendment that 'the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained. *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593, 596, 41 L. ed. 837, 841, 17 Sup. Ct. Rep. 421, 1 Am. Neg. Rep. 768. Compare *Twining v. New Jersey*, 211 U. S. 78, 101, 53 L. ed. 97, 107, 29 Sup. Ct. Rep. 14. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

"In so far as the task of the auditor is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object of each is to concentrate the controversy upon the questions which should control the result. *United States v. Gilmore*, 7 Wall. 491, 494, 19 L. ed. 282, 283; *Tucker v. United States*, 151 U. S. 164, 168, 38 L. ed. 112, 114, 14 Sup. Ct. Rep. 299. No one is entitled in a civil case to trial by jury

unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury, to require, with a view to formulating the issues, an oath by each party to the facts relied upon. *Fidelity & D. Co. v. United States*, 187 U. S. 315, 47 L. ed. 194, 23 Sup. Ct. Rep. 120. Nor does the requirement of a preliminary hearing infringe the constitutional right, either because it involves delay in reaching the jury trial or because it affords opportunity for exploring in advance the evidence which the adversary purposes to introduce before the jury. *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580. In view of these decisions it cannot be deemed an undue obstruction of the right to a jury trial to require a preliminary hearing before an auditor.

"Nor can the order be held unconstitutional as unduly interfering with the jury's determination of issues of fact, because it directs the auditor to form and express an opinion upon facts and items in dispute. The report will, unless rejected by the court, be admitted at the jury trial as evidence of facts and findings embodied therein; but it will be treated, at most, as prima facie evidence thereof. The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made. No incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor, or by the use to which his report may be put. An order of a court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or of verity. *Marx v. Hanthorn*, 148 U. S. 172, 182, 37 L. ed. 410, 413, 13 Sup. Ct. Rep. 508; *Turpin v. Lemon*, 187 U. S. 51, 59, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; *Reitler v. Harris*, 223 U. S. 437, 56 L. ed. 497, 32 Sup. Ct. Rep. 248. In *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, 430, 59 L. ed. 644, 657, P. U. R. 1915D, 1072, 35 Sup. Ct. Rep. 328, Ann. Cas. 1916B, 691, it was held that the provision in § 16 of the Interstate Commerce Act, making the findings and order of the Commission prima facie evidence of the facts therein stated in suits brought to enforce reparation awards, does not infringe upon the right of trial by jury. See also *Mills v. Lehigh Valley R. Co.*, 238 U. S. 473, 59 L. ed. 1414, 35 Sup. Ct. Rep. 888; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361, 382, 24 L. R. A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247. In the *Meeker* case this court relied especially upon *Holmes v. Hunt*, 122 Mass. 505, 23 Am. Rep. 381, and called attention to the fact that there the statute making the report of an auditor prima facie evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence, and in no wise inconsistent with the constitutional right of trial by jury. The reasons for holding an auditor's report

admissible as evidence are, in one respect, stronger than for giving such effect to the report of an independent tribunal like the Interstate Commerce Commission. The auditor is an officer of the court which appoints him. The proceedings before him are subject to its supervision, and the report may be used only if, and so far as, acceptable to the court.

"That neither the hearing before the auditor, nor the introduction of his report in evidence, abridges in any way the right of trial by jury, was the conclusion reached in 1902 in the district of Massachusetts in *Primrose v. Fenno*, 113 Fed. 375, 56 C. C. A. 313, 119 Fed. 801, the first reported case in which an auditor was appointed with the powers here conferred. The practice there established has been followed in the southern district of New York (*Vermeule v. Reilly*, 196 Fed. 226); and in the eastern district of Tennessee (United States use of *Brading-Marshall Lumber Co. v. Wells*, 203 Fed. 146)."

8. Unanimity in Finding a Verdict (p. 508)

State courts enforcing rights under Federal Employers' Liability Act.—State courts, when enforcing rights under the federal Employers' Liability Act, may give effect to a local practice permitting a less than unanimous verdict. *Chicago, etc., R. Co. v. Ward*, (1920) 252 U. S. 18, 40 S. Ct. 275, 64 U. S. (L. ed.) —, *affirming* (Okla. 1918) 173 Pac. 212, *following* *St. Louis, etc., R. Co. v. Brown*, (1916) 241 U. S. 223, 36 S. Ct. 602, 60 U. S. (L. ed.) 966.

VIII. FACTS RE-EXAMINED ONLY ACCORDING TO RULES OF COMMON LAW

1. In General (p. 513)

To same effect as original annotation, see *Thorn v. Browne*, (C. C. A. 8th Cir. 1919) 257 Fed. 519, 168 C. C. A. 469.

Vol. XI, p. 523, amend. 10.

- I. General reserved powers.
- VI. As to rights of property.

I. GENERAL RESERVED POWERS (p. 523)

"The jurisdiction, both legislative and judicial, of the several states of this Union, is, subject to the powers granted to the federal government by the Federal Constitution, supreme and absolute over all persons and property within their respective jurisdictions." *Palmer v. Sturgeon Bank*, (Mo. 1920) 218 S. W. 873.

Migratory bird treaty as infringing rights of several states.—See p. 511.

VI. AS TO RIGHTS OF PROPERTY (p. 528)

Amendment prohibiting manufacture or sale of intoxicating liquors.—In *Ohio v. Cox*, (S. D. Ohio 1919) 257 Fed. 334, which was a suit to restrain the governor of Ohio from submitting the Eighteenth Amendment (1919

Supp. Fed. Stat. Ann. 839) to the Ohio legislature, it was urged that the subject was within the powers reserved to the states or the people under this amendment. The court said:

"Counsel do not favor the court with decisions on this subject, but, granting to the claim all that may be argued for it, it must be said that the members of the Senate and the members of the House are the representatives of the states and the representatives of the people, respectively, to whom is given the power to propose amendments to the Constitution, which become such only when representatives of the people in three-fourths of the states concur. Reserved powers are so called because they have never been surrendered. When the requisite number of states concur, the people surrender to the United States additional power. It may be absolute, or it may be concurrent, becoming absolute only when Congress shows an intention of occupying the whole field embraced by the particular subject."

Vol. XI, p. 530, amend. 11.

XII. Suits against state officers.

1. In general.

10. Injunctions against state officers.

i. To restrain impairment of contract.

(2) As to public lands.

XII. SUITS AGAINST STATE OFFICERS

1. In General (p. 537)

To the same effect as the original annotation see *State v. State Board of Control*, (W. Va. 1920) 102 S. E. 688, wherein the court said: "It was once held by the Supreme Court of the United States, in an opinion rendered by Chief Justice Marshall in *Osborn v. Bank of U. S.*, 9 Wheat. 738, 6 U. S. (L. ed.) 204, that to constitute a suit against the state it was necessary for the state itself to be a party to the record; but this holding has been virtually overruled in a number of subsequent decisions, and the rule now followed by that court is that if the suit be one in which the state is vitally interested, and will have to satisfy the judgment or decree of the court, if satisfaction is made at all, then the suit is one against the state, within the meaning of the eleventh amendment to the Constitution of the United States, even though the suit nominally is one against the state's officers or agents. *In re Ayers*, 123 U. S. 443, 9 S. Ct. 164, 31 U. S. (L. ed.) 216, and cases reviewed in the opinion."

10. Injunctions Against State Officers

1. To Restrain Impairment of Contract

(2) As to Public Lands (p. 548)

Restraint cancellation of irrigation agreement.—A suit by an irrigation company against certain state officers, constituting the state board of land commissioners,

to compel them to accept an irrigation system pursuant to a contract with the company and to enjoin them from cancelling the contract or impairing the company's lien on the lands embraced in the project, is a suit against a state within the meaning of this amendment and not within the jurisdiction of a federal court. *Twin Falls Salmon River Land, etc., Co. v. Alexander*, (D. C. Idaho 1919) 260 Fed. 270.

Vol. XI, p. 554, amend. 13, sec. 1.

III. SLAVERY AND INVOLUNTARY SERVITUDE

1. Involuntary Servitude

a. In General (p. 556)

Master employing another's servant as liable for damages to that master.—A master who employs another's servant with knowledge of that fact, and that the servant has broken his contract of employment with the first master, is not liable in damages to such master, for if a liability were to arise under such circumstances the effect would be to compel a servant to work for his master against his will or be without employment, which would be in violation of this amendment. *Shaw v. Fisher*, (S. C. 1920) 102 S. E. 325, wherein the court said: "If no one else could have employed Carver during the term of his contract with plaintiff, after he had elected to break that contract, without incurring liability to plaintiff for damages, the result would have been to coerce him to perform the labor required by the contract; for he had to work or starve. The compulsion would have been scarcely less effectual than if it had been induced by the fear of punishment under a criminal statute for breach of his contract, which was condemned, as violative of the thirteenth amendment, in *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105. The prohibition is as effective against indirect as it is against direct actions and laws—statutes or decisions—which, in operation and effect, produce the condition prohibited. The validity of the law is determined by its operation and effect. Of course, the sanction of the obligation of the contract, and the liability to pay damages for breach thereof, inhere in every contract, and these alone do not amount to that compulsion which is prohibited so long as the employee has the liberty at any time to elect to break the contract, subject only to the legal consequences—an action for damages—just like any other contractor. But if the law should penalize all who give him employment, after he has breached his contract, the effect would be to deny to him the same freedom that every other contractor enjoys, to wit, that of election at any time to break his contract, subject only to his liability for damages. To that extent, liberty of action and freedom of contract is guaranteed by the fourteenth amendment."

Vol. XI, p. 577, amend. 14, sec. 1.

I. Prohibition on state action.

5. Not against wrongful action of individuals.

III. Privileges and immunities of citizens of the United States.

3. Of citizens of the United States.
10. Regulating pursuit of occupations.
 - b. Insurance.
13. Elections.

I. PROHIBITION ON STATE ACTION

5. Not against Wrongful Action of Individuals (p. 582)

A condition in a deed against sale or lease to negroes is not in violation of the amendment, which "addresses itself to the state government and its instrumentalities, to its legislative, executive, and judicial authorities, and not to contracts between individuals." Title Guarantee, etc., Co. v. Garrott, (Cal. App. 1919) 183 Pac. 470. See to the same effect Los Angeles Invest. Co. v. Gary, (Cal. 1920) 186 Pac. 596.

III. PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES

3. Of Citizens of the United States (p. 587)

To the same effect as the original annotation see Maxwell v. Bugbee, (1919) 250 U. S. 525, 40 S. Ct. 2, 64 U. S. (L. ed.) —, affirming (1917) 90 N. J. L. 707, 101 Atl. 248; Hill v. Bugbee, (1919) 250 U. S. 525, 40 S. Ct. 2, 64 U. S. (L. ed.) —, affirming (1918) 92 N. J. L. 514, 105 Atl. 893.

10. Regulating Pursuit of Occupations

b. Insurance (p. 604)

Regulating exchange of insurance.—A statute which does not attempt to forbid or penalize the making of contracts of insurance outside of the state, to be performed outside of the state, upon property within the state, but only prescribes the conditions under which persons or corporations outside of the state may exchange insurance with persons or corporations within the state, is a valid exercise of police power by the legislature, and does not in anywise interfere with their freedom to contract. Lewelling v. Manufacturing Wood-Workers Underwriters, (1919) 140 Ark. 124, 215 S. W. 258.

13. Elections (p. 609)

Property qualification in irrigation proceeding.—A statute giving a vote in irrigation district bond elections to owners of one acre or more of land in the district is not invalid because it disqualifies the owner of less than an acre of land. In re North Unit Irrigation Dist., (1920) 95 Ore. 520, 187 Pac. 839.

Vol. XI, p. 616, amend. 14, sec. 1.

V. "Person," 858.

1. In general, 858.
2. Corporations, 858.

VII. Nature and incidents of due process of law, 858.

1. In general, 858.

IX. Meaning of property, 858.

2. Right to sue, 858.

X. State action affecting life, liberty, or property, 858.

1. Exercise of police power, 858.

7. State control over court procedure, 859.

- a. In general, 859.

y. As to witnesses and evidence, 859.

- (10) Refusal of party to give his deposition, 859.

- (16) Burden of proof [New], 859.

a1. Judgment, 859.

- (16) Amount of judgment [New], 859.

a1. Appellate jurisdiction and procedure, 860.

- (1) Right of appeal, 860.

- (7) Limiting time to appeal [New], 860.

- (8) Overruling previous decision [New], 860.

8. Notice and opportunity to be heard, 860.

- a. In general, 860.

- c. Trial according to applicable mode of procedure, 861.

x. Inquisition in lunacy, 861.

j1. Service of process, 861.

- (7) On domestic corporations, 861.

- (16) Constructive service, 861.

- (a) In general, 861.

17. Summary destruction of property, 861.

- a. In general, 861.

- c. Property illegally used, 862.

19. Regulating priorities, 862.

- a. Displacing priority of liens, 862.

- d. Giving water rents priority of lien, 862.

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- a. Regulating payment of wages, 863.

- b. Workmen's Compensation Law, 863.

- m. Liability of mine owner for negligence of licensed manager or engineer, 864.

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- a. In general, 864.

- c. Regulating rates, 864.

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- (2) To establish equality in rates, 864.
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- (7) Must admit of earning just compensation, 866.
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- x1. Street railways, 866.
 - (1) In general, 866.
- 26. Water companies, 866.
 - a. In general, 866.
- 27. Gas and electric companies, 867.
 - b. Regulating rates, 867.
 - f. Requiring removal from streets of poles, wires, and conduits, 867.
- 37. Control of municipal corporations, 867.
 - a. In general, 867.
- 38. Regulating manufacture and sale of goods, 867.
 - b. Food laws generally, 867.
- 41. Eminent domain, 867.
 - i. Of water power to generate electricity, 867.
 - k. Question of necessity, 867.
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 - a. Must be provision for compensation, 868.
 - (1) In general, 868.
 - (9) May authorize possession before determination of amount, 868.
 - (10) Tribunal to assess compensation, 868.
 - (a) In general, 868.
- 42. Regulating pursuit of occupations, 868.
 - a. Practice of medicine, 868.
 - (1) In general, 868.
- 43. As affecting conveyance of or title to land, 868.
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- 107. Taxation, 868.
 - a. In general, 868.
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- (1) In general, 873.
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 - (3) Judicial proceeding not essential, 874.
 - (6) By board of revision, 874.

XI. Who may invoke constitutional right, 874.

1. In general, 874.

V. "PERSON"

1. In General (p. 636)

The term "person" as used in this amendment does not embrace the state. *Scott v. Frazier*, (D. C. N. D. 1919) 258 Fed. 669.

2. Corporations (p. 636)

Private corporations.—To same effect as original annotation, see *Scott v. Frazier*, (D. C. N. D. 1919) 258 Fed. 669.

VII. NATURE AND INCIDENTS OF DUE PROCESS OF LAW

1. In General (p. 639)

Federal decisions as controlling state decisions on question of what is due process of law.—State decisions as to due process of law must be controlled by decisions of the federal courts. *Pambleton v. Illinois Commercial Men's Assoc.*, (1919) 289 Ill. 99, 124 N. E. 355.

IX. MEANING OF PROPERTY

2. Right to Sue (p. 647)

Workmen's Compensation Act.—There is no vested right in the beneficiaries of a cause of action for death by wrongful act, which will invalidate an election by the intestate in his lifetime to be bound by the provisions of the *Workmen's Compensation Act*. *Grannison v. Bates, etc., Constr. Co.*, (1920) 187 Ky. 538, 219 S. W. 806.

X. STATE ACTION AFFECTING LIFE, LIBERTY OR PROPERTY

1. Exercise of Police Power (p. 647)

To same effect as original annotation, see *Fisher Flouring Mills Co. v. Brown*, (Wash. 1920) 187 Pac. 399, sustaining regulation as to "concentrated commercial feeding stuffs" for cattle.

Promotion of health and safety by municipality.—Every intendment is to be made in favor of the lawfulness of the exercise of municipal power in making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. *Sullivan v. Shreveport*, (1919) 251 U. S. 169, 40 S. Ct. 102, 64 U. S. (L. ed.) —, *affirming* (1918) 142 La. 573, 77 So. 286.

Requiring street railway to sprinkle portion of streets.—A street railway company may, consistently with due process of law, be required by municipal ordinance to sprinkle the surface of the streets occupied by its tracks between the rails and tracks, and for a sufficient distance beyond the outer rails, so as effectually to lay the dust and prevent the same from arising when the cars are in operation. *Pacific Gas, etc., Co. v. Police Ct.*, (1919) 251 U. S. 22, 40 S. Ct. 79, 64 U. S. (L. ed.) —, *affirming* (1915) 28 Cal. App. 412, 152 Pac. 928.

Promotion of general welfare.—In the process of the application of the police power to new and varied conditions affecting the public welfare, it has been gradually extended beyond its original scope. It was formerly concerned with the protection of the public health, morals and safety, but it is now recognized as extending to the promotion of the general welfare. *State v. J. M. Seney Co.*, (1919) 134 Md. 437, 107 Atl. 189.

7. State Control Over Court Procedure

a. In General (p. 654)

Validity of provision in state constitution making defense of contributory negligence one of fact for jury.—A state law may consistently with due process of law abolish the defense of contributory negligence. It may therefore provide in its constitution that the defense of contributory negligence shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury. *Chicago, etc., R. Co. v. Cole*, (1919) 251 U. S. 54, 40 S. Ct. 68, 64 U. S. (L. ed.) — (*affirming* (Okla. 1918) 177 Pac. 570), wherein the court said: "The argument that the Railroad Company had a vested right to that defense is disposed of by the decisions that it may be taken away altogether. *Arizona Employers' Liability Cases*, 250 U. S. 400, 39 Sup. Ct. 553, 63 L. Ed. —; *Bowersock v. Smith*, 243 U. S. 29, 34, 37 Sup. Ct. 371, 61 L. Ed. 572. It is said that legislation cannot change the standard of conduct which is matter of law in its nature into matter of fact, and this may be conceded; but the material element in the constitutional enactment is not that it called contributory negligence fact but that it left it wholly to the jury. There is nothing, however, in the Constitution of

the United States or its Amendments that requires a state to maintain the line with which we are familiar between the functions of the jury and those of the court. It may do away with the jury altogether, *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; modify its constitution, *Maxwell v. Dow*, 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. Ed. 597; the requirements of a verdict, *Minneapolis & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211, 36 Sup. Ct. 595, 60 L. Ed. 961, L. R. A. 1917A, 86, Ann. Cas. 1916E, 505; or the procedure before it, *Twining v. New Jersey*, 211 U. S. 78, 111, 29 Sup. Ct. 14, 53 L. Ed. 97; *Frank v. Mangum*, 237 U. S. 309, 340, 35 Sup. Ct. 582, 59 L. Ed. 969. As it may confer legislative and judicial powers upon a commission not known to the common law, *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150; it may confer larger powers upon a jury than those that generally prevail. Provisions making the jury judges of the law as well as of the facts in proceedings for libel are common to England and some of the states, and the controversy with regard to their powers in matters of law more generally as illustrated in *Sparf v. United States*, 156 U. S. 51, 715, 15 Sup. Ct. 273, 39 L. Ed. 343, and *Georgia v. Brailsford*, 3 Dall. 1, 4, 1 L. Ed. 483, shows that the notion is not a novelty. In the present instance the plaintiff in error cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed."

y. As to Witnesses and Evidence

(10) Refusal of Party to Give His Deposition (p. 670)

To the same effect as the original annotation, see *Kwiatkowski v. Putzhaven*, (Ind. 1920) 126 N. E. 3.

(16) Burden of Proof [New] (p. 671)

Shifting burden of proof.—A state statute providing that in case of delay in the delivery of a shipment the burden of showing that the delay was not due to negligence shall be on the carrier does not deny due process of law. *Cunningham v. Chicago, etc., R. Co.*, (Mo. 1919) 215 S. W. 5.

a1. Judgment

(16) Amount of Judgment [New] (p. 675)

Judgment on motion for rents pendente lite.—Due process is not denied by a statute providing that in a possessory action "the plaintiff may have judgment for the rent or rental value of the premises which accrues after judgment and before delivery of possession, by motion in the court in which the judgment was rendered, ten days' notice thereof in writing being given, unless judgment is stayed by appeal and bond given to suspend the judgment, in which case the motion may be made after the affirmation thereof." *Genardini v. Kline*, (Ariz. 1920) 190 Pac. 568.

a1. Appellate Jurisdiction and Procedure

(1) Right of Appeal (p. 676)

Restriction on right.—A state statute does not violate this section because it makes a judgment of an intermediate appellate court final unless such court shall grant a certificate of importance and appeal to the Supreme Court, or the Supreme Court shall require, by certiorari or otherwise, the case to be certified to the Supreme Court. *McGinnis v. McGinnis*, (1919) 289 Ill. 608, 124 N. E. 562.

(7) Limiting Time to Appeal [New] (p. 679)

A state statute providing that if a motion for a new trial is filed after the time to appeal has expired it shall not extend the time to appeal does not deny due process of law. *Bates v. Ransome-Crummey Co.*, (Cal. App. 1919) 184 Pac. 39.

(8) Overruling Previous Decision [New] (p. 679)

The overruling of a prior decision under which an oil lease has been obtained is not a taking of property without due process of law. *McCray v. Miller*, (1920) 78 Okla. 16, 184 Pac. 781, 186 Pac. 1089.

8. Notice and Opportunity to Be Heard

a. In General (p. 679)

Judicial review.—The provisions of the Oklahoma laws for the enforcement by penalties of rate-fixing orders of the state corporation commission violate this amendment, because the only judicial review of such orders possible under the state laws is that arising in proceedings to punish for contempt, in which the penalties imposed for a refusal to obey such an order may be \$500 for each offense, each day's continuance of failure or refusal to obey the order constituting a separate offense. *Oklahoma Operating Co. v. Love*, (1920) 252 U. S. 331, 40 S. Ct. 338, 64 U. S. (L. ed.) — (followed in *Oklahoma Gin Co. v. Oklahoma*, (1920) 252 U. S. 339, 40 S. Ct. 341, 64 U. S. (L. ed.) —, reversing (*Okla.* 1916) 158 Pac. 629), wherein the court said: "The order of the Commission prohibiting the company from charging, without its permission, rates higher than those prevailing in 1913, in effect prescribed maximum rates for the service. It was, therefore, a legislative order; and under the Fourteenth Amendment plaintiff was entitled to an opportunity for a review in the courts of its contention that the rates were not compensatory. *Chicago, etc., Railway Co. v. Minnesota*, 134 U. S. 418, 456-458, 10 Sup. Ct. 462, 33 L. Ed. 970; *Ex parte Young*, 209 U. S. 123, 165, 166, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. The Constitution of the state prohibited any of its courts from reviewing any action of the Commission within its

authority except by way of appeal to the Supreme Court (article 9, section 20); and the Supreme Court had construed the Constitution and applicable provisions of the statutes as not permitting a direct appeal from orders fixing rates. *Harriss-Irby Cotton Co. v. State*, *supra*. On behalf of the Commission it was urged at the oral argument that a judicial review of the order fixing rates might have been had also by writ of mandamus or of prohibition issuing out of the Supreme Court of the state. But, in view of the provision of the state Constitution just referred to, it must be assumed, in the absence of a decision of a state court to the contrary, that neither remedy, even if otherwise available, could be used to review an order alleged to be void because confiscatory. The proviso 'that the writs of mandamus and prohibition shall lie from the Supreme Court to the Commission in all cases where such writs, respectively, would lie to any inferior court or officer,' appears to have no application here. The challenge of a prescribed rate as being confiscatory raises a question, not as to the scope of the Commission's authority, but of the correctness of the exercise of its judgment. Compare *Hirsh v. Twyford*, 40 Okl. 220, 230, 139 Pac. 313.

"So it appears that the only judicial review of an order fixing rates possible under the laws of the state was that arising in proceedings to punish for contempt. The Constitution endows the Commission with the powers of a court to enforce its orders by such proceedings. Article 9, sections 18, 19. By boldly violating an order a party against whom it was directed may provoke a complaint; and if the complaint results in a citation to show cause why he should not be punished for contempt, he may justify before the Commission by showing that the order violated was invalid, unjust or unreasonable. If he fails to satisfy the Commission that it erred in this respect, a judicial review is opened to him by way of appeal on the whole record to the Supreme Court. But the penalties, which may possibly be imposed, if he pursues this course without success, are such as might well deter even the boldest and most confident. The penalty for refusal to obey an order may be \$500; and each day's continuance of the refusal after service of the order, it is declared, 'shall be a separate offense.' The penalty may apparently be imposed for each instance of violation of the order. In *Oklahoma Gin Co. v. State*, 251 U. S. —, 40 Sup. Ct. 341, 64 L. Ed. —, decided this day, it appears that the full penalty of \$500, with the provision for the like penalty for each subsequent day's violation of the order, was imposed in each of three complaints there involved, although they were merely different instances of charges in excess of a single prescribed rate. Obviously a judicial review beset by such deterrents does not satisfy the constitutional requirements, even if other-

wise adequate, and therefore the provisions of the acts relating to the enforcement of the rates by penalties are unconstitutional without regard to the question of the insufficiency of those rates."

c. Trial According to Applicable Mode of Procedure (p. 682)

Failure to hear cause in banc.—No federal constitutional right is violated because of the refusal to transfer a cause from the division of the highest court of the state which heard it to the court in banc. *Goldsmith v. George G. Prendergast Constr. Co.*, (1920) 252 U. S. 12, 40 S. Ct. 273, 64 U. S. (L. ed.) —, *affirming* (1918) 273 Mo. 184, 201 S. W. 364.

x. Inquisition in Lunacy (p. 690)

The state alone, as *parens patriae*, is charged with the duty of caring for the insane within its borders, and may adopt whatever method of procedure it may desire for inquisition into their condition and the necessity for their confinement, provided the same is not in contravention of the Constitution or laws of the United States. Thus, where pursuant to a state statute an alleged insane person is personally examined by the committing magistrate and two physicians and is given an opportunity to be heard, there is no violation of this amendment. *Shapley v. Cohoon*, (D. C. Mass. 1918) 256 Fed. 752.

11. Service of Process

(7) On Domestic Corporations (p. 695)

Outside county where suit brought.—Due process of law is not denied by a statute providing that "service of summons and other process upon the agent designated under the provisions of section 825 at any place in this state shall be sufficient service to give jurisdiction over such corporation to any of the courts of this state, whether the service was had upon said agent within the county where the suit is brought or is pending or not." *Pekin Cooperage Co. v. Duty*, (1919) 140 Ark. 135, 215 S. W. 715.

(16) Constructive Service

(a) In General (p. 700)

Rule in Indiana.—In *Temperly v. Indianapolis*, (Ind. 1920) 127 N. E. 149, the court said:

"It has been uniformly held in this state that notice by publication, given in conformity to the statutes authorizing proceedings for the location and construction of highways, drains, sewers, and other works of quasi public character, is such legal notice as to authorize a judgment ordering the improvement and fixing a lien against real estate affected thereby. Such a notice in such a proceeding is sufficient to confer jurisdiction on the court, and such a judg-

ment in pursuance thereof is rendered in accordance with due process of law."

17. Summary Destruction of Property

a. In General (p. 716)

Seizure of property without opportunity to dispose of same after passage of act making its possession unlawful.—Where a commodity constituting property, not inherently dangerous to persons or to their fundamental rights, or injurious to the public welfare because of its mere possession, is lawfully possessed before and at the time of the adoption or enactment of laws forbidding its possession, and such continued possession is not for an unlawful purpose or use, and is not an incipient nuisance, and does not jeopardize the rights of others or the public welfare, and when a reasonable opportunity to lawfully dispose of the commodity before its seizure is not afforded, the enforcement of such laws, as against such previously acquired lawful possession, may deprive persons of property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution. Such enforcement may also violate property rights secured by the state constitution. *In re Seven Barrels of Wine*, (Fla. 1920) 83 So. 627.

Summary destruction of animals.—A state statute is unconstitutional which authorizes any officer or agent of any society for the prevention of cruelty to animals to destroy forthwith any animal found abandoned or not properly cared for, appearing in the judgment of two reputable persons called by him to view the same in his presence, to be diseased or injured or in a condition from lack of food, water or shelter, past recovery, for any useful purpose. *Randall v. Patch*, (1919) 118 Me. 303, 108 Atl. 97, 8 A. L. R. 65, wherein the court said: "But the defendant urges that a horse which has been decided by two reputable persons to be injured or diseased and past recovery for useful purpose is no longer property. The word 'property,' he contends, does not include a 'wreck of what was once a steed,' having no utility and no value. This reasoning, however, begs the question. The plaintiff claims that his animal is not past recovery and that it has value. To conclusively determine this question against the plaintiff without notice or hearing would be to nullify the constitutional guaranty.

"The defendant argues that the determination of the necessity or expediency of any legal enactment is within the exclusive province of the Legislature. This is true. The court cannot declare a law to be void for the reason that it is unnecessary or inexpedient; but it may be the duty of the court to pronounce invalid an act which violates an express mandate of the Constitution, even if the act is expedient and has been determined by the Legislature to be necessary.

"Again, the defendant contends that section 59 is a valid exercise of the police power. No court has ever undertaken to define the limits of the police power of the state. New occasions teach new applications of it. It is based upon society's right of self-defense and is coextensive with that right. *State v. Starkey*, 112 Me. 12, 90 Atl. 431, Ann. Cas. 1917A, 196.

"Under the police power the use by the owner of many species of private property has been held to be subject to uncompensated restriction and regulation. For numerous illustrations see *State v. Robb*, 100 Me. 186, 60 Atl. 874, 4 Ann. Cas. 275; *Opinion of Justices*, 103 Me. 506, 69 Atl. 627, 19 L. R. A. (N. S.) 422, 13 Ann. Cas. 745; *State v. Starkey*, 112 Me. 10, 90 Atl. 431, Ann. Cas. 1917A, 196.

"In cases of extreme and urgent necessity, as conflagrations (*Farmer v. Portland*, 63 Me. 47), or epidemics (*Seavey v. Preble*, 64 Me. 121), it justifies the destruction of property without preliminary notice or hearing, and even without compensation.

"But section 59 provides for the destruction of property, and not for restrictions upon or regulation of its use, and it cannot be justified as a measure of urgent necessity.

"If section 59, now as in its original form in the act of 1883, related to abandoned animals merely, our conclusion might be different. The destruction by public authority of an abandoned animal deprives nobody of property. But the section in its present form does not refer to abandoned animals only. It purports to authorize the defendant to do, without notice or hearing, what the agreed statement says he did, to wit, that he 'took the horse from the plaintiff's possession against his objection' and killed it. It thus contravenes an explicit constitutional mandate."

c. Property Illegally Used (p. 717)

Seizure of automobile conveying contraband deer.—In *Gemert v. Pooler*, (Wis. 1920) 177 N. W. 1, it was held that a statute authorizing the confiscation of property used in transporting game during the closed season was constitutional where it appeared that while that particular statute did not provide for notice and hearing other statutes provided for the recovery back of forfeited property.

Vehicle used to transport intoxicating liquors.—A state statute providing for the condemnation of vehicles being used to transport prohibited liquors is valid. *State v. Killens*, (1920) 149 Ga. 735, 101 S. E. 911.

19. Regulating Priorities

a. Displacing Priority of Liens (p. 719)

A state insolvency law divesting attachments levied before the commencement of the insolvency proceeding is valid. *Greene v. Rice*, (1919) 32 Idaho 504, 186 Pac. 249.

d. Giving Water Rents Priority of Lien (p. 720)

Imposing lien on property for water furnished tenants.—A landlord's property is not taken without due process of law by the lien imposed upon the premises by a city charter for water supplied to a tenant by the city, since the landlord's consent may be implied from the leasing with knowledge of the law—especially as the lease as made contemplated the use of the water by the tenant and provided, so far as the landlord could, for the payment of the water charges; and it is of no consequence at whose request the water meters were installed. *Dunbar v. New York*, (1920) 251 U. S. 516, 40 S. Ct. 250, 64 U. S. (L. ed.) — (affirming (1917) 177 App. Div. 647, 164 N. Y. S. 519), wherein the court said:

"Plaintiff's argument is somewhat difficult to state briefly. It commences by declaring that the question presented was left open in *Provident Inst. for Sav. v. Jersey City*, 113 U. S. 506, 28 L. ed. 1102, 5 Sup. Ct. Rep. 612, which sustained the postponement of mortgages to the lien of water rents because it was said in that case that the complainant in the case knew what the law was when the mortgages were taken, and therefore 'its own voluntary act, its own consent,' was 'an element in the transaction.'"

"Counsel assumes that the case presented an instance of an express consent. In that counsel is mistaken. The consent was implied from the fact that the law imposing the water rents preceded the mortgages. And so in the water charge in controversy, it was imposed and made a lien on plaintiff's property by the charter of the city, and therefore the supreme court at the first instance, and afterwards in appellate division, and we may assume by the court of appeals, decided that the consent of plaintiff could be implied, and any other conclusion would have been impossible. A city without water would be a desolate place, and if plaintiff's property was in such condition it would partake of the desolation. And, as a supply of water is necessary, it is only an ordinary and legal exertion of government to provide means for its compulsory compensation.

"It is of no consequence, therefore, at whose request the meters were installed in the property. The meters, as observed by the appellate division, were 'not the instrumentalities for furnishing the water,' they only registered its consumption. And besides, the lease made by plaintiff contemplated the use of water by the lessees, and provided, as far as the lessor (plaintiff) could, for the payment of the charges for it. That her tenants defaulted in their obligation by reason of their bankruptcy was her misfortune, but it did not relieve the property, which, we may say, would be unfit for human habitation if it could not get water.

"Counsel appear to rely on prior deci-

sions of the court for relief of plaintiff. One in the supreme court, in which, it is said, a doubt was intimated whether a statute making a lessor liable for the personal debt of a lessee for water would be constitutional; and one of the court of appeals, which, to quote counsel, 'having decided in 1910, three years prior to the inception of the charges for which the lien is claimed, that the statute meant what the earlier case had suggested, the lien became unconstitutional,' and plaintiff cannot be charged with an 'implication of assent' to it. Without attempting an estimate of the contention it is enough to say that the decisions in this case and other cases are opposed to the contention, and that, besides, no constitutional rights can be based on the error of prior decisions."

20. Relation of Employer and Employee

a. Regulating Payment of Wages (p. 721)

Wages and period of employment regulated.—A state statute is unconstitutional which undertakes to fix the wages which a person holding a theatrical license shall pay to a person employed by him to guard against danger by fire, to forbid the discharge of such person so employed without the consent of the board of fire commissioners and to forbid a reduction in the wages of such employee without the consent of the board of fire commissioners. *O'Neil v. Providence Amusement Co.*, (R. I. 1920) 108 Atl. 887, wherein the court, after holding that the carrying on of a theatre or place of amusement was a private business, said: "The case of *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E 938, Ann. Cas. 1918A 1024, is referred to in the brief of the complainant, and also in the brief of the defendant. It involves the constitutionality of an act of Congress popularly known as the Adamson Act [see 1918 Supp. Fed. Stat. Ann. p. 754]. We do not deem it necessary to discuss that case at great length. The act provided, among other things, that, pending the report of a commission to investigate and deal with the wages of trainmen on interstate railroads, the then existing rate of compensation should 'not be reduced below the present standard day's wage.' It differs materially from the case at bar, in that it was a temporary expedient, resorted to in the face of an emergency. It did not undertake to fix a permanent wage, but to retain the already existing wage for a limited period of 30 days, until, through an investigation then progressing, certain rights might be determined, 'leaving employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time.' The act was intended as an exercise of governmental power over a matter of interstate commerce or a business affected with a public interest. The act was passed to meet an emergency arising from a

nation-wide dispute over wages between railroad companies and their train operatives, in which a general strike was threatened, which would bring about commercial paralysis and grave loss and suffering; the parties concerned being unable to agree. It was designed to bridge over a limited period within which the parties might reach an agreement. The question in that case, as stated by the court in its opinion, was:

"Did Congress have power under the circumstances stated, that is, in dealing with the dispute between the employers and employees as to wages, . . . to create by legislative action a standard of wages to be operative upon the employers and employees for such reasonable time as it deemed necessary to afford an opportunity for the meeting of the minds of employers and employees on the subject of wages? Or, in other words, did it have the power, in order to prevent the interruption of interstate commerce, to exert its will to supply the absence of a wage scale resulting from the disagreement as to wages between the employers and employees, and to make its will on that subject controlling for the limited period provided for?"

"The difference between the Adamson Law and the act which we are considering, which fixes a permanent wage in the absence of any emergency, is so apparent that it need not be specifically pointed out. That the court recognizes a distinction between employment in a private business and an employment in a business charged with a public interest, and that its decision is not intended to apply to the former, is fully evidenced in the opinion itself, wherein it is stated:

"Whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them, and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest."

"And it may be fairly said that the court confined itself solely to dealing with an employment charged with a public interest."

h. Workmen's Compensation Law (p. 726)

Compensation for facial or head disfigurement.—The due process of law clause does not require a state to make loss of earning power the sole basis for a statutory compulsory compensation scheme for workmen injured with fault of the employer, and the embodiment by amendment in the New York compulsory Workmen's Compensation Law of a provision for a special allowance of compensation not to exceed \$3,500 for serious facial or head disfigurement, irrespective of the compensation allowed for mere inability to work, is not forbidden by the due process of law clause as being arbitrary or oppressive, but is a valid exercise of the police power of the state.

Whether the compensation awarded for serious facial or head disfigurement should be made in combination with or independent of the compensation allowed for mere inability to work is a mere matter of detail for the state to determine, so far as any question of repugnancy to the due process of law clause is concerned, as is also the question whether the compensation should be paid in a single sum, or in instalments. *New York Cent. R. Co. v. Bianc*, (1919) 250 U. S. 596, 40 S. Ct. 44, 64 U. S. (L. ed.) —, *affirming* (1919) 226 N. Y. 586; *American Knife Co. v. Sweeting*, 250 U. S. 596, *affirming* 226 N. Y. 199, 123 N. E. 82; *Clark Knitting Co. v. Vaughn*, 250 U. S. 596, *affirming* 226 N. Y. 586, 123 N. E. 893.

m. Liability of Mine Owner for Negligence of Licensed Manager or Engineer
(p. 727)

To same effect as original annotation, see *Ducktown Sulphur, etc., Co. v. Galloway*, (C. C. A. 6th Cir. 1920) 262 Fed. 669.

23. Railroad Companies

a. In General (p. 736)

Right of private corporation operating railroad in connection with business to discontinue same.—A corporation carrying on a sawmill and lumber business, which has granted to the public an interest in a railroad operated in connection with its business by doing a small business as a common carrier thereon, may withdraw its grant by discontinuing the use of the road when such use can be kept up only at a loss. It cannot be compelled to continue the operation of the railroad after it has ceased to be profitable, merely because a profit would be derived from the entire business, including the operation of the railroad. And it cannot be compelled to continue the operation of the road at a loss on the ground that the owner had failed to petition the Commission for leave to discontinue the business of the railroad, as required by a local law, where the compulsory operation of the railroad would amount to a taking of property without due process of law. *Brooks-Scanlon Co. v. Louisiana R. Commission*, (1920) 251 U. S. 396, 40 S. Ct. 183, 64 U. S. (L. ed.) —, *reversing* (1919) 144 La. 1086, 81 So. 727.

c. Regulating Rates

(1) In General (p. 737)

Questions of fact.—The question what formula for dividing charges and expenses common to railway freight and passenger services, and not capable of direct allocation, the trial court should adopt in determining whether a statutory maximum passenger rate is confiscatory, is at present one of fact, not of law, and the trial court's decision in the matter will not be disturbed by appeal, where the appellate court is unable clearly to say that the trial court erred in

adopting the method there pursued. *Groesbeck v. Duluth, etc., R. Co.*, (1919) 250 U. S. 607, 40 S. Ct. 38, 64 U. S. (L. ed.) —.

Order of reparation by Commission made prima facie evidence.—Where a state statute provides for a hearing before a commission on a complaint that rates are unjust, followed by an order of reparation to be prima facie evidence if an action is maintained to recover the amount of damages contained in the order, and awarded in consequence of unjust collections, such statute does not violate the due process clause of the Constitution. *New York, etc., Co. v. New York Cent. R. Co.*, (Pa. 1920) 110 Atl. 286.

(2) To Establish Equality in Rates (p. 739)

Treble damages and attorney's fees.—A statute permitting the recovery of treble damages and attorney's fees in an action by a shipper against a carrier for unlawful discrimination does not deny due process of law. *Alexander v. Chicago, etc., R. Co.*, (Mo. 1920) 221 S. W. 712.

(5) Regulating Passenger Fares

(a) In General (p. 741)

The imposition of severe penalties as a means of enforcing railway passenger rates prescribed by statute is not a denial of due process of law in a case in which it does not appear that the carrier was not afforded an adequate opportunity for safely testing the validity of the rate, or that its deviation therefrom proceeded from any belief that the rate was invalid. Moreover, so far as due process of law is concerned, the penalties imposed upon a railway company which exacts more than the prescribed passenger fares may be given to the aggrieved passenger, to be enforced by private suit, and such penalties need not be confined or apportioned to his loss or damage. Thus the penalties prescribed by a statute giving to a passenger aggrieved by a carrier's exaction of a fare in excess of the prescribed rate the right to recover in a civil suit not less than \$50 nor more than \$300 and costs of suit, including a reasonable attorney's fee, cannot be said to be so severe and oppressive as to be wholly disproportionate to the offense or obviously unreasonable, and hence to amount to a denial of due process of law. *St. Louis, etc., R. Co. v. Williams*, (1919) 251 U. S. 63, 40 S. Ct. 71, 64 U. S. (L. ed.) — (*affirming* (1917) 131 Ark. 442, 199 S. W. 376), wherein the court said:

"It is true that the imposition of severe penalties as a means of enforcing a rate, such as was prescribed in this instance, is in contravention of due process of law, where no adequate opportunity is afforded the carrier for safely testing, in an appropriate judicial proceeding, the validity of the rate—that is, whether it is confiscatory or otherwise—before any liability for the penalties attaches. The reasons why this is

so are set forth fully and plainly in several recent decisions and need not be repeated now. *Ex parte Young*, 209 U. S. 123, 147, 52 L. ed. 714, 723, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, 53, 53 L. ed. 382, 400, 48 L. R. A. (N. S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Missouri P. R. Co. v. Nebraska*, 217 U. S. 196, 207, 208, 54 L. ed. 727, 731, 732, 30 Sup. Ct. Rep. 461, 18 Ann. Cas. 969; *Missouri P. R. Co. v. Tucker*, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 659, et seq., 59 L. ed. 405, 410, P. U. R. 1915A, 106, 35 Sup. Ct. Rep. 214.

"And it also is true that where such an opportunity is afforded and the rate adjudged valid, or the carrier fails to avail itself of the opportunity, it then is admissible, so far as due process of law is concerned, for the state to enforce adherence to the rate by imposing substantial penalties for deviations from it. *Wadley Southern R. Co. v. Georgia*, *supra*, p. 667 et seq.; *Gulf, C. & S. F. R. Co. v. Texas*, 246 U. S. 58, 62, 62 L. ed. 574, 578, 38 Sup. Ct. Rep. 236.

"Here it does not appear that the carrier had not been afforded an adequate opportunity for safely testing the validity of the rate, or that its deviation therefrom proceeded from any belief that the rate was invalid. On the contrary, it is practically conceded—and we judicially know—that if the carrier really regarded the rate as confiscatory, the way was open to secure a determination of that question by a suit in equity against the Railroad Commission of the state, during the pendency of which the operation of the penalty provision could have been suspended by injunction. *Wadley Southern R. Co. v. Georgia*, *supra*. See also *Allen v. St. Louis, I. M. & S. R. Co.* 230 U. S. 553, 57 L. ed. 1625, 33 Sup. Ct. Rep. 1030; *Rowland v. Boyle*, 244 U. S. 106, 61 L. ed. 1022, P. U. R. 1917C, 685, 37 Sup. Ct. Rep. 577; *St. Louis, I. M. & S. R. Co. v. McKnight*, 244 U. S. 368, 61 L. ed. 1200, 37 Sup. Ct. Rep. 611. And the record shows that at the trial the carrier not only did not raise any question about the correct fare, but proposed and secured an instruction to the jury wherein the prescribed rate was recognized as controlling.

"It therefore is plain that the first branch of the company's contention cannot prevail.

"The second branch is more strongly urged, and we now turn to it. The provision assailed is essentially penal, because primarily intended to punish the carrier for taking more than the prescribed rate. *St. Louis & S. F. R. Co. v. Gill*, 54 Ark. 101, 106, 11 L. R. A. 452, 15 S. W. 18; *St. Louis, I. M. & S. R. Co. v. Waldrop*, 93 Ark. 42, 45, 123 S. W. 778. True, the penalty goes to the aggrieved passenger, and not the state, and is to be enforced by a private, and not a public, suit. But this is not contrary to

due process of law; for, as is said in *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110, 'the power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with the government; and the mode in which they shall be enforced, whether at the suit of the private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.' Nor does giving the penalty to the aggrieved passenger require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state. See *Marvin v. Trout*, 199 U. S. 212, 225, 50 L. ed. 157, 162, 26 Sup. Ct. Rep. 31.

"The ultimate question is whether a penalty of not less than \$50 and not more than \$300 for the offense in question can be said to bring the provision describing it into conflict with the due process of law clause of the 14th Amendment.

"That this clause places a limitation upon the power of the states to prescribe penalties for violations of their laws has been fully recognized, but always with the express or tacit qualification that the states still possess a wide latitude of discretion in the matter, and that their enactments transcend the limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable. *Coffey v. Harlan County*, 204 U. S. 659, 662, 51 L. ed. 666, 668, 27 Sup. Ct. Rep. 305; *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 78, 52 L. ed. 108, 110, 28 Sup. Ct. Rep. 28; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 111, 53 L. ed. 417, 430, 29 Sup. Ct. Rep. 220; *Collins v. Johnston*, 237 U. S. 502, 510, 59 L. ed. 1071, 1079, 35 Sup. Ct. Rep. 649."

(6) Must be Reasonable

(b) Question of Reasonableness Is Judicial (p. 742)

Withholding from the courts power to determine the question of confiscation according to their own independent judgment, when the act of a state public service commission in fixing the value of a water company's property for rate-making purposes comes to be considered on appeal, as is done by the Pennsylvania Public Service Company Law of July 26, 1913, as construed by the highest state court, must be deemed to deny due process of law, in the absence of a ruling by that court that the remedy by injunction provided for by section 31 of that act affords adequate opportunity for testing judicially an order of the commission, alleged to be confiscatory. *Ohio Valley Water Co. v. Ben Avon Borough*, (1920) 253 U. S. 287, 40 S. Ct. 527, 64 U. S. (L. ed.) —, *reversing* (1918) 260 Pa. St. 289, 103 Atl. 744.

(7) Must Admit of Earning Just Compensation (p. 744)

To same effect as original annotation, see *San Antonio Public Service Co. v. San Antonio*, (W. D. Tex. 1919) 257 Fed. 467.

Treating passenger service as whole.—The passenger service, including sleeping car, parlor car, and dining car service, should be treated as a whole in determining whether a statutory two cent per mile maximum passenger rate is confiscatory, notwithstanding the fact that a local statute permits railroads to make special charges for these special services in addition to the regular passenger fares allowed by law. *Groesbeck v. Duluth, etc., R. Co.*, (1919) 250 U. S. 607, 40 S. Ct. 38, 64 U. S. (L. ed.) —.

(10) Whether Compensatory as to Entire Line (p. 749)

Every part of the railway system over which a passenger is entitled by a state statute to ride for a fare of two cents per mile must, whether profitable or unprofitable, be included in the computation taken to determine whether the prescribed rate is confiscatory, at least in the absence of illegality or mismanagement in the acquisition or operation of the particular part of the system sought to be excluded from such computation—and it is immaterial that an extension of the railway company's service was furnished by acquiring traffic rights rather than by building an independent line. *Groesbeck v. Duluth, etc., R. Co.*, (1919) 250 U. S. 607, 40 S. Ct. 38, 64 U. S. (L. ed.) —.

n. Requiring Railroad to Install Scale at Station (p. 754)

Railway companies may not, consistently with due process of law, be compelled by a state administrative order to install cattle-weighting scales at stations from which cattle are shipped. *Great Northern R. Co. v. Cahill*, (1920) 253 U. S. 71, 40 S. Ct. 457, 64 U. S. (L. ed.) —, *reversing* (1918) 40 S. D. 55, 166 N. W. 306.

x1. Street Railways

(1) In General (p. 768)

Contractual duty to pave as dependent on financial status.—A street railway company's contractual duty to repave that part of a street which lies between its tracks and for one foot outside cannot be evaded on the theory that this additional burden will reduce its income below a reasonable return on the investment. *Milwaukee Electric R., etc., Co. v. Wisconsin*, (1920) 252 U. S. 100, 40 S. Ct. 306, 64 U. S. (L. ed.) — (*affirming* (1917) 166 Wis. 163, 164 N. W. 844), wherein the court said: "The financial condition of a public service corporation is a fact properly to be considered when determining the reasonableness of an order directing an unremunerative extension

of facilities, or forbidding their abandonment. *Mississippi R. Commission v. Mobile & O. R. Co.* 244 U. S. 388, 61 L. ed. 1216, 37 Sup. Ct. Rep. 602; *New York ex rel. New York & Q. Gas Co. v. McCall*, 245 U. S. 345, 350, 62 L. ed. 337, 341, P. U. R. 1918A, 792, 38 Sup. Ct. Rep. 122. But there is no warrant in law for the contention that merely because its business fails to earn full 6 per cent upon the value of the property used, the company can escape either obligations voluntarily assumed or burdens imposed in the ordinary exercise of the police power. *Compare Missouri P. R. Co. v. Kansas*, 216 U. S. 262, 279, 54 L. ed. 472, 479, 30 Sup. Ct. Rep. 330; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; *Missouri P. R. Co. v. Omaha*, 235 U. S. 121, 59 L. ed. 157, 35 Sup. Ct. Rep. 82."

Regulations affecting railroad track laid in public street.—A railroad track laid in a public street, though by express public grant, is subject to such regulations as are reasonably necessary to secure the public safety; for this power "is inalienable even by express grant," and its legitimate exertion contravenes neither the contract clause of the Constitution nor the due process clauses of the Fourteenth Amendment. . . . Of course, all regulations of this class are subject to judicial scrutiny, and when they are found to be plainly unreasonable and arbitrary must be pronounced invalid, as transcending that power and falling within the condemnation of one or both, as the case may be, of those constitutional restrictions." *Denver, etc., R. Co. v. Denver*, (1919) 250 U. S. 241, 243, 39 S. Ct. 450, 451, 63 U. S. (L. ed.) 958, 961; *Connecticut Co. v. Stamford*, (Conn. 1920) 110 Atl. 554.

Requiring street railway to use two men in operating cars.—A municipal ordinance, confessedly a valid exercise of the police power when adopted, under which each street car used in the city streets must be operated during designated hours by two persons, a motorman and a conductor, cannot be said to be so arbitrary and confiscatory as to deny due process of law when so applied as to prohibit the use on a line on which the travel is heavy at times, and which has at least one steep grade, of a new type of car still in the experimental stage, so equipped that it may plausibly be contended that if all the appliances work as it is intended that they shall, it may be operated at a reduced cost by one motorman, with a high degree of safety to the public in streets where the traffic is not heavy. *Sullivan v. Shreveport*, (1919) 251 U. S. 169, 40 S. Ct. 102, 64 U. S. (L. ed.) —, *affirming* (1918) 142 La. 573, 77 So. 286.

26. Water Companies

a. In General (p. 773)

To compel a water company to continue business at a loss is a taking of property without due process of law and an order

of a public service commission to that effect is invalid. *Lyon v. Railroad Commission*, (Cal. 1920) 190 Pac. 795.

c. Regulating Rates (p. 774)

Independently of a right to regulate and control the rates to be charged for public service reserved in a grant of a franchise or right to use the city streets, a city or other municipality has no power to regulate rates to be charged by water, lighting, or other public service corporations, in the absence of express or plain legislative authority to do so, nor does such authority arise from the power to regulate the opening and use of streets, nor from a grant of the general right to control and regulate the right to erect works and lay pipes in the city streets. *Winchester v. Winchester Water Works Co.*, (1920) 251 U. S. 192, 40 S. Ct. 123, 64 U. S. (L. ed.) —.

27. Gas and Electric Companies

b. Regulating Rates (p. 776)

Reasonable rates for electric energy, prescribed by a state in the exercise of its police power, through the instrumentality of its public service commission, are not repugnant to the contract or due process of law clauses of the Federal Constitution merely because, if given effect, they will supersede the rates designated in a private contract between the company and a customer, entered into prior to the enactment of the law creating the commission. *Mill Creek Coal, etc., Co. v. Public Service Commission*, (W. Va. 1919) 100 S. E. 556, 7 A. L. R. 1081.

f. Requiring Removal from Streets of Poles, Wires, and Conduits (p. 780)

A municipality may not, consistently with this amendment, as a matter of public right, clear a space for the construction of its own street lighting system by removing or relocating the instrumentalities of a privately owned lighting system occupying the public streets under a franchise legally granted, without compensating the owner of such system for the rights appropriated. *Los Angeles v. Los Angeles Gas, etc., Corp.*, (1919) 251 U. S. 32, 40 S. Ct. 76, 64 U. S. (L. ed.) —, *affirming* (S. D. Cal. 1917) 241 Fed. 912.

37. Control of Municipal Corporations

a. In General (p. 792)

Regulation of municipal waterworks.—Chapter 47, Laws 1919, which limits and restricts the application of the revenue derived by municipalities from public utilities, and authorizes the appointment of a receiver for such public utility upon the failure of the municipal authorities to comply with the statute, does not deprive a municipality of its property without due process of law, because: (1) full judicial hearing is accorded; and (2) the property is not taken from the city, but is preserved and pro-

ected for the benefit of the city and its inhabitants. *Dreyfus v. Socorro*, (N. M. 1920) 189 Pac. 878.

38. Regulating Manufacture and Sale of Goods

b. Food Laws Generally (p. 801)

State price regulation measure giving to a trade commission power to establish maximum prices in respect to all commodities is invalid. *A. M. Holter Hardware Co. v. Boyle*, (D. C. Mont. 1920) 263 Fed. 134.

41. Eminent Domain

i. Of Water-Power to Generate Electricity (p. 821)

To the same effect as the original annotation, see *Rockingham County Light, etc., Power Co. v. Philbrick*, (N. H. 1919) 108 Atl. 813.

k. Question of Necessity (p. 822)

"Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the 14th Amendment. *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 406, 25 L. ed. 206, 207; *A. Backus, Jr., & Sons v. Fort Street Union Depot Co.*, 169 U. S. 557, 568, 42 L. ed. 853, 858, 18 Sup. Ct. Rep. 445; *Adirondack R. Co. v. New York*, 176 U. S. 335, 349, 44 L. ed. 492, 499, 20 Sup. Ct. Rep. 460; *Sears v. Akron*, 246 U. S. 242, 251, 62 L. ed. 688, 698, 38 Sup. Ct. Rep. 245." *Bragg v. Weaver*, (1919) 251 U. S. 57, 40 S. Ct. 62, 64 U. S. (L. ed.) —.

q. Providing for Hearing (p. 825)

"But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard. Among several admissible modes is that of causing the amount to be assessed by viewers, subject to an appeal to a court, carrying with it a right to have the matter determined upon a full trial. *United States v. Jones*, 109 U. S. 513, 519, 27 L. ed. 1015, 1017, 3 Sup. Ct. Rep. 346; *A. Backus, Jr., & Sons v. Fort Street Union Depot Co.*, 169 U. S. 569, 42 L. ed. 859, 18 Sup. Ct. Rep. 445. And where this mode is adopted due process does not require that a hearing before the viewers be afforded, but is satisfied by the full hearing that may be obtained by exercising the right to appeal. *Lent v. Tillson*, 140 U. S. 316, 326, *et seq.*, 35 L. ed. 419, 424, 11 Sup. Ct. Rep. 825; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526, 537, 40 L. ed. 247, 251, 16 Sup. Ct. Rep. 83; *Wells, F. & Co. v. Nevada*, 248 U. S. 165, 168, 63 L. ed. 190, 192, 39 Sup. Ct. Rep. 62. And see *Capital Traction Co. v. Hof*, 174 U. S. 1, 18-30, 45, 43 L. ed. 873,

879-883, 889, 19 Sup. Ct. Rep. 580." Bragg v. Weaver, (1919) 251 U. S. 57, 40 S. Ct. 62, 64 U. S. (L. ed.) —.

a. Must Be Provision for Compensation

(1) In General (p. 825)

Due process of law requires compensation.—The property rights, if any, of one contracting with a state for the construction of a waterway, cannot be said to have been taken without due process of law by state legislation vacating a portion of such waterway and vesting title thereto in a municipal corporation, where there was adequate provision in the state law for assured payment without unreasonable delay of any compensation due such contractor on account of such taking. *Hays v. Seattle*, (1920) 251 U. S. 233, 40 S. Ct. 125, 64 U. S. (L. ed.) —, *affirming* (W. D. Wash. 1915) 226 Fed. 287.

(9) May Authorize Possession Before Determination of Amount (p. 829)

Where adequate provision is made for the certain payment without unreasonable delay of compensation for property taken by eminent domain, the taking does not contravene due process of law merely because it precedes the ascertainment of what compensation is just. *Bragg v. Weaver*, (1919) 251 U. S. 57, 40 S. Ct. 62, 64 U. S. (L. ed.) —.

(10) Tribunal to Assess Compensation

(a) In General (p. 829)

To same effect as original annotation, see *Railway Steel Spring Co. v. Chicago, etc., R. Co.*, (N. D. Ill. 1919) 261 Fed. 690.

42. Regulating Pursuit of Occupations

a. Practice of Medicine

(1) In General (p. 830)

Notice and opportunity to be heard are essential to the validity of a proceeding before the Board of Medical Examiners to revoke the license of a physician for unprofessional conduct. *Suckow v. Medical Examiner*, (Cal. 1920) 187 Pac. 965.

43. As Affecting Conveyance of or Title to Land

c. Restraining Right of Alienation (p. 837)

Foreign corporations.—A state statute under which conveyances to a foreign corporation of real property situated within the state are invalid, though executed and delivered in another state, if the grantee had not theretofore filed a copy of its charter with the secretary of state, does not take property without due process of law. *Munday v. Wisconsin Trust Co.*, (1920) 252 U. S. 499, 40 S. Ct. 365, 64 U. S. (L. ed.) —, *affirming* (1918) 168 Wis. 31, 168 N. W. 393, 169 N. W. 612.

107. Taxation

a. In General (p. 860)

Imposition of occupational tax.—A state may constitutionally impose an occupational tax which is in no sense a tax upon property but is well understood to be a tax on the right to carry on trade or to transact business. *State v. Carrel*, (1919) 99 Ohio St. 220, 124 N. E. 134.

b. For Public Purposes (p. 861)

Carrying on of various enterprises by state.—State taxation to enable the state of North Dakota to carry out such enterprises as a state bank, a state warehouse, elevator, and flour mill system, and a state home building project, all of which have been sanctioned by united action of the people of the state, its legislature, and its courts, cannot be said to deny taxpayers the protection which the constitutional guaranty of due process of law affords against the taking of property for uses that are private. *Green v. Frazier*, (1920) 253 U. S. 233, 40 S. Ct. 499, 64 U. S. (L. ed.) — (*affirming* (N. D. 1920) 176 N. W. 11), wherein the court said: "What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a 'public' as distinguished from a 'private' purpose, but have left each case to be determined by its own peculiar circumstances. *Gray, Limitations of Taxing Power*, § 176: 'Necessity alone is not the test by which the limits of state authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.' *Cooley, Justice*, in *People ex rel. Detroit & H. R. Co. v. Salem*, 20 Mich. 452, 4 Am. Rep. 400. Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which, under our system, is reposed in the people or other departments of government. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L. R. A. 1915C, 1189, 34 Sup. Ct. Rep. 612.

"With the wisdom of such legislation, and the soundness of the economic policy involved, we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire.

"We come now to examine the grounds upon which the supreme court of North Dakota held this legislation not to amount to a taking of property without due process of law. The questions involved were given elaborate consideration in that court, and it held, concerning what may in general terms

be denominated the 'banking legislation,' that it was justified for the purpose of providing banking facilities, and to enable the state to carry out the purposes of the other acts, of which the Mill & Elevator Association Act is the principal one. It justified the Mill & Elevator Association Act by the peculiar situation in the state of North Dakota, and particularly by the great agricultural industry of the state. It estimated from facts of which it was authorized to take judicial notice, that 90 per cent of the wealth produced by the state was from agriculture; and stated that upon the prosperity and welfare of that industry other business and pursuits carried on in the state were largely dependent; that the state produced 125,000,000 bushels of wheat each year. The manner in which the present system of transporting and marketing this great crop prevents the realization of what are deemed just prices was elaborately stated. It was affirmed that the annual loss from these sources (including the loss of fertility to the soil and the failure to feed the by-products of grain to stock within the state) amounted to fifty-five millions of dollars to the wheat raisers of North Dakota. It answered the contention that the industries involved were private in their nature, by stating that all of them belonged to the state of North Dakota, and therefore the activities authorized by the legislation were to be distinguished from business of a private nature having private gain for its objective.

"As to the Home Building Act, that was sustained because of the promotion of the general welfare in providing homes for the people, a large proportion of whom were tenants, moving from place to place. It was believed and affirmed by the supreme court of North Dakota that the opportunity to secure and maintain homes would promote the general welfare, and that the provisions of the statutes to enable this feature of the system to become effective would redound to the general benefit.

"As we have said, the question for us to consider and determine is whether this system of legislation is violative of the Federal Constitution because it amounts to a taking of property without due process of law. The precise question herein involved, so far as we have been able to discover, has never been presented to this court. The nearest approach to it is found in *Jones v. Portland*, 245 U. S. 217, 62 L. ed. 252, L. R. A. 1918C, 765, 38 Sup. Ct. Rep. 112, Ann. Cas. 1918E, 660, in which we held that an act of the state of Maine, authorizing cities or towns to establish and maintain wood, coal, and fuel yards for the purpose of selling these necessities to the inhabitants of cities and towns, did not deprive taxpayers of due process of law within the meaning of the 14th Amendment. In that case we reiterated the attitude of this court towards state legislation, and repeated what had been said before, that what was or was not a public

use was a question concerning which local authority, legislative and judicial, had especial means of securing information to enable them to form a judgment; and particularly, that the judgment of the highest court of the state, declaring a given use to be public in its nature, would be accepted by this court unless clearly unfounded. In that case the previous decisions of this court, sustaining this proposition, were cited with approval, and a quotation was made from the opinion of the supreme court of Maine, justifying the legislation under the conditions prevailing in that state. We think the principle of that decision is applicable here.

"This is not a case of undertaking to aid private institutions by public taxation, as was the fact in *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 461. In many instances states and municipalities have in late years seen fit to enter upon projects to promote the public welfare which, in the past, have been considered entirely within the domain of private enterprise.

"Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the state sees fit to enter upon such enterprises as are here involved, with the sanction of its Constitution, its legislature, and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the 14th Amendment, to set aside such action by judicial decision."

In *Scott v. Frazier*, (D. C. N. D. 1919) 258 Fed. 669, wherein it was held that the final decision of whether a tax is for a public purpose is for the courts and not the legislature, the court said:

"The Fourteenth Amendment contains no express language limiting the taxing power of states. Laws have been condemned by holding that a tax for a purely private purpose deprives the taxpayer of his property without due process of law. When is a tax for a 'purely private purpose' within this rule?

"(a) The only cases in the federal courts in which laws have been condemned are those in which bonds or public funds were given as a mere gratuity to a privately owned manufacturing enterprise to encourage its establishment within the city. Such are the cases cited by counsel for plaintiff. *Loan Association v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *City of Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Cole v. City of La Grange*, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896; *Dodge v. Mission Township*, 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242.

"(b) I have not been able to discover any instance in which the Supreme Court has held invalid an exercise of the taxing power of the state for establishing and maintaining an industry which was owned by the state or a municipality. Such is the character of all the laws here assailed. The industries are to be owned by the state or cities.

The latest expression of the Supreme Court on the subject is *Jones v. City of Portland*, 245 U. S. 217, 38 Sup. Ct. 112, 62 L. Ed. 252, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660, sustaining a statute of the state of Maine authorizing cities to establish and maintain wood, coal, and fuel yards for the purpose of selling at cost wood, coal and fuel to their inhabitants. This decision is the more impressive because a similar law had been held invalid by the Supreme Court of Massachusetts and by some other state courts."

p. As to Whether Property Within or Outside the State

(1) In General (p. 866)

Income received by resident from nonresident trustee.—A state may, without denying due process of law, tax the income received by a resident from securities held for her benefit by the trustee in a trust created and administered by the law of another state, and not directly taxable to the trustee. *Maguire v. Trefry*, (1920) 253 U. S. 12, 40 S. Ct. 417, 64 U. S. L. ed. — (*affirming* (1918) 230 Mass. 503, 120 N. E. 162), wherein the court said: "Of the nature of the tax the chief justice of Massachusetts, speaking for the supreme judicial court, said: 'The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the commonwealth of his residence in his person, in his right to receive the income, and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom, and of being protected by law. It gives security to life, liberty, and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government, measured by and based upon the income, in the fruition of which it defends him from unjust interference. It is true of the present tax, as was said by Chief Justice Shaw in *Bates v. Boston*, 5 Cush. 93, at page 99: 'The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee' to the beneficiary."

"We see no reason to doubt the correctness of this view of the nature and effect of the Massachusetts statute, and shall accept it for the purpose of considering the Federal question before us, which arises from the contention of the plaintiff in error that the imposition of the tax was a denial of due process of law within the protection of the 14th Amendment to the Federal Constitution, because, it is alleged, the effect of the

statute is to subject property to taxation which is beyond the limits and outside the jurisdiction of the state. To support this contention the plaintiff in error relies primarily upon the decision of this court in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493. In that case we held that tangible, personal property, permanently located in another state than that of the owner, where it had acquired a situs, and was taxed irrespective of the domicile of the owner, was beyond the taxing power of the state, and that an attempt to tax such property at the owner's domicile was a denial of due process of law under the 14th Amendment. This ruling was made with reference to cars of the Transit Company permanently employed outside the state of the owner's residence. In that case this court, in the opinion of Mr. Justice Brown, speaking for it, expressly said that the taxation of intangible personal property was not involved. 199 U. S. 211.

"It is true that in some instances we have held that bonds and bills and notes, although evidences of debt, have come to be regarded as property which may acquire a taxable situs at the place where they are kept, which may be elsewhere than at the domicile of the owner. These cases rest upon the principle that such instruments are more than mere evidences of debt, and may be taxed in the jurisdiction where located, and where they receive the protection of local law and authority. *Blackstone v. Miller*, 188 U. S. 189, 206, 47 L. ed. 430, 445, 23 Sup. Ct. Rep. 277; *People ex rel. Jefferson v. Smith*, 88 N. Y. 576, 585. At the last term we held in *De Ganay v. Lederer*, 250 U. S. 376, 61 L. ed. 1042, 39 Sup. Ct. Rep. 524, that stocks and bonds issued by domestic corporations, and mortgages secured on domestic real estate, although owned by an alien nonresident, but in the hands of an agent in this country with authority to deal with them, were subject to the Income Tax Law of October 3, 1913 (38 Stat. at L. 166, chap. 16, 4 Fed. Stat. Ann. 2d ed. p. 236).

"In the present case we are not dealing with the right to tax securities which have acquired a local situs, but are concerned with the right of the state to tax the beneficiary of a trust at her residence, although the trust itself may be created and administered under the laws of another state.

"In *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 38 Sup. Ct. 40, 62 L. Ed. 145, L. R. A. 1918C, 124, we held that a bank deposit of a resident of Kentucky in the bank of another state, where it was taxed, might be taxed as a credit belonging to the resident of Kentucky. In that case *Union Transit Co. v. Kentucky*, *supra*, was distinguished and the principle was affirmed that the state of the owner's domicile might tax the credits of a resident although evidenced by debts due from residents of

another state. This is the general rule recognized in the maxim 'mobilia sequuntur personam,' and justifies, except under exceptional circumstances, the taxation of credits and beneficial interests in property at the domicile of the owner. We have pointed out in other decisions that the principle of that maxim is not of universal application and may yield to the exigencies of particular situations. But we think it is applicable here."

Property of foreign interstate railway company situated outside state.—A state, when taxing a foreign interstate railway company, cannot take into account the property of such railway company situated outside the state unless it can be seen in some plain and fairly intelligible way that such property adds to the value of the railway and the rights exercised in the state. Thus a state may not, consistently with the commerce and due process of law clauses of the Federal Constitution, fix the value of the property of foreign interstate railway companies for the purpose of levying a special excise tax upon the doing of business in the state by taking the total value of the stock and bonds of each railway company and assessing the proportion of this value that the main track mileage bears to the main track of the whole line, where, by reason of topographical conditions, the cost of the lines in that state was much less than in other states, and the great and very valuable terminals of the railways are in other states, and where the valuations as made include such items as bonds secured by mortgage of lands in other states, a land grant in another state, and other property that adds to the riches of the corporation, but does not affect that part of the railway in the state. *Wallace v. Hines*, (1920) 253 U. S. 66, 40 S. Ct. 435, 64 U. S. (L. ed.) —.

Taxation of intangible property which is capital doing business in a state.—A state statute is constitutional which directs that a tax be assessed upon that portion of a corporation's intangible property which is capital doing business within the state. *Mexican Petroleum Corp. v. Blies*, (R. I. 1920) 110 Atl. 867.

q. Of Railroads

(1) On a Mileage Basis (p. 869)

Taxation on a mileage basis of property of public utilities operated as a continuous property in more than one county does not deny due process of law. *State v. State Board of Equalization*, (1919) 56 Mont. 413, 185 Pac. 708, 186 Pac. 697.

w. Of Capital Stock (p. 874)

A state may, consistently with the Fourteenth Amendment, tax a corporation organized under its laws upon the value of its outstanding capital stock, although the corporation's property and business are entirely in

another state. *Cream of Wheat Co. v. Grand Forks County*, (1920) 253 U. S. 325, 40 S. Ct. 558, 64 U. S. (L. ed.) — (*affirming* (1918) 41 N. D. —, 170 N. W. 863), wherein the court said:

"The company concedes that the state of North Dakota might constitutionally have imposed a franchise tax upon a corporation organized under its laws, even though it had no property within the state. The contentions are that the supreme court of North Dakota erred in holding that the tax here in question was a franchise tax; that it was in reality a property tax upon intangible property; that the company's intangible property must be deemed to have been located where its tangible property was; and that in taxing property beyond its limits North Dakota violated rights guaranteed by the 14th Amendment. The view which we take of the matter renders it unnecessary to consider the question whether or not the law under discussion imposed a franchise tax or a property tax. *Compare Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904; *Com. v. Hamilton Mfg. Co.* 12 Allen, 298. The view also renders it unnecessary to consider whether the company, having been incorporated in North Dakota after the enactment of the law in question, is in a position to complain. *Compare Interstate Consol. Street R. Co. v. Massachusetts*, 207 U. S. 79, 84, 52 L. ed. 111, 114, 28 Sup. Ct. Rep. 26, 12 Ann. Cas. 555; *International & G. N. R. Co. v. Anderson County*, 246 U. S. 424, 433, 62 L. ed. 807, 816, 38 Sup. Ct. Rep. 370; *Corry v. Baltimore*, 196 U. S. 466, 49 L. ed. 556, 25 Sup. Ct. Rep. 297.

"The company was confessedly domiciled in North Dakota, for it was incorporated under the laws of that state. As said by Mr. Chief Justice Taney: 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' *Bank of Augusta v. Earle*, 13 Pet. 519, 588, 10 L. ed. 274, 307. The fact that its property and business were entirely in another state did not make it any less subject to taxation in the state of its domicile. The limitation imposed by the 14th Amendment is merely that a state may not tax a resident for property which has acquired a permanent situs beyond its boundaries. This is the ground on which the ferry franchise involved in *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463 (an incorporation hereditarily partaking of the nature of real property), and the tangible personal property permanently outside the state, involved in *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. 669, 49 L. Ed. 1077, and *Union Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493, were held immune from taxation by the states in which the companies were incorporated. The limitation upon the power of taxation does not apply even to tangible personal property

without the state of the corporation's domicile, if, like a seagoing vessel, the property has no permanent situs anywhere. *Southern Pacific Co. v. Kentucky*, 222 U. S. 63, 68, 32 Sup. Ct. 13, 56 L. Ed. 96. Nor has it any application to intangible property (*Union Transit Co. v. Kentucky*, *supra*, 199 U. S. 205, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493; *Hawley v. Malden*, 232 U. S. 1, 11, 34 Sup. Ct. 201, 58 L. Ed. 477, Ann. Cas. 1916C, 842), even though the property is also taxable in another state by virtue of having acquired a "business situs" there (*Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 59, 38 Sup. Ct. 40, 62 L. Ed. 145, L. R. A. 1918C, 124). As stated in that case:

"It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint v. Stone-Tracy Co.*, 220 U. S. 107, 146, 162, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained."

"Counsel for the company direct our attention to cases like *Adams Express Co. v. Ohio*, 165 U. S. 194, 227, 17 Sup. Ct. 305, 41 L. Ed. 683, and 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965, which hold that a state may tax a foreign corporation, not only on the value of its tangible property within the state, but also on that proportion of its entire intangible property which is fairly represented by and must be included, in order to place a just value on the tangible property located and the business transacted there. The conclusion drawn by them is that the situs of the intangible property must be with the tangible; otherwise, they say, we must hold that it is in two places at once and that it may be subjected to double taxation. To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation. *Coe v. Errol*, 116 U. S. 517, 524, 6 Sup. Ct. 475, 29 L. Ed. 715; *Kidd v. Alabama*, 188 U. S. 730, 732, 23 Sup. Ct. 401, 47 L. Ed. 669; *Fidelity & Columbia Trust Co. v. Louisville*, *supra*."

z. Succession or Inheritance Tax (p. 875)

A state does not in effect tax property beyond its territorial jurisdiction, and thus take property without due process of law, merely because it adopts as the measure of an inheritance tax upon the transfer of certain local property of a nonresident decedent passing by will or intestacy the proportion which the specified local property bears to the entire estate of the decedent, wherever situated. *Maxwell v. Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 63 U. S. (L. ed.) —, *affirming* (1917) 90 N. J. L. 707, 101 Atl. 248; *Hill v. Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 63 U. S. (L. ed.) —, *affirming* (1918) 92 N. J. L. 514, 105 Atl. 893.

a1. Income Tax (p. 876)

State law imposing income tax on non-residents.—A state may, consistently with due process of law, impose an annual tax upon the net income derived by nonresidents from property owned by them within the state, and from any business, trade, or profession carried on by them within its borders. *Shaffer v. Carter*, (1920) 252 U. S. 37, 40 S. Ct. 221, 64 U. S. (L. ed.) —, wherein the court said: "The contention that a state is without jurisdiction to impose a tax upon the income of nonresidents, while raised in the present case, was more emphasized in *Travis v. Yale & T. Mfg. Co.* decided this day [252 U. S. 60, *post*, 243, 40 Sup. Ct. Rep. —], involving the Income Tax Law of the state of New York. There it was contended, in substance, that while a state may tax the property of a nonresident situate within its borders, or may tax the incomes of its own citizens and residents because of the privileges they enjoy under its Constitution and laws and the protection they receive from the state, yet a nonresident, although conducting a business or carrying on an occupation there, cannot be required through income taxation to contribute to the governmental expenses of the state whence his income is derived; that an income tax, as against nonresidents, is not only not a property tax, but is not an excise or privilege tax, since no privilege is granted; the right of the noncitizen to carry on his business or occupation in the taxing state being derived, it is said, from the provisions of the Federal Constitution.

"This radical contention is easily answered by reference to fundamental principles. In our system of government the states have general dominion, and, saving as restricted by particular provisions of the Federal Constitution, complete dominion over all persons, property, and business transacted within their borders; they assume and perform the duty of preserving and protecting all such persons, property, and business, and, in consequence, have the power normally pertaining to governments to resort to all reasonable forms of taxation in order to defray the governmental expenses. Certainly they are not restricted to property taxation, nor to any particular form of excises. In well-ordered society, property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these; gains capable of being devoted to their own support, and the surplus accumulated as an increase of capital. The state, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the

support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.

"Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay. Taxes of this character were imposed by several of the states at or shortly after the adoption of the Federal Constitution. New York Laws 1778, chap. 17; Report of Oliver Wolcott, Jr., Secretary of the Treasury, to 4th Congress, 2d Sess. (1796), concerning direct taxes; American State Papers, 1 Finance, 423, 427, 429, 437, 439. . . . The fact that it required the personal skill and management of appellant to bring his income from producing property in Oklahoma to fruition, and that his management was exerted from his place of business in another state, did not deprive Oklahoma of jurisdiction to tax the income which arose within its own borders. The personal element cannot, by any fiction, oust the jurisdiction of the state within which the income actually arises and whose authority over it operates in rem. At most there might be a question whether the value of the services of management rendered from without the state ought not to be allowed as an expense incurred in producing the income; but no such question is raised in the present case, hence we express no opinion upon it."

No violation of due process of law results from the exercise by the state of New York of its jurisdiction to tax incomes of non-residents arising from any business, trade, profession, or occupation carried on within its borders, and to enforce payment so far as it can by the exercise of a just control over persons and property within the state, and by a garnishment of credits (of which the withholding provision of such law is a practical equivalent). *Travis v. Yale, etc., Mfg. Co.*, (1920) 262 U. S. 60, 40 S. Ct. 228, 64 U. S. (L. ed.) —, *affirming* (S. D. N. Y. 1919) 262 Fed. 576.

A nonresident whose entire property within the state consists of oil-producing land, oil and gas mining leaseholds, and other property used in the production of oil and gas, and whose entire net income in the state was derived from his oil operations, which he managed in that and other states as one business, having proceeded, with notice of a law of the state taxing incomes derived by non-residents from business carried on within its borders, to manage the property and conduct the business out of which arose the income taxed under such law, cannot claim that

the state exceeded its power or authority so as to deny due process of law by treating his property interests and his business as a single entity and enforcing payment of the tax by the imposition of a lien to be followed by execution or other appropriate process upon all the property employed by him within the state in the business. *Shaffer v. Carter*, (1920) 252 U. S. 37, 40 S. Ct. 221, 64 U. S. (L. ed.) —.

The Delaware Income Tax Law was held not violative of this section in *State v. Pinder*, (Del. 1919) 108 Atl. 43.

11. Assessments for Public Improvements

(1) In General (p. 879)

No provision for remonstrance.—Due process of law is not denied by a charter which does not provide for a remonstrance by abutters against the paving of streets used for business purposes. *Brougham v. Kansas City*, (W. D. Mo. 1920) 263 Fed. 115.

(5) With Regard to Special Benefits (p. 882)

Railway right of way.—A special assessment for a local drain upon a railway right of way if benefited is not violative of the 14th Amendment. *Northern Pac. R. Co. v. Sargent County*, (N. D. 1919) 174 N. W. 811, *following* *Northern Pac. R. Co. v. Richland County*, (1914) 28 N. D. 172, 148 N. W. 545, *Ann. Cas.* 1916E 574, *L. R. A.* 1915A 129.

(8) Taxing District in Legislative Discretion (p. 885)

The legislative determination as to what lands within a local improvement district will be benefited by an improvement is conclusive upon the owners and the courts, and can be assailed only where the legislative action is arbitrary, wholly unwarranted, a flagrant abuse, and, by reason of its arbitrary character, a confiscation of particular property. The declaration by the legislature that the real property of a railway company within a road improvement district will be benefited by the construction of a contemplated road improvement in such district cannot be said to be so arbitrary, capricious, or confiscatory as to invalidate an assessment for benefits against such real property of the railway company, where there is evidence that the improved road, by making more accessible a village terminus where the railway company in question had the only line, and by developing the adjacent country, would increase the company's business and would divert business from a place where there was a competing railroad, and that before the road was completed a large gas-producing district was discovered not far from the improved road which was tributary to it. *Branson v. Bush*, (1919) 251 U. S. 182, 40 S. Ct. 113, 64 U. S. (L. ed.) —, *reversing* (C. C. A. 8th Cir. 1918) 248 Fed. 377, 160 C. C. A. 387.

m1. Notice and Opportunity to Be Heard

(2) In Assessments for Public Improvements

(a) In General (p. 890)

Hearing by board of supervisors sitting as board of equalization.—The hearing by a board of supervisors, sitting as a board of equalization, of all complaints and objections respecting assessments for public improvements, which was provided for by a city charter, satisfies the requirement of due process of law, although such board apparently is given power only to make recommendations to the board of public works for relief, where such charter provision is construed by the state courts as not taking away the legislative power and discretion of the board of supervisors and vesting it in the board of public works, but as empowering the former board to pass an assessing ordinance charging property with the cost of an improvement which, according to its judgment, would be just and equitable. *Farncomb v. Denver*, (1920) 252 U. S. 7, 40 S. Ct. 271, 64 U. S. (L. ed.) —, *affirming* (1918) 64 Colo. 13, 171 Pac. 66.

Drainage assessment.—The right of a person to contest judicially the validity of a drainage assessment is property and its denial constitutes a violation of the due process of law clause even though the validity of a bond issue is involved and a statute provides that "no court shall have jurisdiction to entertain any contest wherein their validity or constitutionality is questioned." *Godchaux Co. v. Estopinal*, (1920) 146 La. 405, 83 So. 690.

(b) On Question of Benefits (p. 891)

Hearing on protest sufficient.—The fact that no notice and hearing is required on the preliminary determination of benefits from a street improvement does not invalidate the statute if provision is made for a hearing on objections made by abutting owners. *Pryor v. Western Pav. Co.*, (Okla. 1919) 184 Pac. 88.

(3) Judicial Proceeding Not Essential (p. 894)

In assessments for local improvements.—A state statute providing for review before municipal authorities only of the question whether a contract for local improvements has been let to the lowest responsible bidder does not violate the due process of law clause of the Constitution. *People v. Omen*, (1919) 290 Ill. 59, 124 N. E. 860.

(6) By Board of Revision (p. 897)

To same effect as original annotation, see *Hayes Wheel Co. v. American Distributing Co.*, (C. C. A. 6th Cir. 1919) 257 Fed. 881, 169 C. C. A. 31, wherein it was said: "The fact that the statute declares final the decision of this board of appeal does not effect a denial of due process. The right of appeal from the decision of an administrative board in assessing taxes and valuing property is

not necessary. 'One hearing is sufficient to constitute due process.' *Mich. Central R. R. Co. v. Powers*, 201 U. S. at pages 301, 302, 26 Sup. Ct. at page 466, 50 L. Ed. 744. 'A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles.'"

X. WHO MAY INVOKE CONSTITUTIONAL RIGHT

1. In General (p. 903)

One who is not himself denied some constitutional right or privilege cannot be heard to raise constitutional questions on behalf of some other persons, who may at some future time be affected. *Adams v. American Agricultural Chemical Co.*, (Fla. 1919) 82 So. 850.

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IV. THE EQUAL PROTECTION OF THE LAWS

4. As Affected by State Action

a. Power to Classify Subjects of Legislation

(1) In General (p. 922)

Civil service laws.—A county civil service act exempting from examination persons who have been on the pay roll of such county continuously for the four years immediately preceding the date upon which the civil service law took effect, and exempting persons being in the service and on the pay roll of the county less than four years, and requiring the latter class to take only a noncompetitive examination to retain their offices or positions, is not discriminatory and class legislation. *State v. Buech*, (Wis. 1920) 177 N. W. 781.

Prohibiting soliciting employment to collect claims.—Constitutional rights are not violated by a state statute which makes it a criminal offense for any person by personal solicitation to seek employment to prosecute or collect claims, including unliquidated claims for personal injuries, although the state may have made causes of action in tort, as well as in contract, assignable. *McCloskey v. Tobin*, (1920) 252 U. S. 107, 40 S. Ct. 306, 64 U. S. (L. ed.) —, wherein the court said:

"Article 421 of the Penal Code of Texas defined, with much detail, the offense of barratry. In *McCloskey v. San Antonio Traction Co.* (Tex. Civ. App.) 192 S. W. 1116, a decree for an injunction restraining the plaintiff in error from pursuing the practice of fomenting and adjusting claims was reversed on the ground that this section had superseded the common law offense of barratry and that by the Code 'only an attorney at law is forbidden to solicit employment in any suit himself or by an agent.' Article 421 was then amended (Act March 29, 1917, c. 133 [Vernon's Ann. Pen. Code Supp. Tex. 1918, art. 421]) so as to apply to any person who 'shall seek to obtain employment in any claim, to prosecute, defend, present or collect the same by means of personal solicitation of such employment. . . .' Thereafter *McCloskey* was arrested on an information which charged him with soliciting employment to collect two claims, one for personal injuries, the other for painting a buggy. He applied for a writ of habeas corpus, which was denied both by the county court and the Court of Criminal Appeals. The case comes here under section 237 of the Judicial Code, *McCloskey* having claimed below, as here, that the act under which he was arrested violates rights guaranteed him by the Fourteenth Amendment.

"The contention is that, since the state had made causes of action in tort as well as in contract assignable (*Railway v. Ginther*, 96 Tex. 295, 72 S. W. 166), they had become an article of commerce; that the business of obtaining adjustment of claims is not inherently evil; and that therefore, while regulation was permissible, prohibition of the business violates rights of liberty and property and denies equal protection of the laws. The contention may be answered briefly. To prohibit solicitation is to regulate the business, not to prohibit it. Compare *Brazee v. Michigan*, 241 U. S. 340, 36 Sup. Ct. 561, 60 L. Ed. 1034, Ann. Cas. 1917C, 522. The evil against which the regulation is directed is one from which the English law has long sought to protect the community through proceedings for barratry and champerty. Co. Litt. p. 368 (Day's Edition, 1812, vol. 2, § 701, [368, b1]); 1 Hawkins, Pleas of the Crown (6th Ed.) 524; *Peck v. Heurich*, 167 U. S. 624, 630, 17 Sup. Ct. 927, 42 L. Ed. 302. Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable.

Ford v. Munroe (Tex. Civ. App.) 144 S. W. 349. The statute is not open to the objections urged against it."

d. Exercise of Police Power

(1) In General (p. 927)

Requiring street railway to sprinkle portion of streets.—The equal protection of the laws is not denied to a street railway company by a municipal ordinance under which it is required to sprinkle the surface of the streets occupied by its railway between the rails and tracks, and for a sufficient distance beyond the outer rails, so as effectually to lay the dust and prevent the same from arising when the cars are in operation. *Pacific Gas, etc., Co. v. Police Ct.*, (1919) 251 U. S. 22, 40 S. Ct. 79, 64 U. S. (L. ed.) —, *affirming* (1915) 28 Cal. App. 412, 152 Pac. 928.

e. State Control Over Court Procedure

(1) In General (p. 931)

Lack of uniformity of judicial decisions.—One against whom a judicial decision has been rendered can base no rights, under the equal protection of the laws clause of the Federal Constitution, upon a later decision between strangers which is asserted to be irreconcilable on a matter of law with the earlier decision. This constitutional provision does not assure uniformity of judicial decisions. *Milwaukee Electric Ry., etc., Co. v. Wisconsin*, (1920) 252 U. S. 100, 40 S. Ct. 306, 64 U. S. (L. ed.) — (*affirming* (1917) 166 Wis. 163, 164 N. W. 844), wherein the court said:

"The company also insists that the ordinance is void because it denies equal protection of the laws. The contention rests upon the fact that since entry of the judgment below, the supreme court of the state has decided *Superior v. Duluth Street R. Co.* 166 Wis. 487, 165 N. W. 1081, which the company alleges is not reconcilable with its decision in this case. The similarity of the ordinances and conditions in the two cases does not seem to us as clear as is asserted. But, however that may be, the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions (*Backus Jr. & Sons v. Fort Street Union Depot Co.* 169 U. S. 557, 569, 42 L. Ed. 553, 859, 18 Sup. Ct. Rep. 445), any more than, in guaranteeing due process, it assures immunity from judicial error (*Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Tracey v. Ginzberg*, 205 U. S. 170, 51 L. ed. 755, 27 Sup. Ct. Rep. 461). Unlike *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520, and *Muhler v. New York*, 187 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522, where protection was afforded to rights acquired on the faith of decisions later overruled, the company seeks here to base rights on a later decision between strangers, which, it alleges, is irre-

concilable on a matter of law with a decision theretofore rendered against it. The contention is clearly unsound."

Abrogating defenses of certain sureties.—A statute providing that "no change or alteration in the plans, building, construction or method of payment shall in any way avoid or affect" the liability on a building contractor's bond limiting sureties to such defense as the principal could make, does not deny the equal protection of the laws. *Wright v. A. G. McAdams Lumber Co.*, (Tex. Civ. App. 1920) 218 S. W. 571.

(5) Venue (p. 933)

To same effect as original annotation, see *People v. Evanoff*, (Cal. App. 1919) 187 Pac. 54.

(20) Costs Generally (p. 938)

Dispensing with cost bond.—A statute permitting eminent domain proceedings to condemn land for highway purposes to be instituted without the giving of a cost bond is not "a suspension of general law for the benefit of particular individuals." *State Highway Dept. v. Mitchell*, (Tenn. 1919) 216 S. W. 336.

(21) Allowance of Attorney's Fees and Damages

(a) In General (p. 938)

Action for wages.—A state statute allowing an attorney's fee to be taxed in an action against a corporation for wages is invalid. *Anderson v. Uncle Sam Oil Co.*, (Kan. 1920) 186 Pac. 198.

h. Relating to Crimes

(4) Different Sentences (p. 948)

Statute allowing discretion to court.—A penal statute does not deny equal protection of the law because it provides for a wide range between the minimum and the maximum sentence which may be imposed. *Ex p. McGee*, (Nev. 1920) 189 Pac. 622.

(5) Different Penalties for Different Offenses (p. 949)

Allowing jury to fix place of imprisonment in certain cases.—A statute penalizing carnal intercourse with a female under the age of eighteen is not invalid because it permits the jury to award imprisonment either in the county jail or in the state prison where the female is over sixteen but requires imprisonment in the state prison if she is under sixteen. *Ex p. Todd*, (Cal. App. 1919) 186 Pac. 790.

A statute making certain acts inimical to the morals of children a felony is valid though other closely related offenses against children are misdemeanors only. *People v. Camp*, (Cal. App. 1919) 183 Pac. 845.

1. Race Distinctions and Discriminations**(1) Exclusion of Negroes from Juries****(a) In General (p. 950)**

Must be discrimination.—The constitution does not guarantee the presence of members of the same race as the accused on each jury. It protects only against discrimination on account of race or color. *Owens v. Com.*, (Ky. 1920) 222 S. W. 524.

1. Corporations, Officers and Stockholders**(1) Individuals and Corporations (p. 968)**

Punishing corporations more severely than individuals.—An anti-trust law imposing on corporations penalties more severe than those provided in case of the violation of the same law by individuals does not deny the equal protection of the law. *Com. v. Hatfield Case Co.*, (1919) 186 Ky. 411, 217 S. W. 125.

(2) Foreign Corporations**(e) Nonresident Domestic Corporations and Foreign Corporations (p. 971)**

Discrimination between domestic corporations which do no business in state and those which do business both outside and inside state.—The exemption of domestic corporations doing business outside the state, but none within the state, except the holding of stockholders' meetings, from the payment of any income tax, while domestic corporations doing business both within and without the state are required to pay a tax on income derived from their business transacted outside the state as well as upon the income derived from that done within the state, which is the result of Va. Laws 1916, chap. 472, read in connection with Laws 1916, chap. 496, amounts to an arbitrary discrimination forbidden by the equal protection of the laws clause of the 14th Amendment to the Federal Constitution. *F. S. Royster Guano Co. v. Virginia*, (1920) 253 U. S. 412, 40 S. Ct. 560, 64 U. S. (L. ed.) —, wherein the court said: "It is unnecessary to say that the 'equal protection of the laws' required by the 14th Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; *Michigan C. R. Co. v. Powers*, 201 U. S. 245, 293, 50

L. ed. 744, 761, 26 Sup. Ct. Rep. 459; *Keeney v. New York*, 222 U. S. 525, 536, 56 L. ed. 299, 305, 38 L. R. A. (N. S.) 1139, 32 Sup. Ct. Rep. 105; *Citizens' Teleph. Co. v. Fuller*, 229 U. S. 322, 329, 57 L. ed. 1206, 1213, 33 Sup. Ct. Rep. 833; *Northwestern Mut. L. Ins. Co. v. Wisconsin*, 247 U. S. 132, 139, 62 L. ed. 1025, 1037, 38 Sup. Ct. Rep. 444. Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear to be altogether illusory. Now both of the taxing provisions here in question relate to corporations organized under the laws of Virginia. It is the object of chapter 496 to exempt such corporations from income taxes (as well as taxes upon intangible property) where they do no business within the state except holding their stockholders' meetings therein; manifestly in recognition of the fact that Virginia corporations so circumstanced derive no governmental protection from the state warranting the imposition of taxes upon their incomes derived from without the state, or property taxes upon their intangibles, and in recognition of the impolicy, if not injustice, of imposing such taxes upon them while they are liable, and presumably subjected, to taxation in the state or states where their income-producing business is conducted. But no ground is suggested, nor can we conceive of any, sustaining this exemption which does not apply with equal or greater force as a ground for exempting from taxation the income of Virginia corporations derived from sources without the state where they also transact income-producing business within the state. Corporations of this class derive no more protection from the state of their origin with respect to their outside business, and are no less subject to taxation by the states in which such business is conducted, than corporations of the other class; and they are required to comply with the same laws as to the payment of organization taxes and annual registration fees and franchise taxes to the state of origin. Their business done within the state presumably is of some general benefit to the state, certainly enriches its treasury by the amount of the taxes they pay upon the income derived therefrom; and the imposition upon them under chapter 472 of taxes not only upon this income but also upon income that they derive from business conducted outside of the state (similar income of the favored corporations being exempted) has the effect of discriminating against them for that which ought to operate, if at all, in their favor. It is obvious that the ground upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design."

m. Railroad Companies

- (4) Distinguishing Between Street Railway and Steam Railroad (p. 977)

Employers' Liability Act.—A state statute making the provisions of the federal Employers' Liability Act applicable to intrastate railroads is not class legislation, though employees on street railways and the like are not included in the benefits thereof. *Archibald v. Northern Pac. R. Co.*, (1919) 108 Wash. 97, 183 Pac. 95.

w. Banking and Trust Companies

- (1) Licensing Banking Business (p. 1000)

Discretionary power to charter bank.—A state statute providing that a bank shall be chartered by the superintendent of banks "if in his opinion the organization of such bank is justified," does not deny equal protection of the law. *Mulkey v. Bennett*, (1920) 95 Ore. 70, 186 Pac. 1115.

A statute imposing upon the state securities commission the duty of determining whether a certificate of authority to do business as a bank should be issued, applies to proceedings pending before the superintendent of banks at the time of its enactment, and so construed the statute is not unconstitutional as in contravention of the Fourteenth Amendment. *Carlson v. Pearson*, (Minn. 1920) 176 N. W. 346.

d1. Vesting Discretion in Municipal Council and Officers

- (1) In General (p. 1027)

Permits for street stands for public livery cars.—An ordinance which leaves it to the unregulated discretion of the department of public safety as to whom permits should be issued to occupy any part of the streets with a public livery car is unconstitutional. *New Orleans v. Badie*, (1920) 146 La. 550, 83 So. 828, wherein the court said:

"We were informed in oral argument that this was done because the city conceded to the property owners abutting the public streets the right to say who shall occupy the streets in front of their places of business, since they have the right to keep same clear for the use of their customers and themselves. However, this only renders the system all the more obnoxious, for, as was also stated in argument, such proprietors are permitted to award such stands to the one who will pay the largest rental, thus not only allowing an individual to rent the public streets for his private benefit, but also placing in the hands of the department, or officer to whom the discretion of granting or refusing the permit is given, a formidable weapon for oppression or corruption, depending solely upon the wisdom and integrity of the officer."

e1. Relation of Employer and Employee

- (3) Employers' Liability Act (p. 1033)

To same effect as original annotation, see *United Verde Copper Co. v. Wiley*, (1919) 20 Ariz. 525, 183 Pac. 737; *Swansea v. Molloy*, (1919) 20 Ariz. 531, 183 Pac. 740.

The California Workmen's Compensation Law is valid. *Fidelity, etc., Co. v. Llewellyn Iron Works*, (Cal. App. 1919) 184 Pac. 402.

Occupational Disease Act.—A state Occupational Disease Act giving compensation to an employee injured in health as a result of the wilful failure of the employer to comply with the Act was held not to deny the equal protection of the law. *Lobanoski v. Hoyt Metal Co.*, (1920) 292 Ill. 218, 126 N. E. 548.

f1. Regulating Pursuit of Occupations

- (1) Practice of Medicine

- (a) In General (p. 1038)

Discrimination against osteopaths.—The exception of physicians and surgeons but not osteopaths from an Optometry Act is valid. *Ex p. Rust*, (Cal. 1919) 183 Pac. 548.

- (b) Requiring Physicians to Report Contagious Diseases (p. 1039)

Discrimination against osteopaths in matter of reporting vital statistics.—A state statute requiring physicians to furnish birth and death certificates to municipal officers but prohibiting such officers from accepting such certificates from osteopathic practitioners is not in violation of the equal protection clause of the Fourteenth Amendment. *Keiningham v. Blake*, (1919) 135 Md. 320, 109 Atl. 65, 8 A. L. R. 1966, wherein the court said:

"The vital question in the case is whether the prohibition against the acceptance of birth and death certificates from licensed osteopaths is a violation of any of their constitutional rights. It is contended that this provision is a denial of the equal protection of the law to those practicing osteopathy, and is therefore in contravention of the Fourteenth Amendment of the federal Constitution.

"The enactment in question forms part of the Code article entitled 'Health,' and its relation to that subject is obvious. It is therefore within the scope of the police power of the state, and should be sustained as an exercise of that power unless the discrimination it makes can be held to be plainly arbitrary and without any perceptible relation to the objects sought to be accomplished. All reasonable presumptions must be made in favor of the validity of the provision. The judgment of the Legislature that such a regulation is proper and desirable should be respected and enforced by the courts if there is any rational theory upon which it can be supported.

"The separate classification, for licensing purposes, of practitioners of medicine and surgery and those practicing by manipulation only, cannot be held to be unreasonable. Practitioners of the former class were licensed in this state many years before such a provision was made as to osteopaths. The methods of treatment, and the prescribed qualifications, differ in important particulars for the two classes of practitioners, and the differences by which they are actually distinguished suggest an adequate reason for their separate classification by statute. . . .

"The certificates of birth and death to which the statute refers are required to contain such 'items of information as the state registrar of vital statistics shall deem important or necessary,' in addition to such facts as the date and place of a birth or death, the name, sex and color of a child reported born, the name, age, color, occupation, condition, and birthplace of a person reported to have died, the cause of death, duration of illness, and the name and address of the attending physician. It was the evident theory of the Legislature that some of the information which the law directed, or the state registrar of vital statistics might deem necessary, to be included in the birth or death certificates, could be furnished more satisfactorily by a physician having the qualifications demanded by the statute of practitioners of medicine and surgery than by those who were licensed to practice osteopathy exclusively. As to the real necessity for making such a distinction, this court has no right to decide. The only inquiry we are authorized to make is whether the action of the Legislature in restricting the means and agencies by which vital statistics are to be obtained is clearly unreasonable."

g1. Game and Fish Laws

(3) Regulating Catching Fish (p. 1042)

Act applicable to single county.—An act prohibiting the taking of salt water crabs in one certain county is valid. *State v. Savage*, (Ore. 1919) 184 Pac. 567.

f2. Regulating Erection of Buildings (p. 1052)

Laundry near church.—"In the instant case, plaintiffs attempted to install machinery and operate a laundry within ten feet of the First Presbyterian Church of the City of Norman, in violation of an ordinance prohibiting the installation and operation of an oil mill, tannery, cotton gin, steam laundry, machine shop, garage, or blacksmith shop within 150 feet of a church, school, or hospital, on the theory that the ordinance was void and in violation of the fourteenth amendment of the federal Constitution. Held, that such an ordinance is of a regulatory nature and reasonable, and within the police and sanitary powers of a city to enact and enforce,

and not in violation of the fourteenth amendment to the federal Constitution." *Walcher v. First Presbyterian Church*, (1919) 76 Okla. 9, 184 Pac. 106, 6 A. L. R. 1593.

x2. State Taxation

(1) Equality

(a) In General (p. 1057)

Double taxation.—The 14th Amendment to the Federal Constitution no more forbids double taxation than it does doubling the amount of the tax, short of confiscation or proceedings unconstitutional on other grounds. *Ft. Smith Lumber Co. v. Arkansas*, (1920) 251 U. S. 532, 40 S. Ct. 304, 64 U. S. (L. ed.) —, *affirming* (1919) 138 Ark. 581, 211 S. W. 662.

Nothing in the Federal Constitution or in the 14th Amendment prevents the states from imposing double taxation or any other form of unequal taxation so long as the inequality is not based upon arbitrary distinctions. *Shaffer v. Carter*, (1920) 252 U. S. 37, 40 S. Ct. 221, 64 U. S. (L. ed.) —.

(b) Power of Classification

aa. In General (p. 1058)

Discriminating between corporations and individuals.—A state may, so far as the Federal Constitution is concerned, tax its own corporations in respect of the stock held by them in other domestic corporations, although individuals are exempt. *Ft. Smith Lumber Co. v. Arkansas*, (1920) 251 U. S. 532, 40 S. Ct. 304, 64 U. S. (L. ed.) — (*affirming* (1919) 138 Ark. 581, 211 S. W. 662), wherein the court said: "We are of opinion that it is also within the power of a state, so far as the Constitution of the United States is concerned, to tax its own corporations in respect of the stock held by them in other domestic corporations, although unincorporated stockholders are exempt. A state may have a policy in taxation. *Quong Wing v. Kirkendall*, 223 U. S. 59, 63, 56 L. ed. 350, 352, 32 Sup. Ct. Rep. 192. If the state of Arkansas wished to discourage, but not to forbid, the holding of stock in one corporation by another, and sought to attain the result by this tax, or if it simply saw fit to make corporations pay for the privilege, there would be nothing in the Constitution to hinder. A discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the state to insert the distinction in the law."

Confining recovery of back taxes to those due from corporations.—Confining the recovery of back taxes to those due from corporations does not offend against the Federal Constitution. *Ft. Smith Lumber Co. v. Arkansas*, (1920) 251 U. S. 532, 40 S. Ct. 304, 64 U. S. (L. ed.) —, *affirming* (1919) 138 Ark. 581, 211 S. W. 662.

Taxation of intangible property which is capital doing business in a state.—A state statute is constitutional which directs that a tax be assessed upon that portion of a corporation's intangible property which is capital doing business within the state. *Mexican Petroleum Corp. v. Bliss*, (R. I. 1920) 110 Atl. 867.

Taxation of employers employing workmen having no dependents.—A state cannot tax as a class all employers who employ workmen having no dependents who would be entitled to compensation in case of fatal accident. *Bryant v. Lindsay*, (N. J. 1920) 110 Atl. 823, wherein the court said:

"Such a tax has manifestly no relation to the police power; it is plainly not a property tax, and when we consider that it is restricted not merely to employers generally who have in their employ workmen with no dependents entitled to claim, but employers of that character who are within section 2 of the Compensation Act, we reach a tenuity of classification that seems to us to deprive the class of any logical validity and of all substantial basis. *Southern Railway Co. v. Green*, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247.

"From another standpoint the act seems to be simply a taking of the property of this class of employers without any compensation therefor. They are in effect penalized for employing men or women who are without dependents qualified to claim compensation. If we were permitted to comment upon the question of legislative policy which tends to dissuade an employer conducting a hazardous occupation from receiving into his service a workman who, if killed in that service, would not leave a widow and infant children destitute of support, it would be apposite to remark that this is the precise opposite of the policy of the United States in the selective service draft. But, looking at the matter in its purely legal aspect, we are clear that it is an attempted exercise of the power of taxation which runs counter to our constitutional system, both national and state, and that it cannot be supported on that theory or on any other that has been suggested."

(7) Exemption from Taxation

(a) In General (p. 1065)

Number of persons affected by tax exemption statute as material question.—A tax exemption statute which rests upon a rational classification is not to be stricken down merely because affecting a few or even one in its practical operation. *Massachusetts General Hospital v. Belmont*, (1919) 233 Mass. 190, 124 N. E. 21.

(10) Assessments for Local Improvements

(a) In General (p. 1069)

Franchises of railroad company.—The consideration by assessing officers, conformably

to state law, of the franchises of a railway company, when assessing for a public improvement the real estate of a railroad company within the taxing district, does not, without more, justify invalidating the tax as a denial of the equal protection of the laws, on the theory that the franchises of the railway company were included as a separate personal-property value in the real property assessment, thus taxing the railway property at a higher rate than other real property in the district. *Branson v. Bush*, (1919) 251 U. S. 182, 40 S. Ct. 113, 64 U. S. (L. ed.) —, reversing (C. C. A. 8th Cir. 1918) 248 Fed. 377, 160 C. C. A. 387.

All abutting property not included in sewer assessment district.—The federal Supreme Court will not interfere on constitutional grounds with sewer assessments merely because certain abutting property, a part of which might be drained into the sewer, was omitted from such district by the local authorities, where the state courts have upheld the assessments, and the action of the state authorities cannot be said to be arbitrary or wholly unequal in operation and effect. *Goldsmith v. George G. Prendergast Constr. Co.*, (1920) 252 U. S. 12, 40 S. Ct. 273, 64 U. S. (L. ed.) —, affirming (1918) 273 Mo. 184, 201 S. W. 354.

(b) Giving Residents Privilege of Protesting against Improvements (p. 1070)

A statute giving the right to resident owners occupying property on a street to be improved by special assessment to defeat the work by a majority of the residents in such street petitioning against the work, is a limitation on the power of the city to make the improvement in the nature of a veto, legislative in its nature, and does not deny the equal protection of the law to nonresidents. It is equal protection of the law, and not the equal right to make laws, that the Fourteenth Amendment to the Federal Constitution provides. *Union Sav. Bank, etc., Co. v. Jackson*, (Miss. 1920) 84 So. 388.

(24) Graduated Income Tax (p. 1076)

Distribution of income tax collected by state among taxing districts.—A state income tax act which provides for the distribution among the several cities, towns and taxing districts of the income tax collected by the state is not in violation of the equal protection clause of the constitution. *Duffy v. Burrill*, (Mass. 1919) 125 N. E. 135, wherein the court said:

"It has been argued that the statute contravenes the guaranty of equal protection of the laws and that against being deprived of property without due process of law contained in the Fourteenth Amendment to the United States Constitution. Of course, the provisions of that amendment are the law of the land and the exposition of their meaning by the Supreme Court of the United

States is of binding force. We are unable to perceive anything in the present statute which violates those provisions. The income tax is levied by the state equally upon all made subject to the tax, according to valid classifications, for public purposes, and can be expended only for those purposes. Attention was called in argument to the decisions in *Thomas v. Gay*, 169 U. S. 264, 276, 18 Sup. Ct. 340, 42 L. Ed. 740, and *Cole v. La Grange*, 113 U. S. 1, 5 Sup. Ct. 416, 28 L. Ed. 896. No discussion seems to us to be required to demonstrate that the principles declared and applied in those decisions do not invalidate the present statute. While it was held in those decisions that taxes could be levied only for public purposes and expended only for public objects, and that the duty and obligations to pay taxes is founded on participation in benefits arising from the promotion of the public welfare, it also was recognized that in the practical administration of these principles it was not necessary that a specific personal advantage be pointed out as accruing to each taxpayer or taxpaying district. It is enough if some general plan be followed which is not discriminatory, arbitrary or fanciful in its operation, and which confines expenditures to public purposes."

The Delaware Income Tax Law was held not violative of this section in *State v. Pinder*, (Del. 1919) 108 Atl. 43.

(32) Succession or Inheritance Taxes

(a) In General (p. 1078)

Property without state considered in determining tax on property within state.—Nonresident testators and intestates are not denied the equal protection of the laws by a state inheritance tax law under which the tax on the transfer by will or intestacy of the estate of a nonresident decedent, consisting of property both within and without the state, is first ascertained on the entire estate as though it were the estate of a resident with all the decedent's property, both real and personal, situated within the state, and is then apportioned and assessed in the proportion that the taxable estate within the state bears to the entire estate, wherever situated, although by reason of the graduation of the tax the application of the apportionment formula fixed by the statute may result in a greater tax on the transfer of the property of the estate subject to the state's jurisdiction than would be assessed for the transfer of an equal amount, in similar manner, of the property of a resident decedent. *Maxwell v. Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 64 U. S. (L. ed.) —, *affirming* (1917) 90 N. J. L. 707, 101 Atl. 248; *Hill v. Bugbee*, (1919) 250 U. S. 525, 40 S. Ct. 2, 64 U. S. (L. ed.) —, *affirming* (1918) 92 N. J. L. 514, 105 Atl. 893.

(40) Occupation Taxes

(b) Discriminating against Foreign Corporation (p. 1082)

A state statute imposing license taxes on the manufacturer or other person engaged in the business of selling automobiles in this state, reducing the rate if three-fourths of the entire assets of the manufacturer are invested and returned for taxes herein, applies indiscriminately to the manufacturers of every state, and being for the object of reducing the license tax for selling automobiles in this state when the seller is already paying a tax here on three-fourths of his assets, is not in violation of this section. *Bethlehem Motors Corp. v. Flynt*, (1919) 178 N. C. 399, 100 S. E. 693.

(m) Use of Trading Stamps (p. 1087)

Requiring a license fee from persons or corporations giving trading stamps or other similar devices redeemable in merchandise is a proper subject of state legislation. *State v. J. M. Seney Co.*, (1919) 134 Md. 437, 107 Atl. 189, wherein the court said:

"In three recent cases the Supreme Court of the United States has decided that the use of trading stamps, redeemable in articles of merchandise, is subject to regulation, restriction, or prohibition by a state in the exercise of its police power, and hence is not within the protection of the federal Constitution. *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917A, 421, Ann. Cas. 1917B, 455; *Tanner v. Little*, 240 U. S. 369, 36 Sup. Ct. 379, 60 L. Ed. 691; *Pitney v. Washington*, 240 U. S. 387, 36 Sup. Ct. 385, 60 L. Ed. 703. These decisions were based on the theory that such a business is not so clearly devoid of any injurious effect upon the public welfare as to justify a judicial declaration that the effort of the Legislature to apply the police power to the subject is manifestly arbitrary and unreasonable and therefore ineffective.

The statute, however, exempts from the \$1,500 license charge any manufacturer or packer who issues trading stamps or similar devices in connection with his own products. For the use of trading stamps under such conditions a license fee of only \$50 is required to be paid. This classification is alleged to result in an arbitrary and unconstitutional discrimination. In our opinion, the statute should not be held invalid on that ground. An essential element of the police power is the right of the Legislature to classify the conditions to which the power is applicable. There may be different phases or degrees of an injury to which the public is believed to be exposed and against which it is sought to be protected by measures of regulation and restraint properly differing in their nature and effect. Unless a classification adopted by the Legislature in the appli-

cation of the police power is plainly arbitrary and capricious, its judgment on the subject should be respected and sustained."

Vol. XI, p. 1110, amend. 16.

"Income" as including stock dividend.—The word "income" as used in this amendment does not include a stock dividend. Such a dividend is capital and not income and can be taxed only if the tax is apportioned among the several states in accordance with art. 1, sec. 2, cl. 3 (see vol. X, p. 335) and art. 1, sec. 9, cl. 4 (see vol. X, p. 887) of the Constitution. *Eisner v. Macomber*, (1920) 252 U. S. 189, 40 S. Ct. 189, 64 U. S. (L. ed.) — (following *Towne v. Eisner*, (1918) 245 U. S. 418, 38 S. Ct. 158, 62 U. S. (L. ed.) 372), wherein the court said: "The Sixteenth Amendment must be construed in connection with the taxing clauses of the original Constitution and the effect attributed to them before the amendment was adopted. In *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108, under the Act of August 27, 1894 (28 Stat. 509, 553, c. 349, § 27), it was held that taxes upon rents and profits of real estate and upon returns from investments of personal property were in effect direct taxes upon the property from which such income arose, imposed by reason of ownership; and that Congress could not impose such taxes without apportioning them among the states according to population, as required by article 1, § 2, cl. 3, and section 9, cl. 4, of the original Constitution.

"Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress thus determined, the Sixteenth Amendment was adopted, in words lucidly expressing the object to be accomplished: 'The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.' As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income. *Brushaber v. Union P. R. Co.*, 240 U. S. 1, 17-19, 60 L. ed. 493, 501, 502, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713; *Stanton v. Baltic Min. Co.*, 240 U. S. 103, 112 et seq., 60 L. ed. 546, 553, 36 Sup. Ct. Rep. 278; *William E. Peck & Co. v. Lowe*, 247 U. S. 165, 172, 173, 62 L. ed. 1049-1051, 38 Sup. Ct. Rep. 432.

"A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and im-

portant function, and is not to be overridden by Congress or disregarded by the courts.

"In order, therefore, that the clauses cited from article 1 of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not 'income,' as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised.

"The fundamental relation of 'capital' to 'income' has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream, to be measured by its flow during a period of time. For the present purpose we require only a clear definition of the term 'income,' as used in common speech, in order to determine its meaning in the Amendment; and, having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matters at issue.

"After examining dictionaries in common use (*Bouvier's Law Dict.*; *Standard Dict.*; *Webster's Int. Dict.*; *Century Dict.*), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of August 5, 1909 (*Stratton's Independence v. Howbert*, 231 U. S. 399, 415, 58 L. ed. 285, 292, 34 Sup. Ct. Rep. 136; *Doyle v. Mitchell Bros. Co.*, 247 U. S. 179, 185, 62 L. ed. 1054, 1059, 38 Sup. Ct. Rep. 467): 'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the *Doyle Case* (pp. 183, 185).

"Brief as it is, it indicates the characteristic and distinguishing attribute of income, essential for a correct solution of the present controversy. The government, although basing its argument upon the definition as quoted, placed chief emphasis upon the word 'gain,' which was extended to include a variety of meanings; while the significance of the next three words was either overlooked or misconceived,—'derived — from — capital;'— 'the gain — derived — from — capital,' etc. Here we have the essential matter: not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital, however invested or employed, and coming in, being 'derived,' that is, received or drawn by the

recipient (the taxpayer) for his separate use, benefit, and disposal; that is income derived from property. Nothing else answers the description.

"The same fundamental conception is clearly set forth in the 16th Amendment — 'incomes, from whatever source derived,' — the essential thought being expressed with a conciseness and lucidity entirely in harmony with the form and style of the Constitution."

Salary of federal judges as affected by this amendment.— This amendment does not extend the taxing power to new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the states of taxes laid on income, from whatever source derived. *Evans v. Gore*, (1920) 253 U. S. 245, 40 S. Ct. 550, 64 U. S. (L. ed.) —, *reversing* (W. D. Ky. 1919) 262 Fed. 550, and holding that the salary of a federal judge was immune from an income tax by virtue of article III, sec. 1 of the Constitution prohibiting the diminishing of a judge's salary during his term of office.

1919 Supp., p. 839, amend. 18.

Prohibition amendment as part of Constitution.— The Prohibition Amendment to the Federal Constitution by lawful proposal and ratification has become a part of that Constitution, and must be respected and given effect the same as other provisions of that instrument. *National Prohibition Cases*, (1920) 253 U. S. 350, 40 S. Ct. 486, 64 U. S. (L. ed.) —, *affirming* *Feigenspan v. Bodine*, (D. C. N. J. 1920) 264 Fed. 186.

Prohibition amendment as binding on legislative bodies, courts, etc.— That part of the Prohibition Amendment to the Federal Constitution which embodies the prohibition is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act, whether by Congress, by a state legislature, or by a territorial assembly, which authorizes or sanctions what the amendment prohibits. *National Prohibition Cases*, (1920) 253 U. S. 350, 40 S. Ct. 486, 64 U. S. (L. ed.) —, *affirming* *Feigenspan v. Bodine*, (D. C. N. J. 1920) 264 Fed. 186.

Liquors manufactured before amendment became effective.— The power of Congress to enforce the Prohibition Amendment to the Federal Constitution may be exerted against the disposal for beverage purposes of liquors manufactured before the amendment became effective, just as it may be against subsequent manufacture for those purposes. *National Prohibition Cases*, (1920) 253 U. S. 350, 40 S. Ct. 486, 64 U. S. (L. ed.) —, *affirming* *Feigenspan v. Bodine*, (D. C. N. J. 1920) 264 Fed. 186.

Concurrent power of states to enforce Prohibition Amendment.— The declaration in the Prohibition Amendment to the Federal Constitution that "the Congress and the sev-

eral states shall have concurrent power to enforce this article by appropriate legislation" does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means. *National Prohibition Cases*, (1920) 253 U. S. 350, 40 S. Ct. 486, 64 U. S. (L. ed.) —, *affirming* *Feigenspan v. Bodine*, (D. C. N. J. 1920) 264 Fed. 186, which further held that the words "concurrent power" do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them, nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign or interstate commerce from intrastate affairs. It was further said that the power confided to Congress that "the Congress and the several states shall have concurrent power to enforce this article by appropriate legislation," while not exclusive, is territorially coextensive with the prohibition of that amendment, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them.

In *Ex p. Dillon*, (N. D. Cal. 1920) 232 Fed. 563, wherein the constitutionality of this amendment was considered, it was said: "The claim that the Eighteenth Amendment itself is unconstitutional and void is based upon two grounds: first, because the amendment is in derogation of the Constitution, and not an amendment at all; and, second, because Congress was without power or authority to submit a conditional amendment, or an amendment limiting the time within which it must be ratified. The length of this opinion and the limited time at my disposal forbid an extended discussion of these objections, if, indeed, such a discussion be called for by this court. After receiving the approval of two-thirds of the membership of both houses of Congress and after ratification by the Legislatures of more than three-fourths of the states, the defects in a constitutional amendment must be plain indeed before a court of inferior jurisdiction will be justified in declaring it null and void. No such case is presented here. Briefly stated the contention of the petitioner is this:

"An amendment 'implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.' *Livermore v. Waite*, 102 Cal. 118, 36 Pac. 426, 25 L. R. A. 312.

"And from this it is argued that inasmuch as the original Constitution was silent on the question of the manufacture and sale of intoxicating liquors there is nothing to be amended or to amend by and therefore the amendment itself is void. The term 'amend,' as defined by Webster, means:

“‘To change or alter, as a law, bill, motion, or constitutional provision, by the will of a legislative body, or by competent authority; as to amend a charter.’

“That the amendment in question changes the original Constitution does not admit of question, and while it does not change any provision relating to this particular matter it does change the instrument as a whole. The Constitution is a mere grant of power to the federal government by the several states and any amendment which adds to or in any manner changes the powers thus granted comes within the legal and even within the technical definition of that term. The Thirteenth Amendment, abolishing and prohibiting slavery within the states, has been recognized as a part of the Constitution

for upwards of half a century.’ The amendment in question does no more, only the prohibition extends to a different subject-matter. It seems to me therefore that the objections are without substantial merit. Again it is urged that the Constitution does not authorize the submission of conditional amendments. This is no doubt true, but it is equally true that the Constitution does not forbid them. The framers of the Constitution could not foresee the form or character of amendments which might become necessary in the future and wisely left all such questions in the hands of those who might be charged with official duty when the necessity for the change and the character of the change to be made became apparent.”

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